

House Corrections and Juvenile Justice Committee
February 13, 2017
HB 2167

Testimony of the Kansas Association of Criminal Defense Lawyers
in Support of Abolishing the Kansas Death Penalty

KACDL is a 300-plus member organization dedicated to justice and due process for those accused of crimes. Many of our members have represented or currently represent defendants charged with or convicted of capital murder.

KACDL supports complete abolition of the death penalty in Kansas.

The Kansas capital-punishment system should be abolished as ineffective and wasteful.

Abolition is not a liberal-versus-conservative, permissive-versus-tough-on-crime issue. Rather, it is an issue that all Kansas legislators and voters who care about the allocation of our state's resources and the reputation of our justice system can confidently support. What Young Republican Chase Blasi wrote some years ago in the WICHITA EAGLE about conservatives might well apply to Kansans of all political stripes: If we "are serious about cutting costs and promoting a culture of life," then the answer to the death penalty "is a no-brainer. Repeal it."¹

- 1. Speeding up and limiting the review process will neither save money nor decrease the error rate in capital cases.** Some may argue that the Kansas death-penalty system is salvageable if only we rein in the review process. But competent courts and attorneys are going to spend the number of hours necessary per case no matter how that time is allocated. Speeding up the review process will only result in a requirement that death-penalty courts and attorneys have smaller caseloads so that they can handle their capital cases in shorter time spans. Smaller caseloads for those courts and attorneys increases costs elsewhere as their overload cases get reassigned. And limiting the scope of direct appeals to "preserved" error simply moves the litigation of unpreserved error into the postconviction realm (where trial counsel who failed to preserve an error for direct appeal is subject to claims of ineffective assistance of counsel), thereby

¹ Chase Blasi, *Kansas should lead on repealing death penalty*, WICHITA EAGLE (Nov. 1, 2013).

creating two procedures where one is far more efficient. Lastly, it is difficult to imagine how either speeding up or narrowing capital appeals is likely to reduce the error rate in capital cases. At best, the error-rate will remain the same; at worst, fewer errors will be caught in such a whirlwind system—a result that no justice-loving Kansan can abide.

- 2. The costs of maintaining the death penalty will increase exponentially over the next few decades.** Capital cases require more person hours and resources than noncapital cases for myriad reasons unrelated to the duration and scope of the appellate process. For example, they require weeks of in-court hours conducting jury selection to probe potential jurors about issues that are not present in noncapital cases (specifically, whether potential jurors are capable of returning a death sentence); they require extensive preparation for sentencing trials that do not occur in noncapital cases; and they often involve detailed consultation with experts about sentencing issues not present in noncapital cases (for instance, the State relied on an expert neuro-radiologist to rebut certain brain-scan evidence offered as mitigation during sentencing in the Carr case).

Over time, as more death sentences are either reversed or affirmed on direct appeal, Kansans will see costs increase exponentially as the State continues to charge and try new capital cases while *retrying* those cases in which convictions and/or death sentences have been reversed. Meanwhile, cases in which convictions and death sentences have been affirmed on direct appeal will begin winding their way through the cumbersome but necessary state and federal postconviction process, with multiple visits to the United States Supreme Court a given in any capital case. While defendants in noncapital cases have the same rights to the state and federal postconviction process, noncapital cases rarely receive the same level of scrutiny beyond direct appeal that capital cases receive.

The American Bar Association has reported that in one study of the Florida capital postconviction process, it was concluded that “on average, over 3,300 lawyer hours are required to take a post-conviction death

penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari through that state's post-conviction proceedings.”²

The crucial role of postconviction review in our system cannot be underestimated. Floyd Bledsoe—convicted in Kansas of murder in 2000—was not exonerated until 15 years and multiple postconviction actions later.³ While Mr. Bledsoe's was not a capital case, it is a reminder that those convicted of serious crimes are, sometimes, in fact innocent. Indeed, researchers have conservatively estimated that as many as 4.1 percent of those sentenced to death would be *exonerated* (not just relieved of the death penalty) if their cases were subject to rigorous review.⁴ We cannot have the death penalty without that review, but the costs of that review are prohibitive.

Finally, the cost of housing inmates facing a sentence of death during the appeal and postconviction process is another expense related to the death penalty. The Kansas Department of Corrections has chosen to house all death-penalty inmates in its expensive segregation (solitary confinement) units, regardless of the inmate's advanced age, medical condition, or disciplinary history. Many of these inmates would be in general population if only they had been sentenced to life rather than death.

² ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

³ <http://kansasfpd.blogspot.com/2015/12/when-i-didnt-do-it-means-he-didnt-do-it.html>.

⁴ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 7230, 7230 (2014) (conservatively estimating that at least 4.1 percent of those sentenced to death would be exonerated if remaining on death row indefinitely).

3. **The high error rate in capital cases guarantees that the cycle of expensive capital litigation will continue in Kansas.** In 1991, the Chair of the U.S. Senate Committee on the Judiciary asked Columbia University School of Law Professor James Liebman to research the error rates in capital cases around the country. Professor Liebman spent nine years researching “the proportion of fully reviewed capital judgments that were overturned at one of the three stages [direct appeal, state postconviction, and federal postconviction] due to serious error.” He concluded that “[n]ationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%.”⁵

Whether due to trial errors or other causes, the vast majority of death sentences are never carried out. According to the United States Justice Department, between 1973 and 2013, 8,466 people were sentenced to death. Of those, 1,359 have been executed, while more than three times that number—4,128—have been removed from death row by reversal of a conviction or death sentence (3,194), death by means other than execution (509), commutation (392) or other removal (33).⁶

Each time a capital case has to be retried (and especially if the defendant is exonerated and a whole new case must be built against another suspect), the costs of that case increase, the emotional wounds that inevitably accompany these cases are reopened, public faith in the justice system diminishes, and system resources are stretched that much thinner.

