

Approved: 3-8-94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on February 18, 1994 in Old Supreme Court Chamber of the Capitol.

All members were present.

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Governor Joan Finney
K. C. Groves, National Association for Advancement of Colored People
Matt Byrnes
Ed Collister, Attorney, Lawrence
Melody Cathey, Board of Indigents Defense
Bob Runnels, Kansas Catholic Conference
Kurt Thurmaier
David Harper, State Coordinator for Kansas Coalition Against the Death Penalty
Bob Keller, Dover
Dr. Walter Menninger, Clinical Director of Menninger Foundation
Alma Weber, Murder Victims' Families for Reconciliation
Professor Michael Kaye, Washburn University Law School
Robert Frey, Attorney, Wichita
Lieutenant Greg Ruff, Leavenworth Police Department
Sandra Lassiter, Citizens for Equal Justice
Professor David Gottlieb, University of Kansas Law School
Professor John Cochran, University of Oklahoma
Lloyd Moore for Bishop Fritz Mutti of United Methodist Church
Paul Helmut Kindling, MD
Elaine Mann, League of Women Voters of Kansas
E. Jay Greeno, Chief Public Defender for Sedgwick County
Sue Norton
Herbert Callison
Ronald E. Wurtz, 3rd Judicial District Public Defender
Fred L. Cain

Others attending: See attached list

SB 473--death penalty for certain crimes

Governor Joan Finney testified in opposition to SB 473 and answered questions from the Committee. She said during her career she had been personally affected by three tragic murders. Her personal reaction was to kill the murderers herself. However, she said society should place a high value on life and not kill anyone. The Governor testified that instead of killing the criminals, criminals should be incarcerated. Governor Finney said the judicial system was fragmented and overburdened.

David Harper, State Coordinator for Kansas Coalition Against the Death Penalty presented an opening summary in opposition to SB 473 and introduced conferees who would be testifying (Attachment No. 1).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Old Supreme Court Chamber Statehouse, at 10:00 a.m. on February 18, 1994.

Robert Keller, father of Murder Victim, Brenda Keller testified in opposition to SB 473 and provided written testimony (Attachment No. 2).

W. Walter Menninger, M. D. testified in opposition to SB 473 and provided written testimony (Attachment No. 3).

Bob Runnels, Executive Director, Kansas Catholic Conference testified in opposition to SB 473 and provided written testimony (Attachment No. 4).

Alma Weber, Murder Victims' Families for Reconciliation testified in opposition to SB 473 and provided written testimony (Attachment No. 5).

Michael Kaye, Professor of Law, Washburn University School of Law testified in opposition to SB 473 and provided written testimony (Attachment No. 6).

K. C. Groves, National Association for the Advancement of Colored People testified in opposition to SB 473 and provided written testimony (Attachment No. 7).

Robert G. Frey, Former Senate and House Majority Leader, Wichita Attorney, testified in opposition to SB 473 and provided written testimony (Attachment No. 8).

Lieutenant Gregory Ruff, Leavenworth Police Department, testified in opposition to SB 473 and provided written testimony (Attachment No. 9).

Melody Cathey, Board of Indigents' Defense Services testified on the fiscal impact of SB 473 and provided written testimony (Attachment No. 10).

Professor John Cochran, University of Oklahoma testified in opposition to SB 473 and provided written testimony (Attachment No. 11).

Sandra Lassiter, Concern Citizens for Equal Justice testified in opposition to SB 473 and provided written testimony (Attachment No. 12).

Professor David J. Gottlieb, University of Kansas School of Law testified in opposition to SB 473 and provided written testimony (Attachment No. 13).

Ed Collister, Jr., Attorney, Lawrence testified in opposition to SB 473 and provided written testimony (Attachment No. 14).

Lloyd Moore testified on behalf of Bishop Fritz Mutti, Bishop of the Kansas Area for the United Methodist Church in opposition to SB 473 and provided written testimony (Attachment No. 15).

Matt Byrnes testified in opposition to SB 473 and provided written testimony (Attachment No. 16).

Kurt Thurmaier testified in opposition to SB 473. He said he wanted murderers to be locked up for life, however, he did not want to see them murdered.

Paul Helmut Kindling, M.D. provided written testimony in opposition to SB 473 (Attachment No. 17).

Elaine Mann, League of Women Voters of Kansas provided written testimony in opposition to SB 473 (Attachment No. 18).

Jay Greeno, Chief Public Defender for Sedgwick County provided written testimony in opposition to SB 473 (Attachment No. 19).

Sue Norton, whose dad and step-mother were murdered in Oklahoma, provided written testimony in opposition to SB 473 (Attachment No. 20).

Herbert Callison provided written testimony in opposition to SB 473 (Attachment No. 21).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Old Supreme Court Chamber Statehouse,
at 10:00 a.m. on February 18, 1994.

Ronald E. Wurtz, 3rd Judicial District Public Defender provided written testimony in opposition to SB 473
(Attachment No. 22).

Fred L. Cain provided written testimony in support of SB 473 (Attachment No. 23).

Meeting adjourned at 11:15 a.m.

The next meeting is scheduled for February 21, 1994.

GUEST LIST

COMMITTEE: Senate Judiciary Committee

DATE: 2/18/94

NAME (Please Print)	ADDRESS	COMPANY/ORGANIZATION
Bob Lunnick	Lawrence, KS	St. Cath. Con. C.
McLaughlin, Pate		Observer
Shirley C. Moore	815 SUNSHINE JUNCTION CITY, KANSAS	KANSAS AREA THE UNITED METH. CHURCH
LES J. DAVIS	4013 KIMBARK TOPEKA KS 66619	KANSASNS OPPOSED DRUG PENALTY
Bill Lunn	Topeka	MVFR
Alma H. H. H.	Topeka	MVFR
Sue Norton	Arkansas City,	MVFR
Shirley Stephenson	" "	" "
Zachary Stephenson	" "	" "
Walter Menninger	MD Topeka KS	
Lee Burdett	Topeka, KS	KWIC
Dan Finch	Topeka	"
Lina Joyce	Fairway	KCTV
Mike Matson	Topeka	WIBW
Eric D. D.	"	"
Ed Wilkerson	KCMO	KCTV
Sgt. R. Indebach	Lawrence	Associated Press
Gene L. L.		Gov. office
Janine & Kurt Thummaier	1611 Leonard Lawrence	
Bob Keller	13442 SW 57th	Concerned Father
Donna McDaniel	Topeka	Sen Burke's office
TONI WHITESIDE	TOPEKA	SEN. KARR'S OFF.
KEVIN M. WALKER	LAURENCE	SENATE PRESIDENT

GUEST LIST

COMMITTEE: Senate Judiciary Committee

DATE: 2/18/94

[illegible]

GUEST LIST

COMMITTEE: Senate Judiciary Committee

DATE: 2/18/94

NAME (Please Print)	ADDRESS	COMPANY/ORGANIZATION
Erin Pathey	4418 Rochester	High School
Mel Cathey	Topeka	BIDS
Karen Joyce	Johnson County	
Sarah M. Casper		A Person!
Donna Schmeiss	Topeka	AI
Janis McElroy	Topeka	oliver...
Carolus Riem	Topeka	KADM
Pauline Skarn	Topeka	RCAR
Anne Kuchner	Topeka	
John Cochran	Norman OK	U of Oklahoma
David Hoepfer	Wichita	KCADP
JAMES R. JAMES	TOPEKA	
Ron Miles	Topeka	BIDS
H. Perry	Topeka	✓
Jeanie McKenna	"	KCADP
Scott Wren	2429 SW 26, Topeka, KS	Washburn
Tulhe Meyer	8203 WITTH	
Matt Byrnes	1920 N 60w Wichita	Student
Marcie Cornbo	KC K	Sisters of Charity
Jeanne Neenan	Farida, KS	WMCADP - ✓
Shana Stephenson	Ark City, KS	KCANP
Mike Turner	Topeka	IS T/GA
Marisa Larson	"	"

GUEST LIST

COMMITTEE: Senate Judiciary Committee

DATE: 2/18/94

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#1

Opening Remarks by David Clinton Harper
State Coordinator-Kansas Coalition Against the
Death Penalty
Kansas State Senate-Judiciary Committee
February 18, 1994

Mr. Chairman, members of the committee, as the state coordinator for the Kansas Coalition Against the Death Penalty it is my privilege to present an opening summary and introduce our conferee's for this mornings hearing.

The Kansas Coalition Against the Death Penalty is a state-wide consortium of people of faith, academics and professionals, criminal justice administrators and victims family members who, for a multiplicity of reasons oppose the sanction of capital punishment in Kansas.

Among our conferee's are religious and community leaders, sociologists and criminal justice experts who bring to this hearing the telling truths of a practice too long advanced as the sole solution to violent crime.

Important to the Coalition, and an integral part of our make-up are victim's family members who will briefly offer their poignant stories of living and healing.

Those that will offer their testimony here today, like myself and the members of the coalition, believe that society deserves a civilized level of law and peace. They have a right to expect it. Life in parts of this state, it seems, has become ugly and violent. To a great extent it is a cry, a terrible cry of anger and anguish born of frustration and

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fear in the people of this state. We know and have experienced this pain. We understand it.

Mr. Chairman, members of the committee, we must look beyond the abstract and gain a better understanding of this issue. History has shown time and again that decisions made hastily are fraught with error. We need to respond more effectively to the violence in our state. This is one thing that cannot be disputed. It is our hope that following the testimonies of these conferees, each of you will have a better understanding of this issue.

Let me close by saying, that I realize, as a body, the Kansas Legislature must make thousands of decisions each session which are important. Occasionally, we are all confronted with an issue that has transcendent significance; one that describes in fundamental ways who we are as a people; one that projects to ourselves, and to the whole world, our most fundamental values--one, even, that helps configure our souls.

The decision made on this issue, in this day, will not only affect us but will be a legacy for our children. Let us be certain of our decision for their sake for, make no mistake, it is in their hands that this practice will fall.

Thank you for your attention.

#2

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE CONCERNING CAPITAL PUNISHMENT

by
Robert R. Keller
Father of Murder Victim, Brenda Keller
February 18, 1994

On a Saturday afternoon, in October 1991, my 12 year old daughter, Brenda, decided to go on a bike ride. She never came home. Less than a mile from her home, in broad daylight, Brenda was grabbed from behind, pulled off the road, forced to go to a secluded area, where she was raped. Throughout this process she was savagely beaten. Then, after her attacker was through with her he strangled her, and tossed her body into a shed.

This man is now serving what will be a minimum of 40 years in prison. If the death penalty had been Kansas law that day, he would probably be on death row at this very moment.

I was thinking about that other day. I've asked myself how would I feel if this man were to be executed? What would it be like to know that someday in the near future he would be strapped to a table and killed? This man who destroyed my daughter's very precious life. To be honest with you, there are times when I find that idea very appealing.

But then I think of Brenda. Not how she died, but how she lived. The little girl who announced when she was five that she thought maybe God put her in the world to love bugs. And all through her very short time in this world she was dedicated to saving and protecting bugs, and worms and spiders and snakes and things most people would just as soon step on. And I think, no, I know, she would be horrified if a man, not a bug, not a snake, not a beast, but a human being were to be killed in her name.

The one thing that I can't get away from. The one thing that keeps me from joining others in calling for capital punishment is the very thing that losing Brenda has taught me. Once somebody is dead, there is no getting up again. After a life is taken, you can't give it back. Death is final. As Brenda's daddy I know that all too well. My arms ache to hold her. And nothing you do will give her back to our family. Not anything, not even killing her killer.

And what if, in our zeal to get tough on crime an innocent man is executed? Mistakes can still be made. To err is human. Once he's dead, all you can say to his parents is "Oops! I'm sorry. We made a mistake." But you can never give him back his life. And for me, life is too precious to take that chance.

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#3

Testimony for the Kansas Senate Committee on the Judiciary
Hearings, 18 February 1994, re: Capital Punishment
By: W. Walter Menninger, M.D.

I. Concern About Irreversibility

Thank you for the opportunity to contribute some thoughts as you deliberate the proposal to reinstate capital punishment for certain offenses and offenders in Kansas. I speak from a background of more than 30 years experience in the field of law and psychiatry, having worked with offenders of all kinds.

I acknowledge that there is considerable popular, highly emotional support in Kansas these days for reinstatement of the death penalty. I am also keenly aware that there are some evil persons in the world, persons whom the world would be better off without.

The dilemma is being able to identify in a consistent and accurate manner, those persons the world would be better off without. Our criminal justice system may be weighted toward protecting an innocent accused person from wrongful conviction and sentencing, but it cannot guarantee that from happening. In a case involving a capital crime, where emotional issues can be prominent, mistakes in prosecution and conviction can and do occur. If capital punishment is carried out, the error is irreversible.

II. Research Findings -- Innocents Convicted of Capital Crimes

Researchers Hugo Bedau and Michael Radelet identified 350 cases between 1900 and 1985 in which defendants were convicted of capital or potentially capital crimes later found to be innocent.¹ Of the 139 of these individuals who were sentenced to death, 23 were actually executed, and another 22 were reprieved 72 hours or less before execution.

