

REPORT OF THE KANSAS JUDICIAL COUNCIL
DEATH PENALTY ADVISORY COMMITTEE
ON CERTAIN ISSUES RELATED TO
THE DEATH PENALTY

November 12, 2004*

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*** RELATED EVENTS SINCE APPROVAL OF REPORT**

The final meeting of the Judicial Council Death Penalty Advisory Committee was held November 12, 2004 and this report was approved at that meeting. Since that time there have been several events in the death penalty area that were not considered by the Committee and are not included in the report.

On November 17, 2004, the death sentence of Stanley M. Elms of Sedgwick County was vacated and he was sentenced to the "hard 40".

On November 17, 2004, Douglas S. Belt of Sedgwick County was convicted of capital murder, and the jury found the death penalty should be imposed.

On November 18, 2004, Benjamin A. Appleby of Johnson County was charged with capital murder.

On November 24, 2004, Darrell L. Stallings of Wyandotte County was found guilty of capital murder, but the jury found the death penalty should not be imposed.

On December 17, 2004, the Kansas Supreme Court ruled 4 - 3 in the case of State v. Marsh, No. 81,135, that the weighing equation, K.S.A. 21-4624(e) of the Kansas death penalty statute, is unconstitutional.

In addition, the Board of Indigents' Defense Services has decided to count the case of Aaron Stanley of Clay County as a case in which the death penalty could have been sought. Mr. Stanley allegedly committed a crime which would have made him eligible for prosecution for capital murder, but the Kansas case was dismissed, and he was turned over to military authorities for prosecution.

With the addition of the Stanley case and the filing of the Appleby case, there have been 86 cases in Kansas in which the death penalty could have been sought, rather than the 84 cases cited by the Committee in this report.

See page 27 of this report for a chart of "Kansas Death Penalty Statistics as of January 1, 2005". This chart was prepared after this report was approved.

SUMMARY

The following is a summary of the Committee's response to the issues raised:

Issue 1. Whether capital murder cases are charged and prosecuted similarly in all areas of the state.

In potential capital cases, capital charges are brought relatively uniformly throughout the state. But there is a geographic disparity in whether these capital charges are brought to trial. Based on the two counties with the most potential capital cases, Wyandotte and Sedgwick, it is obvious that a capital defendant in Sedgwick County is much more likely to proceed to trial than one in Wyandotte County. Thus, a capital defendant in Sedgwick County is also much more likely to receive a death sentence than a capital defendant in Wyandotte County.

Issues 2 and 3. Whether the race of the victim or the race of the criminal defendant plays a role in charging decisions of the prosecutor and whether the race of the victim or the race of the criminal defendant influences the ultimate disposition of a capital murder case, including plea bargaining.

The Committee finds no evidence which supports an inference that the race of the victim or the race of the defendant influences the charging decision of the prosecutor, plea bargaining or the ultimate disposition of a capital murder case in Kansas.

Issue 4. Whether current statutory and case law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death?

The Committee is of the opinion that additional study would be necessary before it could conclude that current Kansas law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death. The Committee discussed the extensive studies recently conducted in Connecticut and Illinois and considered recommendations contained in those reports that have the potential to further reduce the risk that an innocent person could be sentenced to death. The question of whether it is advisable to adopt those recommendations in Kansas would require additional study. Such an additional study is recommended to adequately answer issue 4.

Issue 5: Whether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence?

The social science community generally agrees that the death penalty does not have a general deterrent effect on would-be murderers. There is some research that

has found a deterrent effect to the death penalty, but these studies have been heavily criticized or are very recent and have not been appropriately scrutinized. Some studies have found an increase in the homicide rate after an execution (called the "brutalization effect"). These studies are also not agreed with by the majority of social scientists.

Issue 6. Whether states that have the death penalty treat murder victims' families who oppose the death penalty the same as murder victims' families who favor the death penalty.

The Committee has found no evidence of discriminatory treatment in Kansas of murder victims' families who oppose the death penalty. In the courtroom at a capital trial, victims' families who support and who oppose the death penalty are generally treated equally in states that have the death penalty. Outside the courtroom, in states other than Kansas, victims' families who are opponents of the death penalty appear to have been denied equal information and assistance in the capital trial process.

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

BACKGROUND

In February of 2004, Senate Vice President and Judiciary Committee Chair John Vratil requested the Judicial Council study certain issues which are related to the Kansas death penalty.

The issues which Senator Vratil requested the Judicial Council study are the following:

1. Whether capital murder cases are charged and prosecuted similarly in all areas of the state;
2. Whether the race of the victim or the race of the criminal defendant plays a role in charging decisions of the prosecutor;
3. Whether the race of the victim or the race of the criminal defendant influences the ultimate disposition of a capital murder case, including plea bargaining;
4. Whether current statutory and case law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death;
5. Whether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence; and
6. Whether states that have the death penalty treat murder victims' families who oppose the death penalty the same as murder victims' families who favor the death penalty.

COMMITTEE MEMBERSHIP

At the June, 2004 meeting of the Judicial Council, the study was assigned to the Judicial Council Death Penalty Advisory Committee whose members are:

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, former consultant on death penalty issues to the Kansas Supreme Court and visiting Professor at Washburn University School of Law.

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

Jared S. Maag, Topeka, Assistant Attorney General in the Criminal Litigation Division.

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.

SCOPE AND METHOD OF THE STUDY

The Committee met four times, beginning in August of 2004, and ending in November of 2004.

In discussing the scope of the study and the methodology to be used in the study, the Committee considered Senator Vratil's request in which he acknowledged the difficulty of answering some of the questions, requested the report be completed prior to the 2005 legislative session and stated that the report need not be lengthy.

