

Informational Hearing on the Death Penalty
House Corrections and Juvenile Justice Committee

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March 15, 2012

Chairperson Colloton and Members of the Committee, I am Ron Wurtz, Vice-Chair of the Kansas Coalition Against the Death Penalty. When the death penalty was reinstated in Kansas, I served as the first director of the Death Penalty Defense Unit. Currently I am a federal public defender. I have been part of the criminal justice system for 34 years as a public defender and 2 years as a prosecutor.

We thank the Committee for holding this informational hearing. As you know, the Kansas death penalty was reinstated in 1994. In these past 18 years, we in Kansas have learned a lot about how the death penalty functions as have other states. Of note, three states have legislatively abolished the death penalty in recent years (New Jersey, New Mexico, Illinois), while a fourth has no death penalty due to the legislature's failure to implement a fix required by the courts (New York).

Those of us who support abolition of the death penalty do so believing that public safety can be protected and murderers held accountable without recourse to executions. In your 2010 testimony to the Senate Judiciary Committee, Rep. Smith, you noted that Senator Derek Schmidt had pointed out numerous flaws in the 2009 Senate

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bill. Indeed the concerns he raised led to an interdisciplinary committee, the Judicial Council Death Penalty Study Committee, rewriting the bill to address those concerns. I was a member of that committee where trial attorneys (prosecution and defense), appellate lawyers (prosecution and defense), trial judges, appellate court law clerks and law professors reached consensus that this bill was fair and wise. Neither prosecutors nor defense attorneys prevailed in their advocates' positions, but they all agreed the bill was good. The outcome was a bill that was stronger in protecting public safety. The bill was amended by the Senate in 2010 and strengthened to provide for a true life in prison without parole provision. The Senate tied in its vote to send that amended bill to final action. We invite you to ask us your best questions today about the death penalty. We believe that hearing your concerns is a vital part of the process.

I will take up the aspect of innocence shortly. Then, you will hear from Kristi Smith of Valley Center, who will speak to her journey of reconciliation and healing after her father's murder. The Kansas Catholic Conference will testify on the Catholic church's support for abolition. Shawn Streepy, Shawnee, is a former federal prosecutor who will address the issues of plea bargaining and arbitrariness. Celeste Dixon, Larned, will share her story of losing her mother to homicide and the impact of the execution. Retired Judge Steven R. Becker, Buhler, will articulate the challenges he experienced in his time on the bench. Rev. John Kreidler, Kansas City, will present an ecumenical plea from faith leaders throughout the state as well as the position of the Evangelical Lutheran Church in America. Carolyn Zimmerman, Topeka, will give

personal witness about the murder of her father and address general murder family victim issues. Written testimony is being submitted by other parties.

One of the variables causing increased discomfort among the public today in terms of the death penalty is the very real dilemma of innocent persons being sent to death row. One hundred forty persons, from 26 states, have been released from death row with evidence of innocence since 1973. The states involved in these serious errors include Oklahoma (10 releases), Missouri (3 releases) , Nebraska (1 release). In addition, the Death Penalty Information Center lists 9 persons who were executed despite strong evidence of innocence. One of those was a Missouri case.

The ongoing dilemma of innocence is what led Governor Ryan of Illinois to declare a moratorium on executions in that state. A Study Commission, again interdisciplinary, thoroughly reviewed the Illinois death penalty system and concluded that even if all their suggested reforms were put in place "...no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death." (Report of the Governor's Commission on Capital Punishment, 4/15/2002, page 207) The risk of sending an innocent person to death row was a pivotal factor in their recent abolition.

The criminal justice system is an adversarial system. Prosecutors work to secure a conviction. Defense attorneys work for the best interests of their client. Once a

conviction is secured, it can become incredibly difficult to make things right if an innocent person was convicted. Often when innocence is finally proven, it is "in spite of" the system rather than because of it.

While Kansas has not yet had a capital case where innocence was proven, we have had felony level cases where clearly an innocent person was sent to prison. I call your attention to the written testimony of Eddie Lowery who could not be with us today. A 22 year old soldier at Fort Riley, he was arrested and charged with rape of an elderly woman, battery, and burglary in Ogden in July 1981. He was questioned for hours on end without food, fed details of the crime by the police interrogating him, and told he did not need a lawyer. The police also reminded him that this was the type of case that in the past if the victim died was a capital crime but that Kansas did not have the death penalty then. Thinking he could tell them what they wanted and clear it up later, he confessed hoping to go home and get some sleep. Testimony by a KBI analyst was botched; the results later were called into question by independent reviewer. The first trial resulted in a hung jury. A second trial led to convictions for rape, aggravated burglary and aggravated assault.

Mr. Lowery served nearly all of his 11 year sentence. He was required to register as a sex offender and was dishonorably discharged from the military. It was only in April of 2003 that the District Court in Riley County vacated the judgment based on the DNA testing which confirmed he was innocent. The parties to this error, including Riley

County, ultimately paid out 7.5 million dollars in compensation. Mr. Lowery waited more than 21 years to be vindicated and he was vindicated because of his own efforts to clear his name, not because of the system.

His case shows two elements that lead to innocent persons being convicted of crime: forensic error and false confessions. These factors are among those which play a role in innocent persons being sent to death row nationally. Kansas has made mistakes. Kansas will continue to periodically convict the innocent because the criminal justice system is a human system with many opportunities for errors to ensnare the innocent. Some of the errors are human, while some are resultant from the adversarial nature high profile crime litigation.

The Innocence Project represented Mr. Lowery. They focus on the cases of persons whose innocence can be proven by DNA exoneration. They are now involved in the case of Thomas Arthur who is scheduled to be executed on March 29th in Alabama. Another man has confessed to being the one who committed the crime. The Alabama Supreme Court ordered limited DNA testing on a wig. (All parties agree that this wig is connected to the crime.) Alabama does not have the capacity to do the testing. The defense has offered to pay for the testing, but the State of Alabama is refusing to allow that testing to be done, even though it could be exculpatory for Mr. Arthur. This is another example of the adversarial nature of the criminal justice system which makes it incredibly hard to prove you are innocent once you have been convicted.

The United States Supreme Court held in *Herrera v. Collins* (506 U.S. 390 (1993)) that unless a person has constitutional violations in his case, new evidence of innocence itself is not justification for a new trial order by the federal courts to order a new trial. The Court in that decision indicated the fail-safe is clemency by state officials, a remedy that is too often impacted by political consideration rather than the demands of justice.

One final note. Some persons believe that because of DNA we can be assured that we will get every conviction right. DNA does not exist in all cases. A myriad of other factors including false witness identification, governmental misconduct, and more can also convict the innocent. The system can be resistant to admitting mistakes even when someone is sentenced to death. Sometimes the error is only proven after the person's journey through the system is done, as in Mr. Lowery's case.

The American people have seen the ongoing releases from death row; about 1 release for wrongful conviction for every nine executions. It is a factor in the public increasingly choosing the option of life in prison without parole in public opinion surveys. The public realizes that if we wrongfully convict someone like Mr. Lowery and send them to prison, we have options for righting the error. If we execute someone in error, there is no possible way to make amends for such a fatal mistake.