⁵ James S. Liebman *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000), at <http://www2.law.columbia.edu/instructionalservices/liebman/>.

⁶ *See* CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES, Table 17 (DOJ Dec. 2014).

4. **The unavailability of the death penalty for BTK, Kansas's most notorious and feared serial killer, allowed for his speedy conviction, his certain incarceration, and the near-guarantee that he will be unable to challenge his conviction.** The contrasting cases of Dennis Rader and Justin Thurber provide just one illustration of the cost savings that abolishing the death penalty will accomplish. Justin Thurber, accused of murdering Jodi Sanderholm in January 2007, offered to plead guilty in exchange for a life sentence. His offer was rejected by a State eager to impose the ultimate punishment. Thurber's case dragged on for two years before he was convicted and sentenced to death, and Kansans now have decades of appellate and postconviction litigation to endure (and fund) while Thurber exercises his rights to challenge the fairness of the process that resulted in his death sentence (Thurber's direct appeal—docketed in 2009—has been briefed, but not yet set for oral argument). In contrast, Dennis Rader pled guilty and was given ten life sentences within six short months after his arrest for the murders he was charged with committing during his confessed reign of terror as Wichita's most notorious and feared serial killer. By pleading guilty, Rader waived any legal avenues for challenging his convictions and sentences (Rader initially filed an appeal, but voluntarily dismissed it less than a year later). Kansans can thus rest assured that the man known as BTK now has no further legal options, and will simply die in prison. Had the State been able to pursue the death penalty in Rader's case, it would surely have done so, thereby ensuring Rader's longevity in the annals of Kansas capital litigation, and costing millions of Kansas litigation dollars in the process.

5. **Arguments that prosecutors need the threat of death to force defendants into pleas resulting in life sentences do not reflect reality.** Prosecutors have argued that they need the death penalty on the books so that they can threaten defendants with death in order to force them to plead guilty. They claim that this “hammer” allows the State to save money by avoiding trial when defendants otherwise would not voluntarily plead guilty and accept a life sentence. But this argument does not reflect reality. Such a hammer was not necessary to induce Dennis Rader to plead guilty to multiple murders, even while knowing that his plea would

result in multiple life sentences. And if the State were truly interested in avoiding the costs associated with capital litigation, it would have accepted the plea offers of Gary Kleypas, Justin Thurber, and others who were willing to waive their trial rights and accept life sentences (some of whom ultimately received life sentences anyway from juries unwilling to return death verdicts). The fact that the State does in some cases accept defendants' plea offers merely serves to illustrate the arbitrariness inherent in the system. Finally, the hammer of death can result in the high cost of inducing innocent people to plead guilty. The state of Nebraska learned this lesson the hard way with the exonerations of five defendants who confessed to a murder they did not commit and pled guilty "to escape the threat of the death penalty."⁷ The Nebraska legislature has since passed a bill that would award damages to the wrongfully convicted.⁸

6. **The death penalty is disproportionately based on race, poverty, mental illness, and geography.** Studies have repeatedly found racial and geographic disparities in the death penalty.⁹ Poverty, too, plays a disproportionate role; indeed, "[t]he death penalty is . . . imposed almost exclusively on the poor."¹⁰ People suffering from mental illness are similarly "at heightened risk for losing their lives to unfair and capricious application of the death penalty."¹¹ Kansans do not want to participate in such a system.

⁷ Paul Hammel, *Pardons Granted To Five In Murder They Didn't Commit*, OMAHA WORLD-HERALD (Jan. 27, 2009).

⁸ Neb. Rev. St. § 29-4604, *et seq.*

⁹ <http://www.deathpenaltyinfo.org/race-and-death-penalty>.

¹⁰ Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, And Mental Illness In The Decline Of The Death Penalty*, 49 U. RICH. L. REV. 671 (March 2015).

¹¹ *Id.*; see also Position Statement 54: Death Penalty and People with Mental Illnesses (MHA June 14, 2016) (call for death-penalty moratorium by Mental Health America).

7. **The moral chaos that accompanies the actual execution process is unsavory, un-Kansan, and yet another reason to support abolition.** Cautionary tales that Kansas should heed on this front include the resignation of Washington’s execution team in the midst of a court battle over lethal injection,¹² Missouri’s secretive and possibly illegal efforts to obtain lethal-injection drugs from an out-of-state compounding pharmacy,¹³ and recent botched executions in Oklahoma, Arizona, Georgia, and Alabama.¹⁴

8. **The death penalty is not a deterrent.** There is an “overwhelming consensus” among leading criminologists “that the empirical research conducted on the deterrence question strongly supports the conclusion that the death penalty does not add deterrent effects to those already achieved by long imprisonment.”¹⁵

For more up-to-date information about the efficacy of the death penalty, and flaws identified in death-penalty systems around the country, please visit the Death Penalty Information Center website at www.deathpenaltyinfo.org.

Respectfully submitted on behalf of KACDL,

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¹² Sara Jean Green, *State’s execution team resigns, fearing identities would be revealed*, THE SEATTLE TIMES (April 2, 2009).

¹³ Steve Vockrodt, *Attorneys for death-row prisoners say Missouri obtains lethal injection drugs illegally*, THE PITCH (Jan. 10, 2014).

¹⁴ <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions>.

¹⁵ Michael L. Radelet and Traci L. Lacock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489 (2009).