The Committee was provided preliminary research on each of the issues and the individual issues were assigned to one or two Committee members for drafting, with the exception of issue 5 relating to deterrent value of the death penalty, which was prepared by the entire Committee. Readers of the report may note differences in the style of the report on the various questions. This is because the Committee responses to the individual issues were prepared by different members.

In addition to reviewing the preliminary research, the Committee reviewed the drafts of the responses to the questions, suggested changes and approved each of them.

Issue 1: Whether capital murder cases are charged and prosecuted similarly in all areas of the state.

The death penalty was reinstated in Kansas on July 1, 1994. As of January 1, 2004, approximately 80 homicides had been committed throughout the state that were death penalty eligible. Of those offenses, over 50 were charged as capital offenses in a total of 18 counties. Analyzing the statistics in charging and prosecution is difficult because most counties have had only one or two potential capital offenses.

The prosecution component of capital cases varies from county to county based upon the dynamics of each case and the individual methodology that prosecution and defense attorneys bring to the case. For instance, certain prosecutors may be more likely than others to explore plea-bargaining. Moreover, plea-bargaining can be expected to occur at different points throughout the process. Some prosecutors may be amenable to plea-bargaining early in the case while others may choose to wait until shortly before trial to engage in plea negotiations. Conversely, certain cases may not be resolved by plea negotiations and will accordingly proceed to trial. With regard to the actual mechanics of conducting the trial itself, the process is substantially similar throughout the state because the trial process is controlled by statutory and case law. There may be small variations in trial procedure based upon local court rules and the methodology of the parties involved, however, these differences are relatively insignificant in nature.

With respect to the charging of capital cases in Kansas, it is illuminating to examine the statistics for Wyandotte and Sedgwick counties. Wyandotte and Sedgwick counties historically have the most potential for charged capital crimes and they are indicative of the inconsistency in the way capital crimes are handled throughout the state.

The rationale for such a large disparity is difficult to explain. However, some suggestions for the disparity are as follows:

1. Relative Strength Of The Evidence. Prosecutors are typically more likely to file capital murder charges if the evidence of guilt is strong and the circumstances surrounding the commission of the murder are such that the jury would likely vote for death. The interpretation of these factors is subject to the discretion of the prosecutor(s) assigned to the case.
2. Cost and Time of Prosecution. The cost of prosecuting a death penalty case is generally quite high. Each side is more likely to employ costly expert witnesses and subsequent appeals are financially draining. It is axiomatic that the larger and more populous counties in Kansas can more readily absorb the cost of death penalty litigation because of a larger tax base. Conversely, a county attorney in a sparsely populated county in western Kansas must consider the very real financial impact upon his or her jurisdiction if a capital murder case is filed. Accordingly, a county's ability to bear the cost of capital murder litigation may factor into whether the death penalty is sought.

The amount of time that a typical death penalty case consumes is yet another factor that may be considered by the prosecution. A death penalty case will assuredly entail numerous pre-trial motions and hearings, and the trial will generally last longer than a non-capital case. Moreover, because a capital case is likely to receive significant media coverage, the defense will typically respond by filing a request for a change of venue. If the request is granted the county will bear the potentially significant additional costs that are routinely associated with a change of venue. Ironically, the least populated counties with correspondingly lesser resources are the most likely to experience a successful change of venue request because it can prove to be difficult to empanel an impartial jury when the county residents are more likely to be familiar with one another.

It also bears mention that death penalty appeals are both costly and time consuming by reason of the exhaustive scrutiny appellate courts (both state and federal) afford to capital cases. These appeals are typically quite complex and will take several years to be resolved.

3. Desire Of Victim's Family. Prosecutors will typically consult with the victim's family members in deciding whether to pursue the death penalty. Family members who are opposed to the death penalty may or may not request that the ultimate penalty be sought. Further, the desire of the victim's family will certainly be significant in deciding whether to accept a plea agreement avoiding the death penalty.
4. Miscellaneous Factors. Other, more intangible matters factor into the disparity as noted below:
 - A. The inherent aggressiveness of the prosecutor and his or her subjective belief regarding the morality of the death penalty.
 - B. Region of the State where the crime was committed. Based upon the demographics and philosophical bent of the local population, certain areas of the state may be more likely to impose a sentence of death.
 - C. Local political climate and presence or absence of public outrage at the offense.

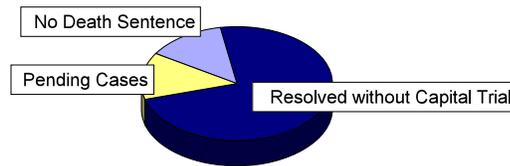
According to BIDS (Board of Indigent Defense Services), Sedgwick County has had 17 potential capital crimes since 1994. Wyandotte has had 25 potential capital crimes in the same time period. Of those crimes, Sedgwick has charged 8 of the 17 defendants with a capital crime, while Wyandotte has charged 15 of the 25 defendants with a capital crime. These numbers are roughly consistent with the overall state trend of approximately 64 percent of the potential capital crimes being charged as capital crimes (54/84).

The inconsistency, however, lies in the bringing of the defendant to trial and the resulting death sentence itself. In Sedgwick County, all of the capitally charged defendants were brought to trial (8/8), while Wyandotte County brought less than one-fifth of the same defendants to trial (2/15). A capital defendant in Sedgwick County is much more likely to go to trial than a capital defendant in Wyandotte County.

Similarly, in Sedgwick County, 71 percent (5/7) of the capital trials ended in a death sentence. None of the cases in Wyandotte County ended in a death sentence. Thus, of the potential capital crimes in each county, 29 percent of the Sedgwick defendants were sentenced to death (5/17), while not one of the Wyandotte defendants was sentenced to death (0/25). The following graphs illustrate this point.