One of the miscarriages of justice identified by Bedau and Radelet was the case of Harry Pyle. Tried in Kansas in 1935, Pyle was convicted of first-degree murder and robbery, although his sentence was for life imprisonment. He claimed the conviction was based on perjured testimony coerced from witnesses by the state and on the state's suppression of exculpatory evidence. In 1941, a letter to Pyle from the prosecuting attorney, submitted in Pyle's application for habeas corpus, stated: "Your conviction was a grave mistake." A letter from a witness admitting perjury was also enclosed. After the trial of another man for complicity

¹ Bedau, Hugo Adam, and Radelet, Michael L. "Miscarriages of Justice in Potentially Capital Cases." Stanford Law Review. 40(1):21-179, 1987 (November).

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in the same crimes, in which evidence was produced that contradicted evidence used in Pyle's trial, the U.S. Supreme Court ruled the new evidence "clearly exonerates petitioner," and Pyle was released.²

Some of the most notable errors that result in such miscarriages of justice include police prompting false confessions, overzealous police or prosecutorial work, prosecutorial suppression of exculpatory evidence, witness errors of mistaken identity or perjury, incompetent defense counsel, misleading circumstantial evidence, inadequate consideration of alibi evidence, or a conviction demanded by community outrage.³

Bedau and Radelet agree with the observation that: "[T]o say that someone deserves to be executed is to make a godlike judgment with no assurance that it can be made with anything resembling godlike perspicacity." Their research highlights the all-too-human errors that afflict the actual attempt to render such judgments.⁴

III. Hate Begets Hate Through Capital Punishment--State Sanctioned Revenge

One's position on the death penalty is all too often driven by emotion, rather than reason. When one is injured or wronged, the normal human response is anger, rage, and an impulse to strike back and demand a "pound of flesh." Filled with the emotion of rage, we do not consider or acknowledge the extent to which our anger can provoke more anger and our hate beget more hate. We are so preoccupied with our own intense emotions, we are oblivious to the consequence, namely that retaliation perpetuates the hate.

Capital punishment is state sanctioned revenge, an absolute and final direction of hate toward a "convicted" perpetrator. It places the state in the position of approving hateful action as a response to an individual's unlawful hateful action. We would do better to interrupt rather than perpetuate the acting out of hate.

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² Ibid, page 153.

³ Ibid. Page 57.

⁴ Ibid, page 90. In addition, for a thoughtful discussion of their findings, see also the concluding chapter (pages 271-281) in Radelet, ML, Bedau, HA and Putnam, CE. In Spite of Innocence--Erroneous Convictions in Capital Cases. Boston: Northeastern University Press, 1992.

TESTIMONY

H.B. 2578

Senate Judiciary Committee, Room 514-S
February 18, 1994 - 10:00 a.m.

KANSAS CATHOLIC CONFERENCE
Bob Runnels, Executive Director

Thank you Mr. Chairman and members of the Senate Judiciary Committee for my chance to appear and testify in opposition to House Bill 2578. I'm here today speaking under the authority of the Catholic Bishops of Kansas who are the teachers and spiritual leaders of our people.

People want less crime -- and they are right. Many people believe that the "Death Penalty" will result in less violent crime. That is yet to be proven. The experience of other states proves this not to be true. Our neighboring States of Missouri, Oklahoma, Colorado have all exceeded our Kansas murder record since they reinstituted the "Death Penalty".

There will be arguments about the relative cost of court cases and executions versus the cost of imprisonment for life. Nationally, states spend more money on an execution than on imprisonment of a convicted felon.

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There will be tragic stories of bereaved families versus the imprisonment of the murderer of their loved one. And, there will be stories of the tragic deaths of the innocent who have been falsely accused.

ANOTHER VIEW

For us, the citizens of Kansas, there is a much more important -- and more compelling question: Can the "Death Penalty" be reconciled with the teachings and example of Jesus Christ?

We believe firmly that the "Death Penalty" takes us down the wrong road of life. It fuels vengeance, diverts from forgiveness and greatly diminishes respect for all human life.

At the same time, we affirm strongly that the life of every person, and the breath of every person, regardless of the status or condition of that person, is in the hands of God.

We oppose the "Death Penalty" to follow the example of Jesus, who taught justice and lived the forgiveness of injustice.

We oppose the "Death Penalty". We wish to join Kansans in sending a message that we can break the cycle of violence ... that we need not take life for life.

We also oppose the "Death Penalty" because of difficulties in its use:

- * The death penalty involves the possibility of innocent persons being executed.
- * The death penalty in our society involves a long and costly process.
- * The death penalty is often motivated by vengeance.
- * The death penalty does not deter the direct taking of innocent human life!
- * The death penalty denies the possibility for conversion, reconciliation, and reparation for the evil done.

We call all Christians and all people of good will to meditate on the crucified Christ who set before us the supreme example of forgiveness and the triumph of compassionate love!

As I see the escalation of violence and the devaluation of human life, I hear hatred, pain, fear, and sometimes revenge in the outcries of families of both the victims and the perpetrators --feelings with which I am very familiar. My concern is with the emotional price these feelings create.

My children and I relived the events of my son, Paul's murder this summer as his murderer came up for parole for the second time in August. Paul was a Parole Officer in Wyandotte County and on October 19, 1976, was stabbed to death by a parolee at the home of the parolee and his mother. The events, as we relived them, brought back seemingly raw, non-ending pain.

As we worked our way through our "now" feelings, I was asked about my anger. I told them I have only so much energy and constant feelings of unresolved anger, which I see as hatred and revenge, would rob me of a great deal of energy and that would not be fair to me, my family, those with whom I interact daily, and to Paul. Murder Victims Families for Reconciliation, a group with focus on supporting survivors of violent crimes such as murder, has re-enforced my belief in reducing the emotional price these feelings bring about -- a price I will not pay. Survivors in our case include not only Paul's family, but the family of the murderer, the parole officer with him at the time, his supervisor being called as the murder was taking place, an official from DDC, in Kansas City that day who called to tell me, and the members of the board who paroled John in the spring of that year.

Bringing back capital punishment would cause us to lose our care and compassion for our fellow human beings, would accelerate the loss of our dignity and most of all the devaluation of human life. This further devaluation of human life is a price we, as a society, positively cannot afford.

Paul's goal that day in October was to mediate differences between a mother and son. As his mother, mother of the remaining eight children, and grandmother of 20, and yes, as a Secretary in the Department of Corrections, I cannot demand the life of another's child.

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Written Testimony of Michael Kaye
Professor of Law
Washburn University School of Law

In Opposition to S.B. 423, Concerning Capital Punishment

February 18, 1994

If Kansas enacts a capital punishment law that does not provide for special funding for appointment of defense counsel, it will probably guarantee years of litigation over the reliability of trials and few, if any, executions will result.

Because a capital case is a sensational event, occurring in an emotional atmosphere, governed by special procedures, the chances for error are highly increased. Capital cases are reversed on a wide variety of legal grounds. It has been found that 40% of all death sentences are reversed on procedural or constitutional grounds. Under the present system of capital punishment under Gregg v. Georgia, 428 U.S. 153 (1976), strict scrutiny mandated in capital cases has resulted in most people who are sentenced to death escaping execution. One scholar has pointed out that virtually all capital cases that have been litigated to conclusion, have been reversed.¹

A sentence of death is usually only the start of a tortuous journey through state and federal courts lasting years and costing thousands of dollars.

And what concerns the courts in these cases increasingly is the inadequacy of trial counsel, usually poorly paid and inexperienced. However, where the court appointed fee system is

¹ Greenberg, "Capital Punishment as a System," 91 Yale L.J. 908, 919 (1982).

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low, even experienced lawyers will be discouraged from aggressive representation.

The American Bar Association Post Conviction Death Penalty Representation Project has confirmed that lawyers are discouraged from taking capital cases because of the political stigma of these cases. Law firms from non-death penalty states have filled the gap. Many of these firms who have contributed their services pro bono have stopped doing so because of the expense. Public interest law firms would be another source of emergency representation.

In appealing a death sentence, lawyers must make a complete reinvestigation and scrutinize the adequacy of trial counsel. It has been shown how defense counsel's role in the penalty phase differs from counsel's role in the guilty phase of a capital trial. Perpetrators of brutal crimes have been spared the death penalty after counsel has presented persuasive mitigating evidence at the penalty stage.² Failure to present evidence allowing a jury to identify with a defendant as a human being and providing understanding of why he acted as he did, will be inadequate assistance of counsel. Such evidence can be obtained only by use of experts and by intensive factual investigation into a person's life. I do not believe Kansas is ready to fund such a defense.

The Attorney General of Pennsylvania has noted that most prosecutors are ill equipped to handle capital cases and has called for state and federal funding to develop a pool of specialists in

² Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U.C. Rev. 299 (1983).

capital cases.³ Such funding of specialized training is unlikely to occur in Kansas, where the State Supreme Court has forced the legislature to fund adequately court appointed criminal defense, where there is a shortfall in court appointed counsel funds, and where much prosecution is by part-time prosecutors.

Unfortunately, the chances of avoiding execution depend on the quality of counsel's representation, more than on any other factor.

In the words of Professor Charles Black, in order to effect a real change, "every capital defendant [would have to] be furnished, by the state at every stage, with the best counsel money can buy, and with completely adequate funds for investigation, for expert witnesses, and for everything else that you or I would hock our souls to get if we had anyone dear to us standing accused of a capital offense."⁴

This is not likely to occur in Kansas, neither at trial nor in habeas corpus litigation which is certain to increase both in Federal and State Court. As a result, any capital punishment law enacted by the legislature will fail to meet a fundamental goal of justice: the even handed application of punishment.

³ Smothers, "A Shortage of Lawyers to Help the Condemned," New York Times, June 4, 1993, p. A21.

⁴ Black, "Death Sentences and Our Criminal Justice System," in H. Bedau, The Death Penalty in America (3d ed. 1982) at 360-61.

#6
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NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
50 t h A N N U A L
KANSAS STATE CONFERENCE OF BRANCHES

ATCHISON KANSAS
OCTOBER 23, 1993

RESOLUTIONS SUBMITTED AND PASSED

PURPOSES AND AIMS

The Kansas State Conference of Branches of the National Association for the Advancement of Colored People shall endeavor to improve the political, educational, social and economic status of minority groups; to eliminate racial prejudice; to keep the public aware of the adverse effects of racial discrimination; and to take lawful action to secure.

To the Judiciary committee,

Feb. 18 1994

Dear Sirs;

We are opposed to bills H-2573 and 473, known as the death bills.

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DEATH PENALTY

WHEREAS, the NAACP works for the enactment of legislation to improve the educational, political, and economic status of all suppressed people; and

WHEREAS, we are opposed to the death penalty; and

WHEREAS, one of the most pointed facts about the use of the death penalty in America is racial discrimination. More than 2,000 people lawfully executed in this country since 1930 were Black, not to mention the thousands of victims of lynch mobs. This capricious pattern of discrimination caused by the courts to declare the death penalty in the United States unconstitutional. Furman v. Georgia. Currently, twenty-one years later, hundreds of people have been discriminatorily sentenced to death under new, post-Furman death penalty laws; and

WHEREAS, minorities continue to bear the brunt of capital punishment; they constitute 50% of those executed, and this figure is going up; and

WHEREAS, a second type of discrimination is used in implementation of this system is bigotry by race of the victim. Sixty-eight percent (68%) of those executed since Furman v. Georgia were convicted of killing white people. Although fifty percent (50%) of the homicide victims were black, no whites were executed for killing blacks; and

WHEREAS, detailed studies have shown that this disparity is not by chance but to enforce phyletic sectarianism. When these matters again appear before the courts, it will be a legal necessity that they again render current death penalties unconstitutional; and

WHEREAS, past conditions in Kansas, in concert with the above analysis would bear out the conclusion that the Kansas justice system discriminates against the people of color and is a bastion of conservative racism; and

Resolution

Passed

WHEREAS, in 1987, the Kansas Legislative Research Department estimated that the death penalty would cost in excess of \$11,000,000 above current costs. There would be an overall cost of \$50,000,000 exclusive of building a death row facility at \$8,000,000 per bed; and

WHEREAS, a crime and punishment bill would make minorities the recipients of the grossest outrage from government; and

WHEREAS, as historian Carl Becker said in 1910, "The belief that Kansas was founded for a cause ... lifts the history of Kansas out of the commonplace ... and gives to the temper of the people a certain elevated purpose and quality."

THEREFORE, the 50th Conference of the Kansas State Conference of the NAACP Branches herewith beseeches this body to combat all efforts of the 1994 legislature to reestablish the death penalty in Kansas.

