

House Corrections and Juvenile Justice Committee
February 13, 2017
HB 2167
Testimony of the Ronald E. Wurtz, Vice Chair, KCADP
in Support of Abolishing the Kansas Death Penalty

My name is Ron Wurtz, and I am the Vice Chair of the Kansas Coalition Against the Death Penalty (KCADP). This testimony explains the death penalty's high cost.

I have been associated with KCADP since before Kansas re-enacted the death penalty in 1994. When the death penalty became law without Governor Finney's signature in 1994, I was the most senior public defender¹ in service of the Board of Indigent Defense Services, and I was therefore tasked to establish a system to provide constitutionally effective defense counsel for the inevitable capital cases to be filed under the new law. We soon established a team of lawyers and support staff that came to be known as the Death Penalty Defense Unit. I served as the unit's chief for about four years. I then transferred to the Federal Public Defender, where I served until retirement in 2013.

The idea that executing someone costs more than imprisonment for life strikes many as counterintuitive. Study after study across the country, however, shows the death penalty to be a more expensive option than life in prison without parole. The high costs of capital cases are primarily due to: additional resources and preparation needed at the pre-trial stage, longer initial trials with more attorneys and experts, a separate sentencing phase at trial, and more complex appeals and higher incarceration costs for death row inmates post-trial.

Kansas has made at least two evidence-based studies that establish without doubt that seeking the death penalty is much more expensive than when the state foregoes attempts to obtain the ultimate punishment: **Kansas Legislative Post Audit Report**, "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections" (2003)², and **Kansas Judicial Council**, "Report of the Judicial Council Death Penalty Advisory Committee," (2014).³ These reports are not the full story because they do not measure law enforcement and prosecution costs.

Below I explain the costs of the death penalty at the pre-trial, trial, and post-trial stages, before turning to findings in various states and counties to show how much the death penalty costs local taxpayers.

¹ I graduated from Washburn University with a BA and commission as a second lieutenant in the U.S. Air Force in 1970. I graduated from Washburn Law School in 1973, and entered four years of active duty as a Judge Advocate where I served as a prosecutor and defense lawyer. Upon separating from active duty I worked as an assistant district attorney in Shawnee County until I was selected to head the Shawnee County Public Defender Office in 1979.

² <http://www.kslpa.org/assets/files/reports/04pa03a.pdf> (Hereafter Kansas Post Audit Report).

³ <http://www.kansasjudicialcouncil.org/death%20penalty%20cost%20report%20final.pdf> (Hereafter, Kansas Judicial Council Report).

Pre-Trial Costs

Because of the complexity of capital cases and preparation required for them, such cases often take longer to go to trial and prove costlier at the pre-trial stage:

- In line with American Bar Association guidelines,⁴ most states, including Kansas⁵, assign no fewer than two defense attorneys to a defendant in every death penalty case.
- Jury selection is longer in death penalty cases, in part because attorneys must find jurors who are “death qualified” – that is, who are not morally opposed to the death penalty.⁶
- In preparation for the trial’s sentencing phase, death penalty cases require a unique investigation by the defense not required in other cases. The defense essentially must detail the defendant’s biography and provide information on his or her childhood, family, and psychological history. When this mitigation research is not conducted adequately, courts later in the legal process may throw out a death sentence due to ineffective assistance of counsel.⁷
- Some argue that the threat of the death penalty leads to plea deals, and thus saves money by avoiding trials. The data, though, do not back up this point. Studies in Georgia, Colorado and Kansas found that capital cases ending in a plea deal do not lead to cost savings.⁸

Trial Costs

The trial stage of a death penalty case also demands more time and resources than do similar murder cases where the death penalty is not sought:

- A capital case requires two separate trials: a phase to decide guilt or innocence phase, and another to decide the sentence. In part because of this extra phase, Kansas death penalty trials have required 58% more court days than similar cases in which death was not sought.⁹ Some states require six times as many court days on average as do life without parole cases.¹⁰

⁴ American Bar Association, *Guidelines for the Appointment and Performances of Defense Counsel in Death Penalty Cases*, Rev. Edition, 2003, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

⁵ K.A.R. § 105-3-2.