Wyandotte County Capital Cases (as of 11/12/04)

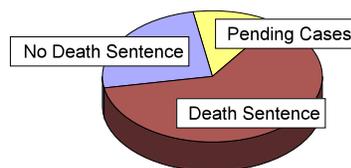
15 Capital Charges



- Cases to Capital Trial: No Death Sentence (2)
- Cases to Capital Trial: Death Sentence (0)
- Cases Pending (2)
- Cases resolved without Capital Trial (11)

Sedgwick County Capital Cases

8 Capital Charges



- Cases to Capital Trial: No Death Sentence (2)
- Cases to Capital Trial: Death Sentence (5)
- Cases Pending (1)
- Cases resolved without Capital Trial (0)

The ultimate conclusion of this data is simple. In potential capital cases, capital charges are brought relatively uniformly throughout the state. Charges are brought near a rate of approximately 60%. But there is a geographic disparity in whether these capital charges are brought to trial. Based on the two counties with the most potential capital cases, Wyandotte and Sedgwick, it is obvious that a capital defendant in Sedgwick County is much more likely to proceed to trial than one in Wyandotte. Thus, a capital defendant in Sedgwick County is also much more likely to receive a death sentence than a capital defendant in Wyandotte County.

Issues 2 and 3: Whether the race of the victim or the race of the criminal defendant plays a role in charging decisions of the prosecutor and whether the race of the victim or the race of the criminal defendant influences the ultimate disposition of a capital murder case, including plea bargaining.

Issues 2 and 3 were combined for consideration by the Committee.

This committee finds no evidence which supports an inference that the race of the victim or the race of the defendant influences the charging decision of the prosecutor, plea bargaining, or the ultimate disposition of a capital murder case in Kansas. This examination of whether racial disparity exists in capital murder cases focuses only on capital eligible cases in Kansas and data collected by the Kansas Board of Indigent Defenses Services between 1994 and 2004. Observations about racial disparity in death penalty cases in other states or on a national level was not used to evaluate the question about the capital process in the State of Kansas.

In the decade since the reenactment of the death penalty in Kansas, 84 potential capital cases have been identified, of which 54 defendants were charged by Kansas prosecutors with capital murder. Of those, only 14¹ defendants were tried as death penalty cases. In those 14 cases jurors convicted all 14 of capital murder and sentenced eight of those defendants to death and six of those defendants to Life/Hard 40 or 50 sentences. No defendants have been executed.

The small numbers of cases and the lack of comprehensive data make it difficult to extrapolate trends or reach conclusions. Comprehensive statewide data has not been compiled from the various agencies involved in the capital process. The Kansas Board of Indigent Defense Services compiled some information, which has been utilized here.

Personal Experience of Committee Members

The Judicial Council Death Penalty Advisory Committee, whose membership includes several members with extensive experience defending persons accused of capital murder and several members who oppose the death penalty, discussed issues 2 and 3 at length. No member of the Committee had experienced a situation in which they believed that the race of the criminal defendant influenced the charging decision of the prosecutor, plea bargaining or the ultimate disposition of a capital murder case.

Racial Breakdown of Defendant to Victim

84 Potential Capital Cases

50% of the 84 cases were White defendants perpetrating on White victims

25% of the 84 cases were Black/Minority defendants perpetrating on White victims

¹ This section of the report was edited by its author after the last meeting of the Committee to include the trial of Douglas S. Belt of Sedgwick County, which was underway at the time the report was finalized. Mr. Belt was the 14th person tried on capital murder charges.

25% of the 84 cases Black/Minority defendants perpetrating on Black/Minority victims

14 Defendants Tried on Capital Murder Charges

Half of the defendants or seven were White killing White victims. Three of the defendants were Black killing White victims and four defendants were Black killing Black victims.

8 Defendants received Death Sentences

Six were White defendants perpetrating on White victims and two were Black defendants perpetrating on White victims.

6 Defendants received Life/Hard40/50 Sentences, three were Black defendants, one perpetrating on Black victims, 2 were Black defendants perpetrating on White victims and 1 defendant was White perpetrating on a White victim.

These statistics indicate the majority of death sentences were imposed in capital cases where White defendants murdered White victims.

Race of Victim

Between 1994 and 2004, **120** individuals were victims of the **84** potential capital murder cases, of which **119** were murdered and **1** remains alive. Of the **120** victims **77** were White, **34** were Black and **10** were Hispanic.

In reviewing the race of the victims of the 54 defendants actually charged with Capital Murder, the numbers indicate a greater percentage of minority victims were represented in capital cases charged by prosecutors. This would suggest that Kansas prosecutors are not deciding whether to charge a capital case based on the race of the victim.

However, in the 14 of those cases that were tried by juries on capital murder the majority of the victims were White. Of the eight defendants who received death sentences all of their victims were White. Of the six defendants whose capital trials resulted in Life/Hard 40 or 50 sentences three killed white victims and three killed minority victims. This indicates a lower representation of minority victims in capital cases tried and death sentences imposed.

Nevertheless, with such a small sampling no definitive inferences or conclusions can be drawn based solely on these numerical statistics. In addition, numerous factors may affect decision makers in the capital process. These factors include facts of a case, aggravating and mitigating circumstances, legal rules, defenses, defendant's rights, desires of victim's family, history of the defendant, relationship of the parties, socioeconomic status, gender, age, juror makeup, etc.

Race of the Defendant

In reviewing the race of the defendant in the 84 potential capital cases, it was found that, **41** of the defendants are Black, **39** of the defendants are White, **3** of the defendants are Hispanic, and

1 defendant is Asian. Again, only 54 defendants were actually charged by Kansas prosecutors with capital murder. Of those fifty-four, **30** were White defendants, which represents **76%** of the total White defendants facing a potential capital case, **21** were Black defendants which represents **50%** of the total Black defendants facing a potential capital case, **2** were Hispanic defendants and **1** defendant was Asian.

These numbers would indicate that prosecutors did not exhibit racial bias against minority defendants in the charging of capital murder cases.