J. C. Grouse
1st Vice Pres.
Ks State NAACP

EQUAL JUSTICE

Resolution 3

WHEREAS, equal justice and equal access to the justice system is essential to fulfillment of the promise of the United States of a democratic system; and

WHEREAS, equal justice and equal access to the justice system is not possible where minorities, particularly African-Americans, do not have reasonable participation in the enforcement and administration of the law enforcement, judicial and penal systems; and

WHEREAS, employment of minorities in proportionate numbers in all levels of all law enforcement agencies, courts of original and appellate jurisdiction, in administrative agencies and in the penal system is essential and long overdue; and

WHEREAS, inclusion of minorities in proportionate numbers in jury panels in all judicial proceedings is a necessary prerequisite to the functioning of the judicial system in a just, lawful and equitable manner; and

WHEREAS, media coverage of events pertaining to minorities, particularly African-Americans, is biased and derogatory; and

WHEREAS, the mass media must be made aware of, and sensitive to, the bias in its coverage and the injurious effect that its biased coverage has on the administration of a just legal system; and

WHEREAS, the mass media must be made aware of, and sensitive to, the insidious effects which its negative portrayal of minorities, particularly African Americans, has upon the images formed, and impressions made, upon all who see and hear those messages, including persons who make decisions about the administration of justice; and

WHEREAS, conscious and subconscious perceptions and preconceived notions about minorities, particularly African-Americans, affects the quality of justice afforded minorities, particularly African-Americans; and

Resolution -
passed

WHEREAS, conscious and subconscious perceptions about their value and worth in this society are formed by minority children, including African-Americans, based (to a substantial degree) upon mass media messages; and

WHEREAS, self-perceptions of minority children affect their participation in and benefitting from the justice system; and

WHEREAS, conscious and subconscious perceptions about minorities, particularly African-Americans, affect the fairness of the jury deliberations and the quality of the judicial process; and

WHEREAS, intense publicity which accompanies criminal charges and criminal trials, adversely affects the opportunity of minorities, particularly African-American, to obtain a just result from the judicial system.

NOW, THEREFORE, the 50th Conference of the Kansas State Conference of the NAACP Branches herewith beseech this body to take all possible steps to encourage and obtain reform of the legal system for the purpose of obtaining equal justice and equal access to the legal system by minorities, particularly African-Americans.

K C Brown
1st Vice President
Ks State
NAACP

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TESTIMONY OF ROBERT G. FREY
before the
SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS
HB 2578
February 18, 1994

It is true that I have supported capital punishment issues in the past. I studied and wrestled with the issue for the 14 years that I was in the legislature and I continue to follow the issue as a private citizen. In 1987 while a member of the Senate I finally had decided to oppose capital punishment. I decided to vote my conscience and not wrap myself in the politically safe vote for capital punishment. I have never regretted that vote.

The reasons for voting against capital punishment were much the same then as they are now:

1. Times are hard in Kansas and there is not much money available for the government to spend.

If the state can't collect enough taxes to pay for the cost of government, budgets must be cut. Tax revenue continues to dwindle behind spending needs. Oil field prices are at an all-time low. Business is "down sizing" and people are being laid off from aircraft and other key jobs. As a result, vital services are under the scrutiny of the legislature to suffer cuts.

It costs a great deal to convict someone of murder and execute them. Estimates vary but it is generally agreed that the cost of execution is far greater than an alternative that does not involve execution. The State of Kansas simply should not take food or medicine from the less fortunate members of our population just so it can execute someone who has committed first-degree murder.

2. Murder Rates Do Not Decline.

Some people say that we should be more concerned about the victims of murder than the murderer. I agree with that. In more than 30 states where the death penalty has been reinstated in the United States, there has been an increase in murders, not a decrease. In most civilized countries of the world the death penalty has been abolished. Russia had the death penalty before the decline of that government. The death rate continued to climb. Since the end of the cold war the trend continues as does the death penalty. The fact is, the sentence of death does not deter murder.

3. Equal Protection.

I am concerned about minorities. The statistics in Kansas and throughout the states where capital punishment is the law

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indicate that members of minority races are executed far more often than white persons. There is strong evidence that our legal system is biased against people who are members of minority races and that they will stand a far greater chance of being executed for murder than will a white person. That is not equal protection.

The same argument also can be made about wealthy people and poor people. If a wealthy person is charged with first-degree murder it is less likely that he or she will be executed than if a poor person is charged with the same offense. It can be easily seen that the judicial system favors those who have the funds to defend themselves, and when it comes to the death penalty that means that the rich escape the gallows while the poor do not. That is not equal protection.

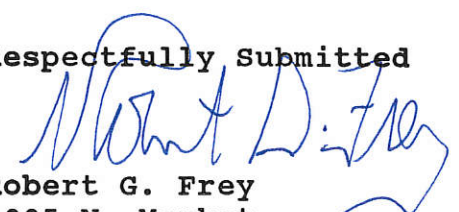
4. Mistakes can be, and are made.

When I was a county prosecutor I charged and tried many people for every offense from speeding to murder. I have come to understand some plain true facts about the criminal justice system. It is not perfect. Mistakes can be made by witnesses, victims, judges, juries, prosecutors and law enforcement officers.

I am not saying that there are deliberate efforts to convict people who are innocent, but it is possible to convict a person of murder who did not commit the crime. As long as that is possible, I am reluctant to have a penalty from which there is no appeal. If, at a later date you discover that the person who was convicted was not the person who committed the crime, it is too late to bring that innocent person back from the grave and say I'm sorry.

I have very serious doubts about the value of killing a person by the government. It cheapens life and it sends a message to the people that we value life very little. We should not give a message to our children that we would kill people just to teach them not to kill.

Respectfully Submitted


Robert G. Frey
1005 N. Market
Wichita, KS. 67214

9
Testimony of Gregory Ruff
February 18, 1994
To the Kansas Senate
Committee on State and Federal Affairs

I am a Kansas certified law enforcement officer with 23 years of law enforcement experience.

I do not believe in the death penalty and do not support legislation to reintroduce capital punishment in Kansas.

There are a number of reasons why I do not support the death penalty. I am primarily against it for moral reasons. I strongly believe in the sanctity of life. The premeditated taking of a life is wrong. It does not matter if a life is taken by a criminal or by the state, in my opinion it is equally wrong and a sin against god and nature.

I have read that the death penalty is justified by some on the basis that it offers public benefits in the form of greater deterrent and retributive value than life imprisonment. First let me address the deterrent value of the death penalty. During my law enforcement career I have been directly involved in approximately 30 homicide investigations. I have seen the ugliness of murder up close and personal. But I have never heard a murder suspect say they thought about the death penalty as a consequence of their actions prior to committing their crimes. I do not know of any studies or statistics that indicate the death penalty has any deterrent value. I agree with Alvin Brooks, a former police officer and president of the Kansas City Ad Hoc Group Against Crime, who said "If we do it (support the death penalty) because we say it's a deterrent, we need to stop saying it that. It's not a deterrent." Quite simply if you believe in capital punishment as a deterrent, you believe in a big lie.

In regards to the retributive value of the death penalty. I think it's only natural that the families and friends of murder victims would see the death penalty as valuable. But think about this, in this state it is a crime for a person to take a life in the name of retribution or vengeance. Is it any less a crime if the state takes a life in the name of retribution? I personally don't think so and I don't believe that catering to the darker side of human emotions will ever benefit society.

I also believe that the death penalty is a waste of a valuable and limited resource, taxpayers money. I am sure all of you are familiar with the increased cost of prosecuting and defending against appeals involved with the death penalty. Does the general public really want to deal with their fear of crime by spending tax dollars on measures such as the death penalty, which over the long run will not reduce crime in any way? I for one do not want to see my tax dollars wasted that way. _____

Thank you for the opportunity to testify today.

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BOARD OF INDIGENTS' DEFENSE SERVICES

LANDON STATE OFFICE BUILDING
900 JACKSON, ROOM 304
TOPEKA, KANSAS 66612-1255

(913) 296-4505

Melody A. Cathey
Administrative Counsel

February 18, 1994

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE

Regarding Death Penalty Legislation
HB 2578
SB 473

I don't know if you'll pass this bill or kill it, I'm not here to dissuade you from endorsing state executions. The rest of the opponent testimony is an attempt to persuade you not to do it, all I'm here to discuss with you is how not to do it.

You expect to hear our estimate of costs, how we reached that estimate and any requests for clean-up language. That is what I expected to tell you, but apparently the Supreme Court was right and "Death is different" in more than one way. For some reason, our estimates are considered perfectly legitimate when it comes to any other budget matters, including millions of dollars we've estimated will be spent if other crime legislation being discussed this session is passed.

I absolutely promise you that the criminal justice system in this state will grind to a halt if you pass this bill and do not pass a funding measure to provide for it at the level which we have detailed in our fiscal impact summary. I heard proponents yesterday say that it is your responsibility to ensure that criminals come to justice. You will have no justice at all unless you provide adequate resources to enable our agency to provide defense services to the handful of people the state proposes to put to death each year and still continue to provide services to the thousands who are accused of ordinary little crimes like rape, aggravated battery and robbery.

I'm not talking about putting innocent people to death or sending innocent people to jail. Although that will happen, it happens now and it will happen more often if you provide inadequate resources, what I am talking about is the guilty people who will go free because of ineffective assistance or lack of assistance in their defense. This is the United States, if you don't give them a way to defend themselves adequately, you can't prosecute them at all.

I apologize if my tone is offensive, it isn't meant to be. Yesterday you heard the District Attorney from Johnson County tell you that the figures you've been given are inflated by opponents of this bill and the result of "creative economics." I can tell you that is not so. The fiscal note prepared by our agency was the result of the best projection methods we could devise. That is not to say it is accurate, only that it is not an inflated guess. Our committee used midline numbers in every calculation. We used midline attorney's hours, midline fee rates and midline experts fees.

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Page two
MELODY CATHEY

Our \$125.00 per hour rate is based on a survey taken five years ago of Kansas attorneys. The Spangenburg Group report to the Texas Bar Association last year quotes \$100.00 per hour as the absolute minimum that should be paid as an hourly rate. A poll this year in Kansas of criminal defense attorneys resulted in a figure of \$185.00 per hour before qualified counsel would accept appointment. We cannot force attorneys to take criminal cases in Kansas. They aren't going to take a case that will shut down the rest of their practice and force them into bankruptcy. Attorneys have to be able to pay their costs and feed their families.

I suppose you can always find people to take cases at a lower rate, I've seen it happen. At \$75.00 an hour, I suppose we can afford to pay them twice when the case is kicked back for retrial because of ineffective assistance of counsel.

Our numbers are higher than the North Carolina Study because we have a different system than the one utilized in North Carolina. North Carolina is a little more than half the size of Kansas and over twice as populated. They can use a statewide public defender system, we cannot. We have a mixed system which uses private counsel in more remote and rural regions in the state. If execution becomes law in Kansas, we could not adjust the system fast enough to prevent the expenditures we project before FY 96. In subsequent years, we could expect to rope in these costs, reducing attorneys fees to \$90.00 or \$80.00 an hour by using in-house trained attorneys.

I'm probably rearing up on my hind legs when I should be down on my knees. This committee, particularly the Chair and certainly the proponent of the Senate version of this bill has always been gracious and quite receptive to our concerns.

If you are determined to buy your constituents a death penalty, do not be fooled by the people that tell you that it can be a bargain. These are the real dollars. These fiscal notes are as real as any other financial projection. I might estimate wrong but I'm not going to intentionally and unrealistically cook these numbers, I have to come back and face you next year.

I'd like to see the appropriation right there in the bill. Over at the Board office, we'd like to see appropriations included in every bill that creates a new crime or penalty. I know many people today and yesterday will be appalled with my testimony, believing it reduces the high-minded debate on life and death to a dollar value. This is one time when it is responsible to put a dollar value on human death.

Many others yesterday and today will tell you what to choose. I won't even ask, except to ask that whatever you choose to do, please act responsibly and pay the bills.

AGENCY SUMMARY
FISCAL IMPACT OF DEATH PENALTY LEGISLATION

Assumptions

- BIDS will retain present system of assigned counsel & public defenders¹
- Indigent defense caseload will approximate that experienced in FY 1993²
- Qualified attorneys will not accept a capital case for less than \$125.00 an hour³
- Capital cases are more costly to defend than non-capital cases⁴

Costs per trial case

Attorney fees/expenses per case:	\$91,750
Expert fees/expenses per case:	10,000
Investigative fees/expenses per case:	2,000

SB 473 **\$2,452,064.00**

- Death Penalty for premeditated murder w/aggravating circumstances
- Follows same procedure as Hard 40 sentencing
- Hard 40 available at judge's discretion as sentence for convictions of premeditated murder where death penalty is not imposed
- Not available when accused is under 18 at time of crime
- Not available when accused is mentally retarded
- Automatic appeal to Kansas Supreme Court
- Subsequent & multiple hearings w/stays of execution upon finding of potential of current state of insanity

Assuming 40% of First Degree Murder cases are prosecuted as death penalty cases, annual cost for 14.8 cases:

(trial atty)	\$1,357,900 +	
(current atty)	<147,956>	-
(trial expt)	148,000	+
(current expt)	<20,462>	-
(trial inv)	24,600	+
(current inv)	<14,800>	-
= subtotal	1,347,282	
(appeal)	1,104,782	+

method 1 = TOTAL 2,452,064

method 2 (current cost of non-capital appeals) - <148,000> = 2,304,064.00

¹ Assumption #1 is predicated on being able to find qualified defenders who are willing to defend a capital case. An alternative, which may be less costly than using private counsel, would be to establish a capital defender office. A capital defender office or resource center would realistically take six months to establish.

² Assumption #2 does not take into account the unusually high number of unsolved or pending murder cases in Kansas, which could easily double or triple these figures.