⁶ See, e.g., Denise Lavoie, “‘Death-Qualified’ Juror Search Slows Marathon, Theater Cases,” Associated Press, January 25, 2015, http://www.denverpost.com/westernroundup/ci_27390048/death-qualified-juror-search-slows-marathon-theater-cases.

⁷ *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

⁸ Sherod Thaxton, “Leveraging Death,” *Journal of Law and Criminology* 103 (2013): 475-552; Justin Marceau and Hollis Whitson, “The Cost of Colorado’s Death Penalty,” *University of Denver Criminal Law Review* 3 (2013): 158; and Kansas Judicial Council Report, *supra*, note 3.

⁹ Kansas Judicial Council Report, pp. 12-13.

¹⁰ Justin Marceau and Hollis Whitson, “The Cost of Colorado’s Death Penalty,” *University of Denver Criminal Law Review* 3 (2013): 145-163.

- The extra costs involved in a death penalty trial are incurred even when the jury returns a life sentence.
- A study at Columbia Law School found that 68% of death penalty cases nationally are overturned on appeal.¹¹ If prosecutors continue to seek the death penalty after a death sentence has been overturned, taxpayers sometimes must pay for not just one but *multiple* capital trials. *State v. Gary Kleypas*¹² is an example of a Kansas death penalty case that has seen retrial of the penalty trial. New trials ordered by the Kansas Supreme Court have resulted in settlements with imposition of life sentences rather than re-trial to seek a death sentence.¹³

Post-Trial Costs

The increased costs also extend to the post-trial portion of a death penalty case:

- Because of the severity and irreversibility of the death penalty, the Supreme Court has held that “death is different” and requires additional due process in capital cases.¹⁴ Capital cases involve three levels of appeal almost always at the taxpayer’s expense, while most non-capital appeals have only one level of review funded by taxpayers.
- Those sentenced to death are housed on death row, or in Kansas, administrative segregation, which requires extra security and can be more than twice as expensive as housing for inmates serving life without parole.¹⁵
- The death penalty’s purported savings from avoiding future incarceration costs rarely materialize. Of all defendants sentenced to death nationally between 1973 and 2012, more defendants have been removed from death row through their sentence or conviction being overturned, commutation, natural death, or other means (48%) than have been executed (16%).¹⁶

¹¹ James S. Liebman and Jeffrey Fagan, “A Broken System: Error Rates in Capital Cases, 1973-1995,” Columbia Law School, 2000, <http://www2.law.columbia.edu/instructionalservices/liebman/>.

¹² 40 P.3d 139, 272 Kan. 894 (Kan. 2001); 382 P.3d 373 (Kan. 2016)

¹³ See, e.g., *State v. Marsh*, 102 P.3d 445, 278 Kan. 520 (Kan. 2004); *State v. Scott*, 183 P.3d 801, 286 Kan. 54 (Kan. 2008)

¹⁴ See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“penalty of death is different in kind from any other punishment”); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (Kennedy, J., concurring) (2008) (“When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”)

¹⁵ See, e.g. Connecticut General Assembly’s Office of Fiscal Analysis, “Fiscal Note for SB-280,” 2012, <http://cga.ct.gov/2012/FN/2012SB-00280-R000111-FN.htm>; and The California Commission on the Fair Administration of Justice, *Fair Administration of the Death Penalty*, June 30, 2008, <http://www.ccfaj.org/rr-dp-official.html>, pp. 69-70; Kansas Judicial Council Report, pp. 1, 11-12.

¹⁶ Frank Baumgartner and Anna Dietrich, “Most Death Penalty Sentences are Overturned. Here’s Why That Matters,” March 17, 2015, https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/?utm_term=.5d57bea65de7. The percentage of inmates who have been removed from death row and those who have been executed does not add up to 100% because the remaining inmates, 35%, are still waiting for their death sentence to be resolved by the courts.