Of the 54 defendants charged with capital murder only **14** defendants or **25%** actually went to trial on those charges. The remaining **40** defendants or **74%** negotiated with prosecutors for sentences less than death, were tried on non-capital charges, or have cases pending. Kansas prosecutors tried **7** White defendants or **23%** of White the total white defendants charged with capital murder, and **7** Black defendants or **31%** of Black defendants charged with capital murder.

In the **14** Capital Murder trials Kansas jurors imposed **8** Death Sentences and **6** Life/Hard 40/50 Sentences. Of the **8** defendants sentenced to death **6** where white **2** were black. Of the **6** defendants sentenced to Life/Hard40/50 sentences, **5** defendants were Black and **1** defendant was white.

This small sampling of fourteen capital murder trials over a ten-year period is insufficient to draw any conclusions. However the limited data suggests that race of the defendant has not been a factor in the plea-bargaining or ultimate disposition of capital murder cases in this state.

Conclusion

Decision-making in capital prosecutions must remain free of racial bias. To allow for a fair and ongoing evaluation of the factors that are involved in the disposition of capital cases it is imperative that a uniform and comprehensive data collection system be established by all agencies involved in the capital process. Therefore, it is the recommendation of this committee that law enforcement, prosecution, defense and courts maintain and compile comprehensive and uniform data in capital eligible murder cases.

Issue 4. Whether current statutory and case law is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death?

One of the issues with which this committee is charged is exploring whether the current statutory and case law in Kansas is sufficient to ensure, to the extent reasonably possible, that no innocent person is ever sentenced to death. In order to facilitate discussion of this issue, the Committee decided that it was proper to examine ways in which other states have examined and answered the same question. While it appears that current Kansas statutory and case law is sufficient to address many of the concerns identified by the recent studies made in Connecticut and Illinois, both state reports also contain additional recommendations not present in current Kansas statutory and case law that have the potential to further reduce the risk that an innocent person will be sentenced to death. However, while these measures can be identified, the question of whether it is advisable or reasonable to adopt such additional measures here in Kansas will require an in-depth study focusing on the benefits and costs of each measure.

In January of 2003, the State of Connecticut's Commission on the Death Penalty issued a report that addressed a similar question. *See* State of Connecticut Commission on the Death Penalty, Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut, 56-62 (Jan. 8, 2003) (conducting "An examination of the safeguards that are in place or should be created to ensure that innocent persons are not executed"). In its report, the Commission found that, according to the legal experts it consulted, "some of the factors that contribute to the arrest, conviction, and imposition of death sentences upon innocent people are lack of DNA testing, ineffective counsel, prosecutorial misconduct [during discovery], mistaken eyewitness testimony, false confessions and testimony from informants." *Id.* at 56. The identification of these categories is generally consistent with most of the other reports of state commissions investigating similar questions regarding the death penalty. *See* Report of the Governor's Commission on Capital Punishment for the State of Illinois, i-iii (April 15, 2002); Nevada Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (Work Session Document, January 4, 2002).

The determinations of the Connecticut and Illinois Commissions are extremely valuable, as they represent the most comprehensive and detailed studies of the question regarding what appropriate safeguards are necessary and feasible.

1. DNA Testing

Currently, Kansas law provides that any person in custody upon conviction of murder or rape may petition the court for DNA testing of material that: 1) is related to the investigation or prosecution that resulted in the conviction; 2) is in the actual or constructive possession of the state, and 3) was not previously subjected to DNA testing, or can be subjected to retesting with newer techniques that provide a "reasonable likelihood of more accurate and probative results". K.S.A. 2003 Supp. 21-2512(a). The court must order such DNA testing if it determines that the testing may produce noncumulative, exculpatory evidence relevant to the claim that the petitioner was wrongfully convicted or sentenced. K.S.A. 2003 Supp. 21-2512(c). The Kansas Bureau of

Investigation is required to maintain DNA samples from criminal investigations. See K.S.A. 2003 Supp. 21-2511(f).

This procedure is consistent with the general recommendations of the Illinois Commission, and similar to that which was recently adopted by the Illinois Legislature. See 725 I.L.C.S. 5/116-3. The procedure used in Kansas appears sufficient to address concerns regarding the preservation and testing of DNA evidence.

It should be noted that one additional recommendation by the Illinois Commission with regard to DNA testing that was not adopted by the Illinois Legislature was the creation of an independent state forensic laboratory not connected to a specific law enforcement agency. See Illinois Commission Report, Recommendation 20, pp. 52-53. The Illinois Commission Report states, however, that, no matter how independent the laboratory, the bulk of its work would still be done for law enforcement officials and prosecutors, and it would still be a “government” laboratory. Id. at 53.

2. Assistance of Counsel

While the lack of effective counsel has been cited as a problem in many states, such problems do not appear to exist presently in Kansas. Kansas currently uses the ABA guidelines for death qualification of counsel, including the requirement that no fewer than two attorneys litigate a capital case. See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 5.1 (2003).

Given recent Supreme Court decisions, however, it appears that the cost of providing constitutionally effective counsel will continue to rise in the future. See, e.g. *Wiggins v. Smith*, 539 U.S. 510 (2003). These increasing costs may require study of the funding of the Board of Indigents’ Defense Services, so Kansas can continue to adhere to the ABA Guidelines.

3. Discovery

With regard to discovery, the main problem in death penalty cases arises from the alleged failure of the prosecution to reveal exculpatory evidence and investigative materials, sometimes because the materials were not turned over to the prosecutor to begin with. See Illinois Commission Report, Recommendation 2, p. 22; Connecticut Report at 60. The United States Constitution requires prosecutors to disclose exculpatory evidence, even in the absence of a request by the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Kansas statutory and case law acknowledges this duty. K.S.A. 2003 Supp. 22-3212; K.S.A. 22-3213; *State v. Aikins*, 261 Kan. 346, Syl. ¶ 17, 932 P.2d 408 (1997).