³ Assumption #3 is based on the current numbers of attorneys qualified for defense of first degree murder, the standards for criminal defense in a capital case and the survey taken in 1989. It is possible that \$185.00 an hour is a more realistic figure, based on a more recent, but limited survey, as it is likely that an attorney would have to forego the rest of his or her private practice while representing a capital case.

⁴ Assumption #4 is based on U.S. Supreme Court requirements for "super due process" in a capital case.

FISCAL IMPACT OF DEATH PENALTY ON BIDS
SB 473

Overview. SB 473 is a death penalty bill. The Board of Indigents' Defense Services must provide all defense related services. An accurate estimate of costs primarily depends on the number of capital defenses the agency will need to fund. That number depends on the scope of the law contemplated. SB 473 defines premeditated murder as potential capital cases. If a sentence of death is not imposed, the defendant may be sentenced to life imprisonment, with no possibility of parole for 40 years (the Hard 40).

A sentence of death is imposed for conviction or adjudication of first degree murder WHEN:

- (a) The defendant is found to be at least 18 years old when the offense occurred;
- (b) The prosecutor has properly notified the defendant of an intention to seek the death sentence;
- (c) The act is found to have been premeditated; and
- (c) A jury (or judge if jury is waived) unanimously finds in a separate proceeding that one or more of the aggravating circumstances listed under 21-4625 exists;

UNLESS:

- (a) The defendant is found to be mentally retarded; or
- (b) Aggravating circumstances are outweighed by mitigating circumstances.

The agency will not be able to absorb the costs of any death penalty measure passed by the legislature, and will require additional staffing and funds to provide services.

Defense costs of a death penalty case are higher than noncapital murder cases. With the ultimate penalty of death, the United States Supreme Court has mandated "super due process" resulting in a bifurcated trial: one trial to determine guilt and a second to determine penalty. The complex trial procedure is followed by several tiers of appeals, all of which can be expected to last ten years before a death sentence is actually carried out.¹ American Bar Association Standards for Criminal Justice mandate assignment of two attorneys to each death penalty case² and the complexity of the litigation mandates assignment of only experienced and specially trained attorneys which increases costs.

The intensity and pressure of capital litigation takes a toll on attorneys assigned to death cases resulting in high turnover of qualified counsel, adding the expense of constant training and the need for higher pay to attract sufficient numbers of qualified attorneys to handle the cases. Burnout risk and case complexity dictate that attorneys assigned to death cases handle no more than three or four cases per year compared to 150 or more cases per year now handled by our public defenders; this requires employment of additional staff or contracting of cases to private counsel. The use of experts increases and investigation must be more thorough--another added expense. Capital case jury selection also lengthens the process with the requirement that juries be "death qualified."

Under SB 473, every murder case is a potential death case prior to arraignment. It would be over-cautious to base fiscal impact on the number of murder one cases filed, since it is unlikely that prosecutors will request the death penalty in every case. However, increased costs will be incurred in even those cases reduced to non-capital during the process. The filing of a charge which potentially carries capital punishment requires immediate treatment of the case as a capital case. Two counsel are assigned, specialized capital motions are prepared and the penalty phase investigation must begin immediately.

¹ Bureau of Justice Statistics, Bulletin, Capital Punishment 1991, U.S. Department of Justice, October 1992, page 13. By January of 1992, the average time was 124 months for Whites (including Hispanics) and 107 months for Blacks.

² ABA Standard 5-1.2 incorporating ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Standards for Criminal Justice: Providing Defense Services, Third Edition, July 1992.

Even though the capital treatment of the case may be dropped before trial of the case, until that decision is final, the expense of capital litigation practice is added to otherwise non-death cases.

Based on figures from states with capital punishment, the agency has determined that 30-40% of the first degree murder cases will ultimately be charged and prosecuted as capital cases. The expense attributed to those 60-80% of the cases which become "non-capital" during the process is difficult to quantify but cannot be disregarded, therefore the agency bases its calculations on the more cautious 40% figure as a means of compromise.

Caseload. If Fiscal Year 1993 is taken as typical, under SB 473, BIDS could expect to finance the defense of 37 cases per year through one or more stages of capital litigation.

TRIAL COSTS

		Felony Murder	Premed Murder	Total Murders	
Assigned Counsel Tried	9		13	22	
Assigned Counsel Nontried		10		10	20
Public Defender Tried	2		10	12	
Public Defender Nontried		1		4	5
TOTALS		22		37	59

Completed first degree murder cases handled by assigned counsel and public defender offices. These numbers do not reflect defendants who retained counsel who would not be able to in a capital case.

I Attorney Time.

In Fiscal Year 1993 BIDS paid assigned counsel for 22 cases in which trials were had in first degree murder cases. The average hours billed per case was 206.9 for an average bill of \$9,997. 25 nontried first degree murder cases paid by BIDS averaged 44.2 hours per case for an average bill of \$1,902. A recent well-publicized trial involved 630 hours of attorney time, with almost 40% of that time spent in court on pre-trial and post-trial motions, grand jury hearings and in jury trial.

Public defenders in states with capital punishment report that a capital case will require around 800 hours of attorney time per case.¹ The Colorado Public Defender, in a 1992 submission to the Colorado legislature estimated 1640 hours to defend a capital murder case involving child abuse.

1. A recent study listed 52 motions which one may expect to be filed by the defense during the trial court phase of a capital case. The Costs of Processing Murder Cases in North Carolina, Terry Sandord Institute of Public Policy and the State Justice Institute, May 1993 (Chapter 3, note 48)

Using these figures, Kansas can expect to pay as much as eight times more in attorney fee hours than currently paid in first degree murder trials.

Some of the factors which cause this increase are:

1. Because these cases will be automatically appealed, defense attorneys must be reluctant to agree to or stipulate to evidence or legal matters. Because the appellate record must reflect all happenings in the case, virtually all questions must be litigated via motion hearing. A sampling of 22 first degree murder cases tried by assigned counsel in FY93 discloses an average of 6.7 motions per case. Training texts uniformly note that two to six times as many motions are necessary in a death penalty case. Anecdotal information from public defenders in death penalty states tells of cases in which 75 to 100 pretrial motions are filed in a single of case.

2. Jury selection is more complicated in a death penalty case largely because the jury must ordinarily be "death qualified." That is, the State is entitled to have jurors who will, if satisfied with the evidence, return a sentence of death. Jury selection takes three times as long as in a nondeath case. Whereas jury selection in a current first degree murder case will take one to three days, a week is the norm in a capital case.

3. The bifurcated trial lengthens the process. The first phase determines the guilt of the defendant, and if a capital offense is found the jury then hears evidence concerning the punishment. Surveys of attorneys in death penalty states disclose that the penalty phase adds from two days to two weeks to the length of the trial itself. One state estimates the bifurcated trial adds 30% to the length of the trial. This "second trial" clearly adds significant time to the preparation of the case. Psychiatric/psychological evidence is nearly always presented, and investigators will track down everyone who has known the accused in an effort to find mitigating evidence.

II Attorney Fees & Expenses

In 1989 BIDS surveyed experienced criminal attorneys across the state to determine if sufficient competent counsel could be found to defend capital cases. None of those contacted would take capital cases for less than \$100 per hour, and most said they would require substantially more. Accordingly, if the current system which uses assigned counsel is to be retained, costs should be figured at \$125 per hour for capital cases.¹ Unsurprisingly, a more recent survey by the KACDL places the average rate per hour higher than that in 1994.²

<u>Out of Court:</u>	550 hours @ \$125	\$68,500
<u>In Court:</u>	250 hours @ \$125	21,250
<u>Expenses:</u>	(phone, travel, out-of-pocket)	2,000

AVERAGE PER CASE COST TRIAL DEFENSE ATTORNEY \$91,750

ANNUAL COST:

All Premeditated Murder I \$3,394,750

Death penalty sought in 40% of cases 1,357,900

1. Attorneys fees under current BIDS regulations are \$50.00 an hour. Fiscal impact on attorneys fees only would be reduced to \$621,600.00 (trial) and \$437,400.00(appellate) for SB 473 calculated by that rate.

2. The more recent survey places the average attorney fee rate for a capital case in Kansas at \$185.00 per hour.

As an alternative to the current system, BIDS may be able to establish a special public defender office to defend capital cases statewide. Hopefully, attorney costs could thereby be reduced.
(See Appendix A for a detailed description of trial counsel duties)

III Psychiatric, Psychological and Other Expert Services

Every defendant charged with a capital offense can expect to be evaluated by a psychiatrist and/or a psychologist. The defense attorney will also need the services of interpreters, physicians, pathologists, ballistics experts, polygraphers, fingerprint examiners, serologists, and the like. These services must be compensated by the state. Ake v. Oklahoma, 105 S.Ct. 1098 (1985).

Expert billings can be expected to reach \$1,500 to \$30,000 for expert services in each case. The state can expect the average death penalty case to require \$10,000 to compensate experts for services rendered. We spent an average of \$1,382.57 for expert services in murder cases.

ANNUAL COST:

All Murder I	\$ 370,000
Death sought 40% of cases	148,000

(See Appendix B)

IV Investigative Services

We have assumed that a capital law covering premeditated first degree murders would result in 37 cases being filed, 40% being true capital cases. Each case is unique and the amount of time required for investigation is difficult to predict, but our analysis of public defender investigator cases reveals an average of about 50 hours of investigation are required under the current non-capital statutes.

Death penalty cases will require much more time. The police investigation must be re-investigated to explore both defenses and mitigating evidence. Most significantly however, is the requirement that counsel prepare for the penalty trial which is not required presently (except in Hard 40 cases). Experienced counsel and investigators from states with experience in death penalty litigation uniformly require a very extensive investigation of the accused's life history in an effort to uncover mitigation evidence. Such an undertaking often reaches across the United States. Attempts to compare the work presently done on "Hard 40" cases in preparation for the penalty phase disclose that such extensive investigation is not undertaken, therefore, because "death is different," the current "Hard 40" defense is not an accurate predictor of time that will be required in an actual death penalty defense.

Assuming only 100 hours of investigative time on each case, the state must pay \$2,000 per case. Total costs are estimated at 29,600.00 per year depending on the type of bill and the number of cases in which prosecutors seek the death penalty. Assuming the same cases would include 50 hours of investigative services under the status quo, the difference would be \$1,000 per case or \$14,800.00.

V. Transcript Fees

K.S.A. 20-916 and K.A.R. 105-8-3 set the rate for transcripts at \$2.00 per page. Transcripts will be requested of most, if not all, pretrial hearings.

APPELLATE COSTS

I Extra Levels of Review

- a) "It is now clear that a permanent and indispensable feature of capital litigation involves the review of constitutional, statutory and discretionary questions at a minimum of ten state and federal judicial levels. These include, but are not limited to:
1. the guilt and penalty phases of the trial
 2. review by the highest state court of the sentence of death and the underlying conviction
 3. writ of certiorari to the United States Supreme Court
 4. post conviction proceedings including evidentiary hearings to vacate judgment or set aside sentence or both;
 5. review by the highest state court of adverse determinations in such post-conviction proceedings;
 6. writ of certiorari to the United States Supreme Court;
 7. petition for writ of habeas corpus to the United States District Court;
 8. appeal of a negative determination of a writ of habeas corpus to the Federal Court of Appeals for the circuit encompassing the district wherein the writ was brought;
 9. a petition for rehearing en banc from a negative determination of the Court of Appeals;
 10. a writ of certiorari to the United States Supreme Court to review a negative determination of either the Court of Appeals or a rehearing en banc.

After final judicial review, commutation applications directed to the executive branch are conducted. Stays at each level or stage of litigation are routine. A litigation process lasting eight to ten years is the norm.

These levels of judicial review are the mandatory daily fare of capital litigation...."¹

Based upon data from the Colorado State Public Defender, one-third of cases prosecuted to the sentencing phase as death penalty cases will get the death penalty. If 40% of the 37 cases covered by SB 473 were prosecuted as capital cases and 30% of those received the death penalty, taking 1993 as typical, Kansas would prepare 4.44 direct death penalty appeals to the Kansas Supreme Court each year. (Note: New York reports an increase at the rate of 25% each year). Statistics currently show a 41% reversal rate at the state level, so Kansas would have 2.63 cases continue through the state habeas process on appeal. Increased federal habeas would increase costs for Kansas taxpayers at some level, at this time however, BIDS would not be effected, as the state does not pay for appeals continued on through the federal habeas process).

II Attorney Hours

- (a) Based upon compilation of statistics from Michigan, New York and Kansas, 1 death penalty appeal to the State Supreme Court takes 1,000 hours. 1000 hours X 4.44 cases per year = 4,440 attorney hours for direct appeals to state court.

¹ Capital Losses, April 1, 1982, New York State Defenders Association, Inc, 150 State Street, Albany, NY 12207.

- (b) Petitions for Cert, according to NLADA Standards reported by New York Public Defenders Association require 256 attorney hours if Petitions for Cert are not granted; 883 hours if Petitions are granted. Assuming that only 41% of the Kansas death penalty cases are reversed at the State Supreme Court level, based upon 1993 data, 2.63 first level Petitions for Cert. will be prepared.

