

Approved: 10-09-05 Date

MINUTES OF THE HOUSE CORRECTIONS & JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 P.M. on February 7, 2005 in Room 241-N of the Capitol.

All members were present except:

Kathe Decker- excused
Oletha Faust Goudeau- excused
Mike Peterson- excused

Committee staff present:

Jill Wolters, Revisor of Statutes Office
Diana Lee, Revisor of Statutes Office
Jerry Ann Donaldson, Kansas Legislative Research
Becky Krahl, Kansas Legislative Research
Reagan Cussimano, Kansas Legislative Research
Connie Burns, Committee Secretary

Conferees appearing before the committee:

Barbara Hinton, Division of Post Audit
Randy Hearrell, KS Judicial Council

Others attending:

See attached list.

The Chairman welcomed and introduced the newest member of the committee, Representative Charlie Roth, from Salina, District 71.

Jill Wolters, Office of Revisor of Statutes, provided the committee an overview of the Kansas death penalty statutes and a brief of *State v. Kleypas* and *State v. Marsh*, specifically the weighing equation "equiporse" set forth in KSA 21-4624(e).

Kansas enacted the current capital murder/death penalty statutes in 1994. Capital murder is an off-grid person felony. The crime of capital murder is limited to seven specific crimes:

1. Intentional and premeditated killing of any person in the commission of kidnapping or aggravated kidnapping when the kidnapping or aggravated kidnapping was committed with the intent to hold such person for ransom;
2. intentional and premeditate killing of any person pursuant to a contract or agreement to kill such person or being a party to the contract or agreement pursuant to which such person is killed;
3. intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional institution, community correctional institution or jail or while in the custody of an officer or employee of a state correctional institution, community correctional institution or jail;
4. intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, such crime: Rape, criminal sodomy or aggravated criminal sodomy or any attempt thereof;
5. intentional and premeditated killing of a law enforcement officer;
6. intentional and premeditated killing of more than one person as a part of the same act pr transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or
7. intentional and premeditated killing of a child under the age of 14 in the commission of kidnaping or aggravated kidnaping when the kidnaping or aggravated kidnaping was committed with intent to commit a sex offense upon or with the child or with intent that the child commit or submit to a sex offense. "Sex offense" means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, prostitution, promoting prostitution or sexual exploitation of a child.

The sentencing procedures provide that a person under 18 or a mentally retarded person can not be

sentenced to death or to life without the possibility of parole. KSA 21-4622 and KSA 2004 Supp. 21-4623.

State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (2001)

The central issue is whether the weighing equation set forth in KSA 21-4624(e) violates the Eighth and Fourteenth Amendments to the United States Constitution because it mandates death when aggravating and mitigating circumstances are equal. In *Kleypas*, a majority of the Kansas Supreme Court said that in order to satisfy the Eighth Amendment, the legislature must narrow the class of murders who are eligible for the death penalty by guiding the jury's decision making process through the specification of aggravating factors and give the jury the discretion to consider and give effect to the mitigating factors it finds. The Court said that the weighing equation in KSA 21-4624(e) did not meet the latter requirement. In other words, in a tie between aggravating and mitigating factors, the jury has no discretion because the result is always imposition of a death sentence. If the jury has no discretion, it is unable to give effect to the mitigating factors it finds, which is a violation of the Eighth Amendment. The Court concluded KSA 21-4624(e) as applied in this case is constitutional and stated supporting case law which allows the Court "...to construe and limit criminal statutes in such a way as to uphold their constitutionality by reading judicial requirements into statutes which otherwise were overbroad" thus "avoiding" a result which might otherwise require a finding of unconstitutionally.

Justice Davis wrote a dissenting opinion joining the majority with the exception of issue of equipoise. He believes "the majority invades the province of the legislature" by adopting the language exactly opposite of the statute.

State v. Marsh, No. 81,135, Supreme Court of Kansas (December 17,2004)

Marsh is the second death penalty case to be reviewed by the Kansas Supreme Court. In regard to the weighing equation, *Marsh* holds the KSA 21-4624(e) is unconstitutional on its face and that the portion of *Kleypas* which made the statute constitutional by judicial construction must be overruled. The majority in *Marsh* agree.

The Court notes that case law makes it "plain that the avoidance doctrine is applied appropriately only when a statute is ambiguous, vague, or overboard. The doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute. The court's function is to interpret legislation, not rewrite it.

Barb Hinton, Legislative Division of Post Audit, ([Attachment 2](#)) provided the committee audit information on costs incurred for death penalty cases:

Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, December 2003, (copies are available in Post Audit and Legislative Research Department). The main audit question was, "How does the cost of death penalty cases in Kansas compare with the costs of cases involving non-death sentences?" During the audit 22 cases at both the state and local levels were obtained and compared estimated cost information. Actual cost for death penalty and non-death penalty cases in Kansas don't exist. The findings:

1. Cases in which the death penalty was sought and imposed could cost about 70% more than cases in which the death penalty wasn't sought.
2. Death penalty cases tend to have higher costs at the trial and appeal stages.

The second audit question was "Are there steps Kansas could take to reduce overall costs in capital punishment cases?" The findings:

- 1) Because much of the process involved in trying a death penalty case is prescribed by law or the US Supreme Court, there are no opportunities for eliminating steps in the process.
- 2) The following could save costs:
 - a) Providing for a true life sentence without the possibility of parole (the 2004 Legislature took this action)
 - b) Creating a specialized group of judges or law clerks who may be able to more efficiently handle death penalty cases
 - c) Ensuring that the State Board of Indigents' Defense Services has adequate staffing to avoid hiring contract attorneys at much higher cost

Randy Hearrell, Kansas Judicial Council, provided a briefing on “Report of the Kansas Judicial Council Death Penalty Advisory Committee on certain Issues Related to the Death Penalty” November 12, 2004. (Attachment 3) There were six issues addressed in the report:

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. (2 and 3 were combined)
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?
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.

Background information used for the basis of the report was provided, committee membership and the Kansas Death Penalty Statistics updated as of January 1, 2005, were also included.

The meeting was adjourned 2:30 pm. The next meeting is February 8, 2005.