The Illinois Commission report recommended that police officers be required to document on a schedule all items of relevant evidence, and to turn this schedule over to the prosecutor. The Commission also recommended that prosecutors be given access to all police investigatory materials. Illinois Commission Report, Recommendation 2, p. 22. The Illinois legislature adopted this

recommendation in modified form, stating that police are required to give the prosecutor all information “that would tend to negate the guilt of the accused.” 725 I.L.C.S. 5/114-13.

The Connecticut Commission report recommended that an open-file procedure be set up in all death penalty cases, with a mechanism for creating a joint inventory of items disclosed and a formal record of their disclosure. Connecticut Report at 62.

Many prosecutors in Kansas pursue an “open file” policy. However, there is no law which mandates such a policy. Further, there is no law which mandates that police keep track of evidence and give evidence to the prosecutor. Whether any statutory change is necessary in the area, however, would require further detailed investigation.

4. Mistaken Eyewitness Testimony

Both the Illinois and Connecticut reports found that mistaken eyewitness testimony was a major problem in erroneous death penalty convictions. See Illinois Commission Report, 31-40; Connecticut Commission Report, 60. The Connecticut report concluded that mistaken eyewitness testimony was a primary reason for wrongful convictions. In order to combat this problem, the Illinois and Connecticut reports made several recommendations.

Both reports recommended that lineups be done sequentially, with the person or photograph shown to the witness one at a time and the witness informing the investigator whether or not that person is the perpetrator before the next person or photograph is viewed. Illinois Commission Report, Recommendation 12, p.34; Connecticut Commission Report, 62. The idea behind this procedure is to eliminate the "relative judgment" through which the witness identifies the person who looks most like the perpetrator. Illinois Commission Report, 34. The Illinois Commission cited studies showing that this sequential procedure produces a lower rate of mistaken identifications in perpetrator-absent lineups with little loss in the rate of accurate identifications in perpetrator present lineups. *Id.* at 34-35.

Both reports also recommended that a "double-blind" lineup be conducted, in which the official conducting the lineup or photo spread is not aware of the identity of the suspect. Illinois Commission Report, Recommendation 10, p. 32-33; Connecticut Commission Report, 62. The Illinois Commission recommended that this procedure be used "[w]hen practicable", although a minority of the Commission would have recommended that it be mandatory in all cases. Illinois Commission Report, 32-33. The concern of the majority of the Commission was that the mandatory implementation of this would pose problems for smaller police departments. *Id.* at 33.

Both reports further recommended that the witness in a lineup or photo spread be specifically told that the suspect might not be in the lineup or photo spread, thus reducing the pressure on the witness to identify someone in the array. Illinois Commission Report, Recommendation 11(a), p. 34; Connecticut Commission Report, 61. The Illinois Commission further recommended that the witness be told that he or she should not assume that the person administering the array knows which person is the suspect, thus reducing the possibility that the witness will believe that the law enforcement officer is "signaling" him or her as to which person to pick. Illinois Commission

Report, Recommendation 11(b), p.34. Illinois has adopted these recommendations. 725 I.L.C.S. 5/107A-5(b).

The Illinois Commission went on to recommend that a clear written record be made of any statements made by the witness at the time of the identification as to his or her confidence that the identified person is or is not the perpetrator, and that this record be made prior to any feedback from law enforcement personnel. Illinois Commission Report, Recommendation 14, p. 37-38. The purpose behind this recommendation is to reduce the possibility of a wrongful conviction where the witness makes a tentative identification at the lineup, but makes a stronger identification in court after receiving unintentional or even intentional positive feedback from law enforcement officers. *Id.*

Another recommendation by the Illinois Commission was that "[w]hen practicable", police should videotape lineup procedures. The Illinois legislature adopted this recommendation. *See* 725 I.L.C.S. 5/107A-5(a).

5. Interrogation Procedures

Both the Illinois and Connecticut Commissions have recommended that procedures be put in place to help insure that suspects are not coerced or tricked into making an involuntary or false confession. The most controversial of these recommendations is the videotaping or sound recording of all police interviews in capital cases. In Kansas, video or audio-taping of an interrogation is not a prerequisite to allowing the statement into evidence at trial. *See State v. McIntosh*, 30 Kan.App.2d 504, Syl.¶4, 43 P.3d 837, *aff'd* 274 Kan. 939, 58 P.3d 716 (2002).

The Connecticut Commission recommended that questioning of suspects in capital cases that is conducted in police facilities should be recorded. Videotape is suggested as the preferred option, with audiotape allowed where videotape would not be practicable. Connecticut Commission Report, 61. The Illinois Commission similarly recommended that videotape of the entire interrogation at a police facility be conducted. Illinois Commission Report, Recommendation 4, p. 24. Where a statement is made in a situation where recording is not practicable, the statement should be reread to the suspect on videotape, and the suspect should either confirm or deny its accuracy. *Id.* at Recommendation 5, p. 28-29. Where videotaping is not practicable, audiotape should be used. *Id.* at Recommendation 6, p. 29. Illinois has adopted this rule in modified form, providing that, beginning in 2005, all statements must be taped and non-taped statements are presumed inadmissible unless one of nine exceptions apply. *See* 705 I.L.C.S. 405/5-401.5.

The co-chair of the Illinois Commission has reported that: "Various police throughout the country who already follow this practice report no impairment in their ability to obtain admissions and confessions, a decrease in motions to suppress based on claims of police coercion and trickery, an increase in pleas of guilty, and jury acceptance of recordings as to what was said and done at the station." Thomas P. Sullivan, *Capital Punishment Reform: What's Been Done and What Remains to Be Done*, 51 Fed. Law. 37 (July 2004).