(c) State post-conviction appeals, according to the Spangenberg Group study require 200 hours at the state appeal level and 100 hours for second level Petitions for Cert. Assuming 41 % of the Kansas death penalty cases are reversed at the direct appeal, 59 % are then projected through the post-conviction process at 300 attorney hours each.

(d) The non-capital murder case appeals will require 200 attorney hours.

III Cost:

Attorney fees: Assuming no additional staff is provided to the State Appellate Defender office to provide service for the additional hours related to capital cases, it would be necessary to pay private counsel to provide those services. Attorney fees for appellate work on death penalty cases are calculated at the same rate as attorney fees for trial work on death penalty cases, calculated to be \$125.00 per hour. Attorney fees for non-

	1,000 x A		(direct appeals capital cases)	
+	256 x C	(C=50 %B)	(Petition for Cert denied)	
+	883 x C	(C=50 %B)	(Petition for Cert granted)	
+	200 x B	(B=59 %A)	(post-conviction capital case appeals)	
+	100 x B	(B=59 %A)	(post-conviction Petitions for Cert	
=	Y =	Total annual capital case hours		
+	200 x N-A	(number of murder cases minus capital cases)		
=	X =	Total annual appellate hours for murder one		

Note: The number of attorney hours projected for first Petition for Cert and post-conviction appeals are based upon the assumption that the same attorney who prepares the direct appeal will remain the attorney throughout the appellate process.

Formula for calculating appellate attorney hours

capital cases are calculated at the current rate of \$50.00 per hour.

Transcripts & general expenses: Each capital case direct appeal is estimated to involve 3500 pages of trial and pretrial transcripts. No additional transcripts are required for a Petition for Cert. A Post-conviction appeal of a capital case will require additional transcription of about one-fifth as much more. Non-capital case appeals will involve transcripts of about 1000 pages in length. The current rate for transcription is \$2.00 per page.

Caveat: The remaining cases charged as death penalty, not receiving the death sentence, would increase the volume of the transcripts and issues on appeal, as the case was subject to "super due process" prosecution and defense tactics through out the lower court proceedings. Since HB 2578 subjects these defendants to an automatic Hard 40, it is likely that all first degree convictions will be appealed.

Additional expenses will include copying charges, travel expenses, phone calls and the like, which may not exceed that of a non-capital case and will not be included in the calculation.

Appellate Defender Staff: Assuming that the State Appellate Defender is authorized to hire additional staff, the attorney fees calculations would not apply. Transcription costs would remain the same. Based on National Advisory Commission on Criminal Justice Standards and Goals (NAC) caseload standards, capital appellate defenders can be expected to handle 2 death penalty appeals and 1 habeas corpus annually. Adding attorney positions would require the addition of one secretary for each three new attorney positions and a paralegal for the death penalty specialists. The experience necessary for a capital appeals specialist would require hiring at

the attorney B or above level. It would be necessary to hire two to three new attorneys at the higher rate, one secretary and a paralegal to staff the capital specialist unit.

The annual cost would equal:

Attorney B + benefits x 2 or 3 plus

Paralegal I + benefits x 1 plus

Secretary I + benefit x 1 plus

Annual capital outlay & expenses (supplies, office space, etc.) x 4 or 5 plus

In addition the capital outlay start-up costs of furniture, equipment, etc. would add a first year impact.

III Calculation of appellate costs with current staffing:

Total cost of transcripts under SB 473 is \$55,282.00.

Total cost of assigned counsel is \$1,093,500.00 - \$44,000.00 = \$1,049,500.00.

\$1,104,782.00

Appendix A

ATTORNEY COSTS

Basis for Assumption: Capital cases cost more than non-capital cases.

1. Limited plea bargaining results in higher trial rate and concomitant cost increases.
 - a) 85-90 percent non-capital felony cases reaching arraignment result in guilty pleas
 - b) "In economic terms, therefore, the immediate effect of the prosecutor's decision to seek the death penalty is that capital cases become jury trials." Garey at 1247.
 - c) Ten times as many trials for capital cases as there are for non-capital cases. Nakell at 71. Garey at 1247, N. 114.
 - d) The Costs of Processing Murder Cases in North Carolina, Terry Sanford Institute of Public Policy and the State Justice Institute, May 1993 (Chapter 3, page 11)
2. Pretrial motions are more extensive, more complex, more numerous.
 - a) The usual number of pretrial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical, requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions. Motions for Capital Cases, Southern Poverty Law Center (1981) p. 2.
 - b) ". . . [N]umber of pretrial motions filed is at least double, but more often three or four times, the number of motions filed in a non-capital case." Garey at 1248.
 - c) Questionnaire data collected by Garey in California and from capital defense attorneys and district attorneys throughout the United States (on file at U.C. Davis Law Review) revealed:

"Defense attorneys assert that the increased number of pretrial motions in capital cases ranges from twice as many to as much as five to six times the number of motions as in non-capital cases." Garey at 1248, N. 118.
 - d) Ordinary motions take on different meaning in death penalty cases; routine motions are generally longer, more complicated, and more heavily litigated. Capital Losses at 13.
 - (i) Change of venue
 - (ii) Challenging death eligibility
 - (iii) Individual voir dire
 - (iv) Sequestered voir dire
 - (v) In capital cases, motions for the appointment of expert witnesses, the employment of investigators, the utilization of private psychiatrists for trial and sentencing and special motions to increase the Court's consciousness of the requirements of "super due process" are not only routine but required as an element of the effective assistance of counsel.
 - (vi) Constitutionality of death penalty generally.
 - (vii) Constitutionality of death penalty as applied

- (viii) Motions designed to achieve penalty phase results.
- (ix) Educational motions
- (x) Unique preservation motions.

- e) The Costs of Processing Murder Cases in North Carolina, Terry Sanford Institute of Public Policy and the State Justice Institute, May 1993 (Chapter 3, page 16)

3. Defense Costs.

- a) Almost all capital defendants are indigent. Therefore, almost all require state paid counsel
 - (i) at trial
 - (ii) on appeal
- b) Office of the Public Defender, State of Maryland, Operational Overview - Impact Death Penalty Cases 1982 Fiscal Year 3 (1982), cited in Garey, at N. 138 revealed cost of the defense attorney through trial disposition to range from \$50,000 to \$75,000 per capital case.
- c) California frequently requires two counsel per case, thereby doubling cost. See California Penal Code §987(d) (West Supp. 1985)
- d) Projected costs of defense counsel for New York guilt and penalty phases under Volker/Graber bill: \$212,700.
- e) In 1985, New Jersey budgeted \$102,000 in defense costs for each then pending death case. Garey at 1261.
- f) Maryland Public Defender reports that 90 percent of its office expenditure is from death penalty cases. Garey at 1261.
- g) Ohio Public Defender: 1981 estimate of death penalty costs: \$1.5 million annually. Garey 1261.
- i) Oregon: \$700,000/case. Garey 1261-62.
- j) Total cost to the North Carolina system (a system of public defenders costing \$68 and \$48 per hour and district attorneys costing \$83 and \$56 per hour) of prosecuting a case capitally versus non-capitally is \$216,000.00, or \$2,160,000.00 per execution The Costs of Processing Murder Cases in North Carolina, Terry Sanford Institute of Public Policy and the State Justice Institute, May 1993, page 98.

4. Penalty Phase

- a) "The penalty phase of a capital trial is categorically different, in character, procedure and magnitude from any counterpart in a non-capital trial, and it accounts for the greatest increase in cost before the appellate stage." Garey at 1254.
- b) Any aspect of the defendant's character or record and any other circumstance offered in mitigation of punishment must be considered by the jury in the penalty phase of a capital trial. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Lockett followed on the heels of Woodson v. North Carolina, 428 U.S. 280 (1976). In Woodson, the Supreme Court, in defining the requirements of capital sentencing procedures, stated that courts must consider the
"character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."
[Emphasis supplied.] Id., at 304.
In Gardner v. Florida, 430 U.S. 349, 358 (1977), the Court held that:
"[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause***[T]he sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel.***The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. . . ." [Citations Omitted.][Emphasis supplied.]
At this critical stage of the proceeding, the defense attorney may use many of the socio-psychiatric witnesses employed in the trial phase. However, this stage additionally requires the investigation of the defendant's family, friends, neighbors, school personnel, and social workers.
The investigation at the sentencing phase requires a complete retrospective analysis of every positive aspect of the defendant's life from the day of birth to the date of sentence. The witnesses called to this proceeding, vital to establishing evidence in mitigation of sentence, must be made available to testify, requiring, in many cases, the reimbursement of travel expenses and accommodations. Military, school, work, and other records must be designated, located and retrieved.
- c) See also NYSDA Mitigation Outline *infra* at p. 77
- d) The Costs of Processing Murder Cases in North Carolina, Terry Sandord Institute of Public Policy and the State Justice Institute, May 1993 (pp 15, 19)

Appendix B

EXPERTS AND EXPERT WITNESSES

Basis for Assumption: Capital cases cost more than non-capital cases.

1. Psychiatrists

- a) Increased utilization generally at both trial and penalty phases.
- b) Ake v. Oklahoma, 105 S.Ct. 1087 (1985) held that an indigent defendant has a due process right to a state compensated psychiatrist.
- c) Typical costs:
 - (i) \$700 to \$1500 per day exclusive of expenses. Capital Losses at 15; Garey at 1253.
 - (ii) \$110/\$125 per hour examination/testimony. Capital Losses at 15.
 - (iii) Psychiatry

		<u>Trial Preparation</u>			<u>Court Testimony</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>	<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	125	250		350	125	300	500
Daily		1000	2000	2800	1000	2500	4000

		<u>Reports</u>			<u>Depositions</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>	<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	80	235		350	125	285	400
Daily		650	1800	2800	500	2200	4000

From National Forensic Center's 1992-93 Guide to Expert's Fees, [National Forensic Center, 17 Temple Terrace, Lawrenceville, NJ 08648, 609/883-0550 or 1-800-526-5177]. (hereinafter NFC)

STATE OF CONNECTICUT
DIVISION OF PUBLIC DEFENDER SERVICES
OUTLINE OF EXPENSES FOR DEFENSE OF DEATH PENALTY CASES*

From Letter to Geraldine Bryant from Gerard A Smith, Assistant Public Defender,
Division of Public Defender Services, October 17, 1986.

<u>Case</u>	<u>Highest Stage of Capital Litigation</u>	<u>Total Expense</u>	<u>Cost of Psych Svcs</u>	<u>Disposi /date</u>
State v. Wood	Penalty Phase	\$83,944	\$47,683	Life 9/84
State v. Usry	Penalty Phase	\$14,117	\$12,590	Life 5/85
State v. Daniels	Penalty Phase	\$18,491	\$10,822	Life 3/86
State v. Gonzalez	Agg Factors Dism @ Pretrial Hearing	\$14,380	\$ 3,114	70 yrs 12/85
State v. Ross	Awaiting Trial	\$31,949	\$21,259	Pending

*Figures are in addition to and do not include fees of salaries for counsel, investigators and other staff members, or costs of appeal.

2. Other Experts: Typical Costs

a) Medical Examiner: \$700-\$100/day. Capital Losses, at 15.

b) Pathologist

		<u>Trial Preparation</u>					<u>Court Testimony</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	100	185		250	100		275		1000
Daily		800	1400	2000			375	2100	8000

		<u>Reports</u>					<u>Depositions</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	75	180		250	100		250		700
Daily		600	1400	2000			800	2000	5600

From: NFC

c) Polygraph: \$200-\$1500/day (testimony); \$150-\$200 (examination). NFC and Capital Losses at 15.

Single issue examination: \$200; complicated homicide case examination; \$400 or more; \$250 for one-half day testimony. Garey at 1254.

		<u>Trial Preparation</u>					<u>Court Testimony</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	150	175		200	25		100		185
Daily		1200	1400	1600			200	800	1500

		<u>Reports</u>					<u>Depositions</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	150	175		200	25		85		150
Daily		1200	1400	1600			200	700	1200

From: NFC

Appendix C

INVESTIGATION COSTS

1. Cost high primarily for two reasons:
 - a) "A capital trial is qualitatively different from non-capital trials...." Garey at 1251.
 - b) "...[A]n effective attorney must prepare to introduce mitigating circumstances during the penalty phase of the trial and therefore must extensively investigate the defendant's background." Garey at 1251.
2.
 - a) "One capital case [in California] involved interviewing 240 persons, one-half of whom became witnesses at the trial." Garey at 1252, N. 140.
 - b) Extensive investigator travel is required.
 - c) Investigation is generally three to five times longer than non-capital trials. Garey, at 1252, N. 142.
 - d) Investigation may take two years. Garey at 1252, N. 143.
 - e) Investigators' fees, in our survey, range from \$500 to \$1500 per day. Hourly rates for experienced investigators were reported to range between \$75 and \$200. The Office of the State Public Defender in California has found the cost for investigators at trial in some death penalty cases to have been in excess of \$40,000. Similar amounts were reported by private attorneys. The National College for Criminal Defense in Houston found that the bare minimum needed only represents the investigation required for the trial phase. Capital Losses at 13.
3. Mitigation investigation is unique and constitutionally required because penalty phase demands preparation.
 - a) "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence...." Gardner v. Florida, 430 U.S. 349, 358 (1977) [sentencing is a critical stage ; sentencing process must satisfy due process clause].
 - b) The sentence may not, consistent with due process rest upon materially false assumptions about the defendant. Townsend v. Burke, 334 U.S. 736 (1948)
 - c) "Probably the single most important factor which contributes to a successful result is early, thorough and creative investigation and preparation of the defense case for mitigation. Preparation for the penalty phase must begin long before the guilt trial commences, both to ensure that all potential mitigating evidence will be uncovered and developed, and to enable counsel to develop an overall strategy for the capital trial as a whole." California Death Penalty Manual at H - 3 (1986).
 - d) ABA Standard 4-4.1 Duty to Investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty...."
 - e) "The investigation may include an exploration of the past twenty, thirty or forty years." Garey, at 1251.
 - f) See NYDSA Mitigation outline infra at p. 77.