- In those relatively rare cases ending in an execution, states still must house inmates on death row, which is costly, usually for more than a decade. For those inmates executed in 2016, on average over 18 years elapsed between the dates of their sentence and execution.¹⁷

State Studies on the Cost of the Death Penalty

Below is a summary of recent cost studies carried out by academic researchers or carried out by state legislatures. These studies consistently have found the death penalty to place a greater fiscal burden on state budgets than the alternative of life in prison without parole. There are costs related to the death penalty not captured in many of the studies below, such as prosecution costs, so in many cases the actual cost of the death penalty is even higher than the figures given:

- KANSAS: The 2014 Judicial Council study found that defense and district court costs in cases where the death penalty is sought are nearly four times higher on average than similar cases where the death penalty is not sought (\$468,292 v. \$120,517).¹⁸ The 2003 study by the Kansas Legislative Post Audit estimated the costs of death penalty prosecutions were 70% higher than non-death-penalty prosecutions.¹⁹
- OREGON: A 2016 study by Lewis & Clark Law School and Seattle University has concluded that "maintaining the death penalty incurs a significant financial burden on Oregon taxpayers." The average trial and incarceration costs of an Oregon murder case that results in a death penalty are almost double those in a murder case that results in a sentence of life imprisonment or a term of years. Excluding state prison costs, the study found, cases that result in death sentences may be three to four times more expensive.²⁰
- INDIANA: An analysis by Indiana's Legislative Services Agency found that the average trial and appeal costs are ten times more expensive in death penalty cases compared to life-without-parole cases (\$449,887 v. \$42,658).²¹
- MARYLAND: From examining data in Maryland between 1978 and 1999, a study appearing in the *American Law and Economics Review* found that a prosecutor's decision to file a death notice adds, on average, \$1 million in costs throughout the duration of a murder case.²²

¹⁷ Death Penalty Information Center, "Execution List 2016," December 2016, <http://www.deathpenaltyinfo.org/execution-list-2016>.

¹⁸ Kansas Judicial Council Report, *supra*, note 4.

¹⁹ Kansas Post Audit Report, *supra*, note 2.

²⁰ A. Kaplan, P. Collins, and V. Mayhew, "Oregon's Death Penalty: A Cost Analysis," November 16, 2016, <http://www.deathpenaltyinfo.org/files/pdf/OregonDeathPenaltyCostAnalysis.pdf>

²¹ Indiana General Assembly Legislative Services Agency, "Fiscal Impact Statement, SB 43," January 6, 2010, <http://www.deathpenaltyinfo.org/documents/INCostAssess.pdf>.

²² John Roman, Aaron Chafin, and Carly Knight, "Reassessing the Cost of the Death Penalty Using Quasi-Experimental Methods: Evidence from Maryland," *American Law and Economics Review* 11 (2009): 530-574.

- NEVADA: A legislative audit, based on a sample of 28 Nevada murder cases, found that the trial, appeal, and incarceration costs of death penalty cases are on average over \$1 million, whereas those same costs for similar cases where the death penalty is not sought are \$775,000.²³
- NEW HAMPSHIRE: A study commission established by the New Hampshire legislature concluded nearly unanimously (14-1) that the costs of the death penalty are significantly higher than the costs of life without parole.²⁴ New Hampshire is one of the few states to keep track of prosecution costs in death penalty cases. As of 2013, prosecution and defense costs in the case of the one individual on New Hampshire's death row already have reached \$5 million.²⁵
- NORTH CAROLINA: Another study in the *American Law and Economics Review* examined the costs for defense attorneys, defense expert witnesses, and payments to jurors for capital cases compared to non-death cases for fiscal years 2005 and 2006. The study concluded that, over these two years, repeal of the death penalty could have saved North Carolina nearly \$22 million.²⁶

Death Penalty's Impact on County Budgets

The death penalty can have a devastating fiscal impact on local counties with limited budgets. Especially for small counties that rarely deal with death penalty cases, such a case can result in a host of unexpected expenses that force cuts and even tax increases. Here are a few specific examples from counties across the country:

- Osage County, KS, had to raise its property taxes in 2010 in part to pay for an upcoming capital trial.²⁷
- Richardson County, NE, nearly went bankrupt, had to borrow money, and had to mortgage its ambulances to pay legal expenses for the two death penalty cases it prosecuted.²⁸
- Jasper County, TX, raised its property taxes by 6.7% just to cover the cost of one death penalty trial.²⁹

²³ State of Nevada Legislative Auditor, *Performance Audit: Fiscal Costs of the Death Penalty*, 2014, <http://www.deathpenaltyinfo.org/documents/NevadaCosts.pdf>.