A second issue concerning interrogation techniques has to do with the time period in which a person is afforded counsel. The Illinois Commission recommended that, in death eligible cases,

the public defender be authorized to represent indigent suspects as soon as they request counsel, rather than waiting for the first appearance before a magistrate. Illinois Commission Report, Recommendation 3. Illinois has not acted on this recommendation.

6. Testimony from Informants

Both Commissions recognize that testimony from informants can be very troublesome. Both Commissions recommended that, before testimony can be introduced from jailhouse informants, the district court must hold a pretrial hearing to determine whether the testimony of the informant is reliable. Connecticut Commission Report, 62; Illinois Commission Report, Recommendation 51. Illinois has adopted this recommendation. 725 I.L.C.S. 5/115-21. The Illinois statute provides that, if the prosecution fails to prove by a preponderance of the evidence that the jailhouse informant's testimony is reliable, "the court shall not allow the testimony to be heard at trial." *Id.*

The Illinois Commission also recommended that the jury be specially instructed to view the testimony of a jailhouse informant with caution even if it is allowed into evidence. Illinois Commission Report, Recommendation 57. The Illinois legislature did not adopt this recommendation. Finally, Illinois law now prohibits the death penalty if the only evidence of the defendant's guilt is the uncorroborated testimony of a jailhouse informant or accomplice. See 720 I.L.C.S. 5/9-1(h-5).

Kansas has adopted a pattern jury instruction to be given regarding the testimony of an informant who receives benefits. See P.I.K. Crim. 3d 52.18-A (2003). The instruction provides that "[y]ou should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence". *Id.*

7. Other Recommendations

Both Commissions made other recommendations, such as reducing the number of factors that make a defendant eligible for the death penalty. However, Kansas has a fairly narrow statute already. The bulk of the other recommendations are also a part of Kansas law at the moment.

Conclusion

Kansas law appears sufficient to address many of the concerns identified by the recent studies made in Connecticut and Illinois. However, both state reports also contain additional recommendations, discussed above, that have the potential to further reduce the risk that an innocent person will be sentenced to death. As noted earlier, the question of whether it is advisable or reasonable to adopt additional measures here in Kansas will require an in-depth study focusing on the benefits and costs of each measure.

Issue 5: Whether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence?

The social science community generally agrees that the death penalty does not have a general deterrent effect on would-be murderers. There is some research that has found a deterrent effect to the death penalty, but these studies have been heavily criticized or are very recent and have not been appropriately scrutinized. Some studies have found a “brutalization effect” of the death penalty. These studies are also not agreed with by the majority of social scientists. General crime statistics can be used to support both theories and both sides of the deterrence debate.

Literature finding a deterrent effect

To this date, the most cited and influential study which found the existence of a deterrent effect to the death penalty was conducted by social scientist Isaac Ehrlich in 1975. Ehrlich, a professor of economics at the University of Chicago, was not the first to question the established notion that the death penalty was not a deterrent, however, he was the first to show a relationship between executions and murders that pro-deterrence theorists could use to support that claim.¹ Using econometrics and a mathematical technique termed “multiple regression analysis,” Ehrlich examined many variables simultaneously in order to determine the independent impact that each variable had on the murder rate.² Ehrlich concluded that the death penalty, if used rather than imprisonment, may deter eight murders for every execution actually carried out.³ By using national homicide data from the years 1933-67 in a time series analysis, Ehrlich claimed he was the first to analytically look at the issue of deterrence.⁴

Ehrlich’s study has been criticized for a number of methodological errors. Among these errors include the failure to account for several important factors in the analysis, including rural-to-urban migration, gun ownership, level of violent crime, and length of prison sentences. When these factors are taken into account, the deterrent effect found by Ehrlich goes away.⁵ Similarly, when Ehrlich’s data was reexamined by a panel of the National Academy of Sciences (headed by a Nobel Prize-winning economist), the data did not support the existence of a deterrent effect of the death penalty.⁶

¹Hook 1989, 47.

²Gerber, Rudolph J., “Death is Not Worth It,” 28 Ariz. St. L.J. 335, 348 (1996).

³See Carrington, at 90.

⁴ Ehrlich 1975, 397.

⁵M. Costanzo, Just Revenge 103 (1997)

⁶Supra.

Some recent studies support the existence of a deterrent effect of the death penalty. Dudley Sharp, a death penalty advocate, listed in a recent article several new studies that claim to show a deterrent effect of the death penalty.⁷ Sharp cited Emory University Economics Department Chairman Hashem Dezhbakhsh and Emory Professors Paul Rubin and Joanna Shephard, who recently stated that “our results suggest that capital punishment has a strong deterrent effect. An increase in any of the probabilities – arrest, sentencing or execution – tends to reduce the crime rate. In particular, each execution results, on average, in eighteen fewer murders – with a margin of error of plus or minus 10.”⁸ Their database used nationwide data from 3,054 U.S. counties from 1977-1996.⁹

Similar to the results from the Emory University study, University of Colorado Economics Department Chairman Naci Mocan and Graduate Assistant R. Kaj Gottings found “a statistically significant relationship between executions, pardons and homicide. Specifically each additional execution reduces homicides by 5 to 6, and three additional pardons (commutations) generate 1 to 1.5 additional murders.”¹⁰ Their data set contained detailed information on the entire 6,143 death sentences between 1977 and 1997.¹¹

Sharp noted five other studies from the last three years that found a deterrent effect to the death penalty.¹² Because these studies are recent, they have not yet been scrutinized by the social science community. Sharp also cited anecdotal evidence of criminals who allegedly were deterred from murdering because of the death penalty.¹³

Literature finding no deterrent effect

Despite the existence of studies that show a deterrent effect to the death penalty, the overwhelming mass of research on the subject concludes that the death penalty has no deterrent effect. Each study that purports to find a deterrent effect is attacked by the social science community

⁷Sharp, The Deterrent Effect of the Death Penalty, <http://mc4se.org/deteff.htm>.