AGENCY SUMMARY
FISCAL IMPACT OF DEATH PENALTY LEGISLATION

Assumptions

- BIDS will retain present system of assigned counsel & public defenders¹
- Indigent defense caseload will approximate that experienced in FY 1993²
- Qualified attorneys will not accept a capital case for less than \$125.00 an hour³
- Capital cases are more costly to defend than non-capital cases⁴

Costs per trial case

Attorney fees/expenses per case:	\$91,750
Expert fees/expenses per case:	10,000
Investigative fees/expenses per case:	2,000

HB 2578 **\$4,062,232.00**

- Death Penalty for any first degree murder w/aggravating circumstances
- Follows same procedure as Hard 40 sentencing
- Hard 40 automatic sentence for all convictions of first degree murder where death penalty is not imposed
- Not available when accused is under 16 at time of crime
- Not available when accused is developmentally incapacitated
- Automatic appeal to Kansas Supreme Court
- Subsequent & multiple hearings w/stays of execution upon finding of potential of current state of insanity

Assuming 40% of First Degree Murder cases are prosecuted as death penalty cases, annual cost for 23.6 cases:

(trial atty)	\$2,165,300 +
(current t.atty)	<235,929> -
(trial expt)	236,000 +
(current expt)	32,629 -
(trial inv)	47,200 +
(current inv)	<23,600> -
= subtotal	2,392,271
(appeal)	1,669,961
= TOTAL	4,062,232

¹ Assumption #1 is predicated on being able to find qualified defenders who are willing to defend a capital case. An alternative, which may be less costly than using private counsel, would be to establish a capital defender office. A capital defender office or resource center would realistically take six months to establish.

² Assumption #2 does not take into account the unusually high number of unsolved or pending murder cases in Kansas, which could easily double or triple these figures.

³ Assumption #3 is based on the current numbers of attorneys qualified for defense of first degree murder, the standards for criminal defense in a capital case and the survey taken in 1989. It is possible that \$185.00 an hour is a more realistic figure, based on a more recent, but limited survey, as it is likely that an attorney would have to forego the rest of his or her private practice while representing a capital case.

⁴ Assumption #4 is based on U.S. Supreme Court requirements for "super due process" in a capital case.

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FISCAL IMPACT OF DEATH PENALTY
HB 2578

Overview. HB 2578 is a death penalty bill. The Board of Indigents' Defense Services must provide all defense related services. An accurate estimate of costs primarily depends on the number of capital defenses the agency will need to fund. That number depends on the scope of the law contemplated. HB 2578 includes all first degree murder cases (premeditated and felony murder) as potential capital cases. If a sentence of death is not imposed, the defendant is automatically sentenced to life imprisonment, with no possibility of parole for 40 years.

A sentence of death is imposed for conviction or adjudication of first degree murder WHEN:

- (a) The defendant is found to be at least 16 years old when the offense occurred;
- (b) The prosecutor has properly notified the defendant of an intention to seek the death sentence; and
- (c) A jury (or judge if jury is waived) unanimously finds in a separate proceeding that one or more of the aggravating circumstances listed under 21-4625 exists;

UNLESS:

- (a) The defendant is found to be developmentally disabled; or
- (b) Aggravating circumstances are outweighed by mitigating circumstances.

The agency will not be able to absorb the costs of any death penalty measure passed by the legislature, and will require additional staffing and funds to provide services.

Defense costs of a death penalty case are higher than noncapital murder cases. With the ultimate penalty of death, the United States Supreme Court has mandated "super due process" resulting in a bifurcated trial: one trial to determine guilt, and a second to determine penalty. The complex trial procedure is followed by several tiers of appeals, all of which can be expected to last ten years before a death sentence is actually carried out.¹ American Bar Association Standards for Criminal Justice mandate assignment of two attorneys to each death penalty case² and the complexity of the litigation mandates assignment of only experienced and specially trained attorneys which increases costs.

The intensity and pressure of capital litigation takes a toll on attorneys assigned to death cases resulting in high turnover of qualified counsel, adding the expense of constant training and the need for higher pay to attract sufficient numbers of qualified attorneys to handle the cases. Burnout risk and case complexity dictate that attorneys assigned to death cases handle no more than three or four cases per year compared to 150 or more cases per year now handled by our public defenders; this requires employment of additional staff or contracting of cases to private counsel. The use of experts increases and investigation must be more thorough--another added expense. Capital case jury selection also lengthens the process with the requirement that juries be "death qualified."

Under HB 2578, every case is a potential death case prior to arraignment. It would be over-cautious to base fiscal impact on the number of murder one cases filed, since it is unlikely that prosecutors will request the death penalty in every case. However, increased costs will be incurred in even those cases reduced to non-capital during the process. The filing of a charge which potentially carries capital punishment requires immediate treatment of the case as a capital case. Two counsel must be assigned, specialized capital

¹ Bureau of Justice Statistics, Bulletin, Capital Punishment 1991, U.S. Department of Justice, October 1992, page 13. By January of 1992, the average time was 124 months for Whites (including Hispanics) and 107 months for Blacks.

² ABA Standard 5-1.2 incorporating ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Standards for Criminal Justice; Providing Defense Services, Third Edition, July 1992.

motions must begin, penalty phase investigation must immediately start, etc. Even though the capital treatment of the case may be dropped before trial of the case, until that decision is final, the expense of capital litigation practice is added to otherwise non-death cases.

Based on figures from states with capital punishment, the agency has determined that 30-40% of the first degree murder cases will ultimately be charged and prosecuted as capital cases. The expense attributed to those 60-80% of the cases which become "non-capital" during the process is difficult to quantify but cannot be disregarded, therefore the agency bases its calculations on the more cautious 40% figure as a means of compromise.

Caseload. If Fiscal Year 1993 is taken as typical, under HB 2578, BIDS could expect to finance the defense of 59 cases per year through one or more stages of capital litigation.

		Felony Murder	Premed Murder	Total Murders	
Assigned Counsel Tried	9		13	22	
Assigned Counsel Nontried		10		10	20
Public Defender Tried	2		10	12	
Public Defender Nontried		1		4	5
TOTALS		22		37	59

Completed first degree murder cases handled by assigned counsel and public defender offices. These numbers do not reflect defendants who retained counsel who would not be able to in a capital case.

TRIAL COSTS

I Attorney Time.

In Fiscal Year 1993 BIDS paid assigned counsel for 22 cases in which trials were had in first degree murder cases. The average hours billed per case was 206.9 for an average bill of \$9,997. 25 nontried first degree murder cases paid by BIDS averaged 44.2 hours per case for an average bill of \$1,902. A recent well-publicized trial involved 630 hours of attorney time, with almost 40% of that time spent in court on pre-trial and post-trial motions, grand jury hearings and in jury trial.

Public defenders in states with capital punishment report that a capital case will require around 800 hours of attorney time per case. The Colorado Public Defender, in a 1992 submission to the Colorado legislature estimated 1640 hours to defend a capital murder case involving child abuse. Using these figures, Kansas can expect to pay as much as eight times more in attorney fee hours than currently paid in first degree murder trials.

Some of the factors which cause this increase are:

1. Because these cases will be automatically appealed, defense attorneys must be reluctant to agree to or stipulate to evidence or legal matters. Because the appellate record must reflect all happenings in the case, virtually all questions must be litigated via motion hearing. A sampling of 22 first degree murder cases tried by

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assigned counsel in FY93 discloses an average of 6.7 motions per case. Training texts uniformly note that two to six times as many motions are necessary in a death penalty case. Anecdotal information from public defenders in death penalty states tells of cases in which 75 to 100 pretrial motions are filed in a single of case.

2. Jury selection is more complicated in a death penalty case largely because the jury must ordinarily be "death qualified." That is, the State is entitled to have jurors who will, if satisfied with the evidence, return a sentence of death. Jury selection takes three times as long as in a nondeath case. Whereas jury selection in a current first degree murder case will take one to three days, a week is the norm in a capital case.

3. The bifurcated trial lengthens the process. The first phase determines the guilt of the defendant, and if a capital offense is found the jury then hears evidence concerning the punishment. Surveys of attorneys in death penalty states disclose that the penalty phase adds from two days to two weeks to the length of the trial itself. One state estimates the bifurcated trial adds 30% to the length of the trial. This "second trial" clearly adds significant time to the preparation of the case. Psychiatric/psychological evidence is nearly always presented, and investigators will track down everyone who has known the accused in an effort to find mitigating evidence.

II Attorney Fees & Expenses

In 1989 BIDS surveyed experienced criminal attorneys across the state to determine if sufficient competent counsel could be found to defend capital cases. None of those contacted would take capital cases for less than \$100 per hour, and most said they would require substantially more. Accordingly, if the current system which uses assigned counsel is to be retained, costs should be figured at \$125 per hour for capital cases.¹ Unsurprisingly, a more recent survey by the KACDL places the average rate per hour higher than that in 1994.²

<u>Out of Court:</u>	550 hours @ \$125	\$68,500
<u>In Court:</u>	250 hours @ \$125	21,250
<u>Expenses:</u>	(phone, travel, out-of-pocket)	2,000

AVERAGE PER CASE COST TRIAL DEFENSE ATTORNEY \$91,750

ANNUAL COST:

All Murder I \$5,413,250

Death penalty sought in 40% of cases 2,165,300

As an alternative to the current system, BIDS may be able to establish a special public defender office to defend capital cases statewide. Hopefully, attorney costs could thereby be reduced.

(See Appendix A for a detailed description of trial counsel duties)

1. Attorneys fees under current BIDS regulations are \$50.00 an hour. Fiscal impact on attorneys fees would be reduced to \$1,147,120.00 (trial) and \$660,675.00(appellate) for HB 2578 calculated by that rate.

2. The more recent survey places the average attorney fee rate for a capital case in Kansas at \$185.00 per hour.

III Psychiatric, Psychological and Other Expert Services

Every defendant charged with a capital offense can expect to be evaluated by a psychiatrist and/or a psychologist. The defense attorney will also need the services of interpreters, physicians, pathologists, ballistics experts, polygraphers, fingerprint examiners, serologists, and the like.

These services must be compensated by the state. Ake v. Oklahoma, 105 S.Ct. 1098 (1985).

Expert billings can be expected to reach \$1,500 to \$30,000 for expert services in each case.

The state can expect the average death penalty case to require \$10,000 to compensate experts for services rendered, compared with an average of \$1,382.57 expended in FY 93.

ANNUAL COST:

All Murder I	\$ 590,000
Death sought 40% of cases	236,000

(See Appendix B)

IV Investigative Services

We have assumed that a capital law covering all first degree murders would result in 59 cases being filed. If the bill is limited to premeditated murders only, we assume 37 cases will be filed with about 40% having the death penalty involved. Each case is unique and the amount of time required for investigation is difficult to predict, but our analysis of public defender investigator cases reveals an average of about 50 hours of investigation are required under the current non-capital statutes.

Death penalty cases will require much more time. The police investigation must be re-investigated to explore both defenses and mitigating evidence. Most significantly however, is the requirement that counsel prepare for the penalty trial which is not required presently (except in Hard 40 cases). Experienced counsel and investigators from states with experience in death penalty litigation uniformly require a very extensive investigation of the accused's life history in an effort to uncover mitigation evidence. Such an undertaking often reaches across the United States. Attempts to compare the work presently done on "Hard 40" cases in preparation for the penalty phase disclose that such extensive investigation is not undertaken, therefore, because "death is different," the current "Hard 40" defense is not an accurate predictor of time that will be required in an actual death penalty defense.

Assuming only 100 hours of investigative time on each case, the state must pay \$2,000 per case. Total costs will range from \$7,400 to \$118,000 per year depending on the type of bill and the number of cases in which prosecutors seek the death penalty. Assuming the same cases would be include 50 hours of investigative services under the status quo, the difference would be \$1,000 per case.

V. Transcript Fees

K.S.A. 20-916 and K.A.R. 105-8-3 set the rate for transcripts at \$2.00 per page. Transcripts will be requested of most, if not all, pretrial hearings.