²⁴ Commission to Study the Death Penalty in New Hampshire, *Final Report*, December 1, 2010, <http://www.deathpenaltyinfo.org/documents/NHDeathPenalty.pdf>.

²⁵ Connie Eppich, "Group Renews Push to Repeal N.H. Death Penalty," *Fosters Daily Democrat*, October 25, 2013, http://www.fosters.com/apps/pbcs.dll/article?AID=/20131025/GJNEWS_01/131029468/-1/FOSNEWS.

²⁶ Philip Cook, "Potential Savings from Abolition of the Death Penalty in North Carolina," *American Law and Economics Review* 11 (2009): 498-529.

²⁷ Steve Fry, "Kahler Trial Costs Osage County Big Bucks," *Topeka Capital-Journal*, August 6, 2011, <http://cjonline.com/news/2011-08-06/kahler-trial-costs-osage-county-big-bucks>.

²⁸ Paul Hammel, "Spat Brews Over Public Defenders," *Omaha World Herald*, January 31, 2012.

²⁹ Russell Gold, "Counties Struggle with High Cost of Prosecuting Death Penalty Cases," *Wall Street Journal*, January 9, 2002, <http://www.wsj.com/news/articles/SB1010527927506582520?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB1010527927506582520.html>.

- Jefferson County, FL, had to freeze employee raises and slash the library budget due to two capital cases.³⁰
- Clallam County, OR, spent over \$1 million to retry a death row inmate, which led administrators to cut county staff by 15%.³¹
- Lincoln County, GA, raised its taxes multiple times to fund a single capital case. The commissioners were eventually jailed because of their refusal to pay the defense costs accrued during the retrial.³²

Conclusion

Given the consistent findings in Kansas and across other jurisdictions, the evidence is clear that the death penalty imposes significant costs to state and local budgets not incurred with life in prison without parole. Beyond the fiscal costs, the time-intensive nature of capital cases also imposes opportunity costs, which prevent state and county employees from addressing other tasks that demand their attention and can lead to backlogs in the legal system. In light of U.S. Supreme Court rulings mandating “super due process” in capital cases, it is unrealistic to expect that Kansas or any other state can construct a system of capital punishment that avoids the high costs associated with it.

Of course, there are a variety of factors beyond cost to consider when evaluating the death penalty. Each individual must decide how to weight the cost of the death penalty relative to other relevant factors. What is clear, however, is that officials have an obligation to use taxpayer dollars in a responsible manner when operating government programs. We cannot ignore this point when evaluating capital punishment, which at the end of the day is a government program that requires taxpayer dollars to sustain it.

Respectfully Submitted,

Ronald E. Wurtz
 Vice Chair
 Kansas Coalition Against the Death Penalty
 785-608-7324
 ronwurtz65@gmail.com

³⁰ Jeff Scullin, “Death Penalty: Is Price of Justice Too High?” *The Ledger*, December 14, 2003, <http://www.theledger.com/article/20031214/NEWS/312140372>.

³¹ Jonathan Martin, “How the Death Penalty Can Bankrupt a County,” *Seattle Times*, February 18, 2014, <http://blogs.seattletimes.com/opinionnw/2014/02/18/how-the-death-penalty-can-bankrupt-a-county/>.

³² Richard Dieter, “Millions Misspent: What Politicians Don’t Say About the Death Penalty,” Rev. Edition, 1994, <http://www.deathpenaltyinfo.org/node/599#fn25>.