⁸Dezhbakhsh, Hashem, Paul H. Rubin, and Joanna M. Shephard. “Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data,” *American Law and Economics Review* V5 N2 2003 (344-76)

⁹Sharp, at 1.

¹⁰“Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment,” *Journal of Law and Economics*, v 46, no 2, October 2003 at www.journals.uchicago.edu/cgi-bin/resolve?JLE460202.

¹¹See Sharp, at 2-3.

¹²Supra.

¹³Supra, at 4-5.

for methodological errors, and several other studies are conducted that find the opposite conclusion. As one author put it:

Research on the lack of deterrence will continue to accumulate. And, occasionally, because of a methodological flaw or a statistical anomaly, or an unusual confluence of events, a researcher will trap the elusive deterrent effect. Later, when other researchers look at the same data, the effect will vanish. The supposed deterrent effect of the death penalty looks more and more like some mythical creature whose existence seems less and less probable.¹⁴

Consistent with Costanzo's view, 80% of criminologists believe existing research fails to support deterrence.¹⁵ Former Attorney General Janet Reno concurred, stating, "I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent. And I have not seen any research that would substantiate that point."¹⁶

One recent study that is cited regularly to show there is no deterrent effect of the death penalty is that of John Sorenson, Robert Wrinkle, Victoria Brewer, and James Marquart. This group of researchers examined executions in Texas from 1984 to 1997. They speculated that if a deterrent effect were to exist, it would be found in Texas because of the high number of death sentences and executions within the state. Using patterns in executions across the study period and the relatively steady rate of murders in Texas, the authors found no evidence of a deterrent effect. They concluded that the number of executions is unrelated to murder rates generally, and the number of executions was also unrelated to the felony rates.¹⁷ This study is highly regarded, and was cited by Supreme Court Justice Breyer in his concurring opinion in Ring v. Arizona.¹⁸

Crime statistics generally support the notion that the death penalty is not a deterrent. A 2000 New York Times article highlighted that in the last 20 years, homicide rates in death penalty states have been 48% to 101% higher than in non-death penalty states.¹⁹ Similarly, the abolition of the death penalty in Canada in 1976 has not led to increased homicide rates. In fact, the number of

¹⁴M. Costanzo, *Just Revenge* 103 (1997).

¹⁵Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & C. 1, 8 (1996).

¹⁶Reno, quoted at www.deathpenaltyinfo.org.

¹⁷Sorenson, Wrinkle, Brewer, & Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 *Crime and Delinquency*, 481-93 (1999).

¹⁸536 U.S. 584 (2002).

¹⁹Bonner & Fessenden, *Absence of Executions: A special report, States With No Death Penalty Share Lower Homicide Rates*, N.Y. Times, Sept. 22, 2000, p. A1.

homicides in Canada in 2001 (554) was 23% lower than the number of homicides in 1975 (721), the year before the death penalty was abolished. In addition, homicide rates in Canada are three times lower than homicide rates in the U.S., which uses the death penalty.²⁰ However, death penalty advocates note the jump in the U.S. murder rate during the death penalty moratorium of the 1970's to counter the argument that statistics do not support deterrence theory.²¹

Some empirical research exists to support the theory that the death penalty increases the number of murders because executions make people more inclined to commit violent acts. This is known as the "brutalization effect." One study, reviewing the homicide rate in New York over a more than 57 year period, concluded that the homicide rate increased by one per month after an execution.²² Some researchers believe that the brutalization effect is more consistent with the evidence than is the deterrent theory.²³ However, "[t]he few studies which report that capital punishment may actually incite killings (Bowers & Pierce 1980; Bowers 1984; Cochran, Chamlin, and Seth 1994) have not been subjected to detailed scrutiny."²⁴ The "brutalization" studies have not accounted for factors such as age, gender, race, economic status, and access to an attorney for redress.²⁵

Conclusion

Ultimately, some studies show a deterrent effect of the death penalty, including a handful of recent studies. These recent studies have still yet to be examined by the social science community. Most social research concludes there is no deterrent effect, and the social science community generally agrees with this conclusion. The research for a brutalization effect of the death penalty is not conclusive.²⁶ On deterrence theory, some noteworthy social researchers recently concluded, "based on our assessment of the literature, we feel quite confident in concluding that in the United States a significant general deterrent effect for capital punishment has not been observed, and in all probability does not exist."²⁷

²⁰Facts About Deterrence and the Death Penalty, www.deathpenaltyinfo.org, at pg. 3.

²¹See Sharp, at 6.

²²See W. Bowers and G. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?* In V. Streib (Ed.), *A Capital Punishment Anthology* 86 (1993).

²³Costanzo at 110.

²⁴William C. Bailey and Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, In Hugo A. Bedau (Ed.), *The Death Penalty in America, Current Controversies*, 153 (1997).

²⁵Supra

²⁶Peterson and Bailey at 153.

²⁷Peterson and Bailey at 153.

Issue 6. Whether states that have the death penalty treat murder victim's families who oppose the death penalty the same as murder victims' families who favor the death penalty.

Thirty-one states have victims' rights provisions in their constitutions.¹ The question is whether victims' families who oppose the death penalty are afforded the same rights as those who favor it.

Inside the courtroom at the trial level, victims' families who favor and who oppose the death penalty appear generally to be treated equally. At later proceedings and outside the courtroom literature on the question suggests that victims' families who oppose capital punishment are sometimes treated as second-class victims, and may not be given the same rights and assistance as victims' families who support capital punishment.²³

The Committee has found no evidence of discriminatory treatment in Kansas of murder victim's families who oppose the death penalty.