APPELLATE COSTS

I Extra Levels of Review

a) "It is now clear that a permanent and indispensable feature of capital litigation involves the review of constitutional, statutory and discretionary questions at a minimum of ten state and federal judicial levels. These include, but are not limited to:

1. the guilt and penalty phases of the trial
2. review by the highest state court of the sentence of death and the underlying conviction
3. writ of certiorari to the United States Supreme Court
4. post conviction proceedings including evidentiary hearings to vacate judgment or set aside sentence or both;
5. review by the highest state court of adverse determinations in such post-conviction proceedings;
6. writ of certiorari to the United States Supreme Court;
7. petition for writ of habeas corpus to the United States District Court;
8. appeal of a negative determination of a writ of habeas corpus to the Federal Court of Appeals for the circuit encompassing the district wherein the writ was brought;
9. a petition for rehearing en banc from a negative determination of the Court of Appeals;
10. a writ of certiorari to the United States Supreme Court to review a negative determination of either the Court of Appeals or a rehearing en banc.

After final judicial review, commutation applications directed to the executive branch are conducted. Stays at each level or stage of litigation are routine. A litigation process lasting eight to ten years is the norm.

These levels of judicial review are the mandatory daily fare of capital litigation...."¹

Based upon data from the Colorado State Public Defender, one-third of cases prosecuted to the sentencing phase as death penalty cases will get the death penalty. If 40% of the 59 cases covered by HB 2578 were prosecuted as capital cases and 30% of those received the death penalty, taking 1993 as typical, Kansas would prepare 7.08 direct death penalty appeals to the Kansas Supreme Court each year. (Note: New York reports an increase at the rate of 25% each year). Statistics currently show a 41% reversal rate at the state level, so Kansas would have 2.9 cases continue through the state habeas process on appeal. Increased federal habeas would increase costs for Kansas taxpayers at some level, at this time however, BIDS would not be effected, as the state does not pay for appeals continued on through the federal habeas process).

II Attorney Hours

(a) Based upon compilation of statistics from Michigan, New York and Kansas, 1 death penalty appeal to the State Supreme Court takes 1,000 hours. 1000 hours X 7.08 cases per year = 7,080 attorney hours for direct appeals to state court.

¹ Capital Losses, April 1, 1982, New York State Defenders Association, Inc, 150 State Street, Albany, NY 12207.

(b) Petitions for Cert, according to NLADA Standards reported by New York Public Defenders Association require 256 attorney hours if Petitions for Cert are not granted; 883 hours if Petitions are granted. Assuming that only 41% of the Kansas death penalty cases are reversed at the State Supreme Court level, based upon 1993 data, 2.09 first level Petitions for Cert. will be prepared.

(c) State post-conviction appeals, according to the Spangenberg Group study require 200 hours at the state appeal level and 100 hours for second level Petitions for Cert. Assuming 41 % of the Kansas death penalty cases are reversed at the direct appeal, 59 % are then projected through the post-conviction process at 300 attorney hours each.

(d) The non-capital murder case appeals will require 200 attorney hours.

III Cost:

Attorney fees: Assuming no additional staff is provided to the State Appellate Defender office to provide service for the additional hours related to capital cases, it would be necessary to pay private counsel to provide those services. Attorney fees for appellate work on death penalty cases are calculated at the same rate as attorney fees for trial work on death penalty cases, calculated to be \$125.00 per hour. Attorney fees for non-

	1,000 x A	(direct appeals capital cases)	
+	256 x C	(C=50 %B)	(Petition for Cert denied)
+	883 x C	(C=50 %B)	(Petition for Cert granted)
+	200 x B	(B=59 %A)	(post-conviction capital case appeals)
+	100 x B	(B=59 %A)	(post-conviction Petitions for Cert)
=	Y =	Total annual capital case hours	
+	200 x N-A	(number of murder cases minus capital cases)	
=	X =	Total annual appellate hours for murder one	

Note: The number of attorney hours projected for first Petition for Cert and post-conviction appeals are based upon the assumption that the same attorney who prepares the direct appeal will remain the attorney throughout the appellate process.

Formula for calculating appellate attorney hours

capital cases are calculated at the current rate of \$50.00 per hour.

Transcripts & general expenses: Each capital case direct appeal is estimated to involve 3500 pages of trial and pretrial transcripts. No additional transcripts are required for a Petition for Cert. A Post-conviction appeal of a capital case will require additional transcription of about one-fifth as much more. Non-capital case appeals will involve transcripts of about 1000 pages in length. The current rate for transcription is \$2.00 per page.

Caveat: The remaining cases charged as death penalty, not receiving the death sentence, would increase the volume of the transcripts and issues on appeal, as the case was subject to "super due process" prosecution and defense tactics through out the lower court proceedings. Since HB 2578 subjects these defendants to an automatic Hard 40, it is likely that all first degree convictions will be appealed.

Additional expenses will include copying charges, travel expenses, phone calls and the like, which may not exceed that of a non-capital case and will not be included in the calculation.

Appellate Defender Staff: Assuming that the State Appellate Defender is authorized to hire additional staff, the attorney fees calculations would not apply. Transcription costs would remain the same. Based on National Advisory Commission on Criminal Justice Standards and Goals (NAC) caseload standards, capital appellate defenders can be expected to handle 2 death penalty appeals and 1 habeas corpus annually. Adding attorney positions would require the addition of one secretary for each three new attorney positions and a paralegal for the death penalty specialists. The experience necessary for a capital appeals specialist would require hiring at

the attorney B or above level. It would be necessary to hire four new attorneys at the higher rate, one secretary and a paralegal to staff the capital specialist unit.

The annual cost would equal:

Attorney B + benefits x 4 plus

Paralegal I + benefits x 1 plus

Secretary I + benefit x 1 plus

Annual capital outlay & expenses (supplies, office space, etc.) x 6 plus

In addition the capital outlay start-up costs of furniture, equipment, etc. would add a first year impact.

III Calculation of appellate costs with current staffing:

Total cost of transcripts under HB 2578 is \$91,072.00 - \$2,000.00 = **\$89,072.00.**

Total cost of assigned counsel is \$1,651,688.75 - \$70,800.00 = **\$1,580,888.75.**

\$1,669,960.75

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Appendix A

ATTORNEY COSTS

Basis for Assumption: Capital cases cost more than non-capital cases.

1. Limited plea bargaining results in higher trial rate and concomitant cost increases.
 - a) 85-90 percent non-capital felony cases reaching arraignment result in guilty pleas
 - b) "In economic terms, therefore, the immediate effect of the prosecutor's decision to seek the death penalty is that capital cases become jury trials." Garey at 1247.
 - c) Ten times as many trials for capital cases as there are for non-capital cases. Nakell at 71. Garey at 1247, N. 114.
2. Pretrial motions are more extensive, more complex, more numerous.
 - a) The usual number of pretrial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical, requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions. Motions for Capital Cases, Southern Poverty Law Center (1981) p. 2.
 - b) ". . . [N]umber of pretrial motions filed is at least double, but more often three or four times, the number of motions filed in a non-capital case." Garey at 1248.
 - c) Questionnaire data collected by Garey in California and from capital defense attorneys and district attorneys throughout the United States (on file at U.C. Davis Law Review) revealed:

"Defense attorneys assert that the increased number of pretrial motions in capital cases ranges from twice as many to as much as five to six times the number of motions as in non-capital cases." Garey at 1248, N. 118.
 - d) Ordinary motions take on different meaning in death penalty cases; routine motions are generally longer, more complicated, and more heavily litigated. Capital Losses at 13.
 - (i) Change of venue
 - (ii) Challenging death eligibility
 - (iii) Individual voir dire
 - (iv) Sequestered voir dire
 - (v) In capital cases, motions for the appointment of expert witnesses, the employment of investigators, the utilization of private psychiatrists for trial and sentencing and special motions to increase the Court's consciousness of the requirements of "super due process" are not only routine but required as an element of the effective assistance of counsel.
 - (vi) Constitutionality of death penalty generally.
 - (vii) Constitutionality of death penalty as applied
 - (viii) Motions designed to achieve penalty phase results.
 - (ix) Educational motions
 - (x) Unique preservation motions.

3. Defense Costs.

- a) Almost all capital defendants are indigent. Therefore, almost all require state paid counsel
 - (i) at trial
 - (ii) on appeal
- b) Office of the Public Defender, State of Maryland, Operational Overview - Impact Death Penalty Cases 1982 Fiscal Year 3 (1982), cited in Garey, at N. 138 revealed cost of the defense attorney through trial disposition to range from \$50,000 to \$75,000 per capital case.
- c) California frequently requires two counsel per case, thereby doubling cost. See California Penal Code §987(d) (West Supp. 1985)
- d) Projected costs of defense counsel for New York guilt and penalty phases under Volker/Graber bill: \$212,700.
- e) In 1985, New Jersey budgeted \$102,000 in defense costs for each then pending death case. Garey at 1261.
- f) Maryland Public Defender reports that 90 percent of its office expenditure is from death penalty cases. Garey at 1261.
- g) Ohio Public Defender: 1981 estimate of death penalty costs: \$1.5 million annually. Garey 1261.
- i) Oregon: \$700,000/case. Garey 1261-62.

4. Penalty Phase

- a) "The penalty phase of a capital trial is categorically different, in character, procedure and magnitude from any counterpart in a non-capital trial, and it accounts for the greatest increase in cost before the appellate stage." Garey at 1254.
- b) Any aspect of the defendant's character or record and any other circumstance offered in mitigation of punishment must be considered by the jury in the penalty phase of a capital trial. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Lockett followed on the heels of Woodson v. North Carolina, 428 U.S. 280 (1976). In Woodson, the Supreme Court, in defining the requirements of capital sentencing procedures, stated that courts must consider the

"character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."
[Emphasis supplied.] Id., at 304.

In Gardner v. Florida, 430 U.S. 349, 358 (1977), the Court held that:

"[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause***[T]he sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel.***The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. . . . " [Citations Omitted.][Emphasis supplied.]

At this critical stage of the proceeding, the defense attorney may use many of the

socio-psychiatric witnesses employed in the trial phase. However, this stage additionally requires the investigation of the defendant's family, friends, neighbors, school personnel, and social workers.

The investigation at the sentencing phase requires a complete retrospective analysis of every positive aspect of the defendant's life from the day of birth to the date of sentence. The witnesses called to this proceeding, vital to establishing evidence in mitigation of sentence, must be made available to testify, requiring, in many cases, the reimbursement of travel expenses and accommodations. Military, school, work, and other records must be designated, located and retrieved.

- c) See also NYSDA Mitigation Outline *infra* at p. 77

Appendix B

EXPERTS AND EXPERT WITNESSES

Basis for Assumption: Capital cases cost more than non-capital cases.

1. Psychiatrists

- a) Increased utilization generally at both trial and penalty phases.
- b) Ake v. Oklahoma, 105 S.Ct. 1087 (1985) held that an indigent defendant has a due process right to a state compensated psychiatrist.
- c) Typical costs:
 - (i) \$700 to \$1500 per day exclusive of expenses. Capital Losses at 15; Garey at 1253.
 - (ii) \$110/\$125 per hour examination/testimony. Capital Losses at 15.
 - (iii) Psychiatry

		<u>Trial Preparation</u>			<u>Court Testimony</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>	<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	125	250	350	125	300	500	
Daily		1000	2000	2800	1000	2500	4000

		<u>Reports</u>			<u>Depositions</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>	<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	80	235	350	125	285	400	
Daily		650	1800	2800	500	2200	4000

From National Forensic Center's 1992-93 Guide to Expert's Fees, [National Forensic Center, 17 Temple Terrace, Lawrenceville, NJ 08648, 609/883-0550 or 1-800-526-5177]. (hereinafter NFC)

STATE OF CONNECTICUT DIVISION OF PUBLIC DEFENDER SERVICES OUTLINE OF EXPENSES FOR DEFENSE OF DEATH PENALTY CASES*

From Letter to Geraldine Bryant from Gerard A Smith, Assistant Public Defender,
Division of Public Defender Services, October 17, 1986.

<u>Case</u>	<u>Highest Stage of Capital Litigation</u>	<u>Total Expense</u>	<u>Cost of Psych Svcs</u>	<u>Disposi /date</u>
State v. Wood	Penalty Phase	\$83,944	\$47,683	Life 9/84
State v. Usry	Penalty Phase	\$14,117	\$12,590	Life 5/85
State v. Daniels	Penalty Phase	\$18,491	\$10,822	Life 3/86
State v. Gonzalez	Agg Factors Dism @ Pretrial Hearing	\$14,380	\$ 3,114	70 yrs 12/85
State v. Ross	Awaiting Trial	\$31,949	\$21,259	Pending

*Figures are in addition to and do not include fees of salaries for counsel, investigators and other staff members, or costs of appeal.

2. Other Experts: Typical Costs

a) Medical Examiner: \$700-\$100/day. Capital Losses, at 15.

b) Pathologist

		<u>Trial Preparation</u>					<u>Court Testimony</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	100	185		250	100		275		1000
Daily		800	1400	2000			375	2100	8000
		<u>Reports</u>					<u>Depositions</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	75	180		250	100		250		700
Daily		600	1400	2000			800	2000	5600

From: NFC

c) Polygraph: \$200-\$1500/day (testimony); \$150-\$200 (examination). NFC and Capital Losses at 15.