Kansas has both a Victims' Rights Amendment to the Constitution, Art. 15, Sec. 15, and a statutory Bill of Rights for Victims of Crime. K.S.A. 74-7333 et seq. The Kansas Constitutional provision says, in part,

"(a) Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed of and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused."

K.S.A. 74-7333 (a)(5) and (6) provide that: "The views and concerns of victims should be ascertained and appropriate assistance provided throughout the criminal process" and "When the personal interests of the victims are affected, the views or concerns of the victim should, when appropriate and consistent with criminal law and procedure, be brought to the attention of the court." The term "victim" is defined in K.S.A. 74-7333(b) as "any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person".

¹See Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289, 289 (1999).

²Dignity Denied, *The Experience of Murder Victims' Family Members Who Oppose the Death Penalty*, published by Murder Victims' Families for Reconciliation, (MVFR) Cambridge, MA. (2002)

_____ In *State v. Parks*, 265 Kan. 644, 648 (1998) the Kansas Supreme Court said:

"The purpose of the bill of rights for victims of crime is to ensure the fair and compassionate treatment of such victims. See K.S.A. 1997 Supp. 74-7333 (a). In order to do so the bill of rights ensures that victims will receive certain minimum rights. The same is true with the Victims Rights Amendment. See Kans. Const. Art 15, Sec. 15. The purpose of these enactments is to guarantee rights, not restrict rights."

Parks held that the trial court did not abuse its discretion in admitting statements of a nonvictim, the sister in law of the victim, at the sentencing hearing.

Mr. Bill Lucero, Kansas Coordinator of the all-volunteer Murder Victims Families For Reconciliation (MVFR), appeared before the Committee on September 10, 2004. Mr. Lucero spoke of his association with MVFR; his father's murder in New Mexico, and his concern that murder victim families who oppose the death penalty receive the same support and treatment from prosecutors and courts as that extended to victims' families supporting the death penalty. Mr. Lucero has appeared before the Kansas Legislature opposing the death penalty.

Mr. Lucero was not aware of discriminatory treatment in Kansas of murder victims' families who oppose the death penalty.

K.S.A. 74-7337 requires the attorney general to appoint a victims' rights coordinator. Mr. Lucero favored victims' rights programs administered by a fully independent agency dedicated solely to serving the needs of all victims of crime. See, *Dignity Denied*, MVFR, Recommendation #3, p. 33.

Testimony at Post-Trial Proceedings

There have been documented instances when victims' family members who opposed the death penalty were not allowed to testify at post-trial proceedings while supporters of the death penalty in the same family were allowed to testify, See, *Dignity Denied*, MVFR, pp. 10-13. for a discussion of the denial of the Lamm family's right to testify in a Nebraska capital case.³

³*State ex rel, Lamm v Neb. Bd. Of Prisons et al*, 260 Neb. 1000, 1004 620 N.W. 2d 763 (2001). The Lamms, a husband and daughter of the victim advanced a moot claim. The death sentence imposed on the killer, Reeves, had been vacated. *State v. Reeves*, 258 Neb. 511, 604 N.W. 2d 151 (2000). The victims rights provision of the Nebraska Constitution was not self executing. The legislature is required to provide for implementation of the rights established by the constitutional provision. It had not done so. The Nebraska Supreme Court considered the Lamms' claim, although moot, under a public policy exception. 260 Neb. At 1004.

Not all victims' families who oppose capital punishment are treated unfairly. For example, the parents of Matthew Shephard were allowed to effectively request mercy for their son's killers against the wishes of the prosecutor.⁴

Conclusion

The Committee has found no evidence of discriminatory treatment in Kansas of murder victims' families who oppose the death penalty.

In the courtroom at a capital trial, victims' families who support and who oppose the death penalty are generally treated equally in states that have the death penalty. Outside the courtroom, in states other than Kansas, victims' families who are opponents of the death penalty appear to have been denied equal information and assistance in the capital trial process.

In Kansas, Mr. Lucero knows of no instances of discriminatory treatment of victim's families who oppose the death penalty. Mr. Lucero told the Committee that MVFR did not seek out families of death penalty victims to learn of the families' views on the death penalty. MVFR is available if other family members of victims wish to seek MVFR's counsel. Mr. Lucero also indicated that MVFR would be available to speak to Kansas prosecutors concerning the views of MVFR. The Committee recommends that a dialogue be opened between MVFR and The Kansas Association of County and District Attorneys.

Committee members have extensive experience with capital prosecutions in Kansas. None of the Committee members are aware of any instances of discriminatory treatment of Kansas's death penalty victims' families who oppose the death penalty.

⁴ See, Tom Kenworthy, "I'm Going to Grant You Life, "Parents of Slain Gay Student Agree to Prison for His Killer, Wash. Post, Nov. 5, 1999, at A2.

KANSAS DEATH PENALTY STATISTICS

AS OF JANUARY 1, 2005

	Potential Seeking Death	Not Charged Capital	Charged with Capital Murder	Tried for Capital Murder	Life/ Hard 40/ Hard 50	Death ¹ Penalty	Pending Charges
Sedgwick	17	9	8	7	2 ²	5	0
Wyandotte	25	10	15	3	3	0	1
All Others	44	12	32	5	3	2	4
Total	86	31	55	15	8²	7³	5

¹On December 17, 2004, the Kansas Supreme Court held the Kansas death penalty unconstitutional in the *State v. Marsh* case. The decision has been appealed to the United States Supreme Court. The Kansas Supreme Court has stayed its mandate in the *Marsh* case.

²Stanley M. Elms is included in these numbers. He was originally sentenced to death, but on November 17, 2004 his sentence was vacated and he was sentenced to the "hard 40."

³Defendants Kleypas, Scott and Marsh are included in this number, but depending on the decision by the United States Supreme Court, Kleypas and Scott may receive a retrial on the sentencing phase. Defendant Marsh will receive a new trial on the guilt phase.