Single issue examination: \$200; complicated homicide case examination; \$400 or more; \$250 for one-half day testimony. Garey at 1254.

		<u>Trial Preparation</u>					<u>Court Testimony</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	150	175		200	25		100		185
Daily		1200	1400	1600			200	800	1500
		<u>Reports</u>					<u>Depositions</u>		
		<u>Low</u>	<u>Average</u>	<u>High</u>			<u>Low</u>	<u>Average</u>	<u>High</u>
Hourly	150	175		200	25		85		150
Daily		1200	1400	1600			200	700	1200

From: NFC

Appendix C

INVESTIGATION COSTS

1. Cost high primarily for two reasons:
 - a) "A capital trial is qualitatively different from non-capital trials...." Garey at 1251.
 - b) "...[A]n effective attorney must prepare to introduce mitigating circumstances during the penalty phase of the trial and therefore must extensively investigate the defendant's background." Garey at 1251.
2.
 - a) "One capital case [in California] involved interviewing 240 persons, one-half of whom became witnesses at the trial." Garey at 1252, N. 140.
 - b) Extensive investigator travel is required.
 - c) Investigation is generally three to five times longer than non-capital trials. Garey, at 1252, N. 142.
 - d) Investigation may take two years. Garey at 1252, N. 143.
 - e) Investigators' fees, in our survey, range from \$500 to \$1500 per day. Hourly rates for experienced investigators were reported to range between \$75 and \$200. The Office of the State Public Defender in California has found the cost for investigators at trial in some death penalty cases to have been in excess of \$40,000. Similar amounts were reported by private attorneys. The National College for Criminal Defense in Houston found that the bare minimum needed only represents the investigation required for the trial phase. Capital Losses at 13.
3. Mitigation investigation is unique and constitutionally required because penalty phase demands preparation.
 - a) "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence...." Gardner v. Florida, 430 U.S. 349, 358 (1977) [sentencing is a critical stage ; sentencing process must satisfy due process clause].
 - b) The sentence may not, consistent with due process rest upon materially false assumptions about the defendant. Townsend v. Burke, 334 U.S. 736 (1948)
 - c) "Probably the single most important factor which contributes to a successful result is early, thorough and creative investigation and preparation of the defense case for mitigation. Preparation for the penalty phase must begin long before the guilt trial commences, both to ensure that all potential mitigating evidence will be uncovered and developed, and to enable counsel to develop an overall strategy for the capital trial as a whole." California Death Penalty Manual at H - 3 (1986).
 - d) ABA Standard 4-4.1 Duty to Investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty...."
 - e) "The investigation may include an exploration of the past twenty, thirty or forty years." Garey, at 1251.
 - f) See NYDSA Mitigation outline infra at p. 77.

DETERRENCE OR BRUTALIZATION? AN IMPACT ASSESSMENT OF OKLAHOMA'S RETURN TO CAPITAL PUNISHMENT*

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On September 10, 1990 Charles Troy Coleman was put to death by lethal injection at the Oklahoma State Penitentiary. Coleman's execution was the first in the state in more than 25 years, generating significant media coverage and providing a unique opportunity to assess the impact of the state's return to executing capital offenders. Interrupted time-series analyses are performed with weekly data from the UCR Supplemental Homicide Reports for the state for the period January 1989 through December 1991. Analyses are performed for the total level of criminal homicides and homicides disaggregated into two types of murder—felony murder and stranger homicides—testing hypotheses that predict opposing impacts for each type of homicide. As predicted, no evidence of a deterrent or a brutalization effect is found for criminal homicides in general. Similarly, the predicted deterrent effect of the execution on the level of felony murders is not observed. Evidence of the predicted brutalization effect on the level of stranger homicides is observed, however. Supplementary analyses on further offense disaggregations continue to support these initial findings and permit a more coherent interpretation of the results.

On September 10, 1990 Charles Troy Coleman, a white male convicted of first-degree murder and sentenced to death, was executed by lethal

* Cochran and Chamlin contributed equally to this work and jointly share first authorship. Presented at the annual meetings of the American Society of Criminology, held in New Orleans, November 4-7, 1992. We would like to thank Mr. Raymond Pascutti, Uniform Crime Reporting Supervisor for the Oklahoma State Bureau of Investigation, for kindly providing the data for this analysis; we would also like to acknowledge the helpful comments of Drs. Robert J. Bursik, Jr., Harold G. Grasmick, and the anonymous reviewers who read earlier drafts of the manuscript. Please submit any correspondence to John K. Cochran at the following address: Department of Sociology, University of Oklahoma, Norman, OK 73019.

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injection at the Oklahoma State Penitentiary in McAlester, Oklahoma. Coleman's execution is significant because it represents the state's first execution since James French was put to death in the electric chair 25 years earlier. This execution also is relevant because it provides an opportunity to examine the possible deterrent or brutalization effects, if any, of such a symbolically meaningful and highly publicized event.¹

With weekly time-series data on the number and type of criminal homicide incidents in the state for more than one year before and after the execution, the quasi-experimental qualities of this naturally occurring "experiment" (Campbell, 1969) permit us to assess the impact of the execution on the subsequent incidence of homicide. Unlike previous studies of the impact of the reintroduction of executions, this study disaggregates criminal homicides into two types of murder highly likely to be affected by capital sentencing (felony murder and stranger homicides) and makes opposing predictions about the impact of the Coleman execution on each.

THE IMPACT OF EXECUTIONS: DETERRENCE OR BRUTALIZATION?

Many advocates of capital punishment claim that the death penalty protects society by deterring potential murderers. Opponents of the death penalty, on the other hand, often argue that there is no body of convincing evidence for any deterrent effect of the death penalty; some even suggest that highly publicized executions actually brutalize society by legitimating lethal violence, leading to unintended increases in the level of criminal homicide (Bowers and Pierce, 1980; King, 1978).

THE DETERRENCE ARGUMENT

The deterrence argument assumes that most behavior, including criminal behavior, results from rational actors' assessing the costs and benefits of various alternative courses of action and voluntarily opting for that alternative which provides the greatest ratio of benefits to costs. If the behavioral outcome is criminal, it is because the ratio of benefits to costs for crime exceeds those for the alternative courses of action. Thus, in the case of murder, the deterrence argument assumes that potential killers exercise rational judgment in deciding whether to kill.

The assumption that murderers exercise rational judgment and are sensitive to objective costs and benefits is open to question. We know, for instance, that most murders are acts of passion involving persons who know one another and are driven by rage, jealousy, and/or frustration; that

1. Please contact John Cochran for data on the amount and nature of media attention (local, statewide, and national) given to the Coleman execution.

alcohol and drugs facilitate many criminal homicides; that many killings are the end result of "situated transactions" involving affronts to honor and attempts to save face; and that often the primary difference between an aggravated assault and a criminal homicide is partially a function of the lethality of the weapon employed and/or the quality of the emergency medical services available in the community (Doerner, 1988; Luckenbill, 1977; Wolfgang, 1958). These observations hardly support the image of rationality assumed by deterrence theorists.

On the other hand, murder cases with many of these characteristics (e.g., among family members or between friends or acquaintances, while under the influence of alcohol or drugs, and/or undertaken to save face or otherwise in the heat of passion) are the least likely to receive a death sentence (Peterson and Bailey, 1991). Felony-murders are most likely to result in death sentences (Peterson and Bailey, 1991). In felony murders, the offenders enter their offense situation with at least a tacit understanding that lethal force may be necessary to further the commission of their felonious plans. Thus, under these conditions, it is most reasonable to accept the assumption that such offenders are rational actors who choose purposefully to use lethal force. Hence felony murders may be more likely than most other killings to involve rational actors sensitive to the objective costs and benefits of their crimes. The potential offenders in these felony-murder situations perhaps are most likely to be deterred by the threat of capital punishment (Peterson and Bailey, 1991).²

For even the most rationally oriented of potential offenders, however, the deterrent effect (if any) of capital punishment requires that potential offenders be somewhat aware of information relevant to the calculus of the utility ratio for murder (i.e., benefits to costs). Because it is essentially impossible for the lay public either to know or accurately estimate the proportion of capital murders for which executions have been carried out (a necessary indicator of the probability or certainty of punishment crucial in the rational calculation of costs), it is unlikely that the death penalty could deter even "deterable" potential offenders. In all likelihood, only those executions receiving significant media coverage are likely to have any deterrent potential (Bailey, 1990; Phillips, 1980; Stack, 1987, 1990).

2. Stack (1990) suggests that several perspectives other than deterrence also predict a decline or "death dip" in criminal homicide after a highly publicized execution: these are social condemnation/normative validation and victim mobilization (see Stack, 1990 for a discussion of each). To these we add the possible moral educative effects of execution.

11-11

THE BRUTALIZATION ARGUMENT

The brutalization thesis raises a compelling argument for a much different effect of highly publicized executions. Rather than decreasing the incidence of criminal homicide, executions actually may increase the level of postexecution homicides (Bowers and Pierce, 1980; Decker and Kohfeld, 1990; King, 1978). This brutalization effect, it is argued, is the consequence of the "beastly example" that an execution presents (Becarria, 1764:50). Ostensibly, executions devalue human life and "demonstrate that it is correct and appropriate to kill those who have gravely offended us" (Bowers and Pierce, 1980:456). The lesson taught by execution may be the legitimacy of lethal vengeance, not of deterrence.

Death penalty advocates who believe in the deterrent effects of capital punishment presume that potential offenders identify with the executed. Alternatively, it is possible that these potential offenders identify with the state (i.e., the executioner) and see in their prospective victims characteristics of deservedness similar to those of the executed. If this is true, then executions may inspire or stimulate criminal homicides rather than deterring them.

If we accept the argument that any observed brutalization effect of executions stems from potential killers' identification with the executioner, it may be that any inhibitions against the use of lethal violence to solve problems created by "unworthy" others are relaxed by the execution example. Once freed from their inhibitions, potential killers may become more willing to initiate their own "executions." Such a brutalization effect is most likely to occur in those "situated transactions" (Luckenbill, 1977) where inhibitions against the use of violence are already absent or considerably relaxed, such as situations that involve affronts by strangers. Because social ties and hence social controls possibly are much weaker among strangers, such affronts, particularly if they follow an execution, could result in somebody's being killed.³

Thus the deterrence and the brutalization theses make opposite predictions about the impact of widely publicized executions. Deterrence theory predicts that executions decrease the level of criminal homicide; the brutalization thesis argues that executions stimulate increases in criminal homicides. Both of these theories can be and have been tested simultaneously against the null hypothesis of no impact of executions.

3. In addition to this "executioner identification" explanation for an expected brutalization effect of the death penalty, others have suggested imitation (Berkowitz and McCauley, 1971), death wish (Diamond, 1975; Solomon, 1975; West, 1975), dehumanization (Bonger, 1916), and the subculture of violence (Gastil, 1971).

DETERRENCE OR BRUTALIZATION? THE EMPIRICAL EVIDENCE

The deterrent impact of capital punishment is perhaps one of the most frequently studied phenomena in criminology. The great majority of works on the subject consistently fail to find more than chance-only associations between the use of capital punishment and the level of criminal homicide. A small minority of these studies, however, report evidence of a deterrent effect (Ehrlich, 1975, 1977; Layson, 1985; Phillips, 1980; Stack, 1987, 1990); a handful of others find support for the brutalization thesis (Bailey, 1983; Bowers, 1988; Bowers and Pierce, 1980; Decker and Kohfeld, 1990; King, 1978). Nevertheless, the most consistent finding in the extant research is that the death penalty has no significant measurable impact whatever.

Because this body of research overwhelmingly fails to support the deterrence hypothesis, some abolitionists have expressed dismay that many pro-retentionists have yet to yield on this key element of the death penalty debate. Some death penalty supporters, however, are reluctant to regard this body of evidence as definitive. This reluctance is due in part to valid criticisms about the quality of the data and research designs used in the past. Yet even with the use of the highly sophisticated time-series designs currently in vogue (analyses that also tend not to support the deterrence argument), staunch advocates of the deterrent effect of capital punishment remain unconvinced.

Early research on the death penalty employed very simple comparative designs examining differences in the levels of criminal homicide in abolitionist and in retentionist jurisdictions (Schuessler, 1952; Sellin, 1959, 1967; Vold, 1932). Although these studies found that the retentionist jurisdictions had higher levels of criminal homicide than the abolitionist jurisdictions (findings consistent with the brutalization hypothesis), problems of temporal ordering and the lack of statistical controls for potential sources of spuriousness posed serious challenges to these studies.

The criticisms of these early works led to the development of much more sophisticated research designs employing multivariate and time-series analyses (Bailey, 1975, 1977, 1980, 1990; Black and Orsagh, 1978; Bowers and Pierce, 1980; Decker and Kohfeld, 1990; Ehrlich, 1975, 1977; Forst, 1977; Layson, 1985; Peterson and Bailey, 1988, 1991). The most recent of these have focused on the impact of execution publicity (Bailey, 1990; Bailey and Peterson, 1989; Bowers, 1988; King, 1978; McFarland, 1983; Peterson and Bailey, 1991; Phillips, 1980; Stack, 1987, 1990). Again most of these studies tend to reveal little support for the deterrence hypothesis.

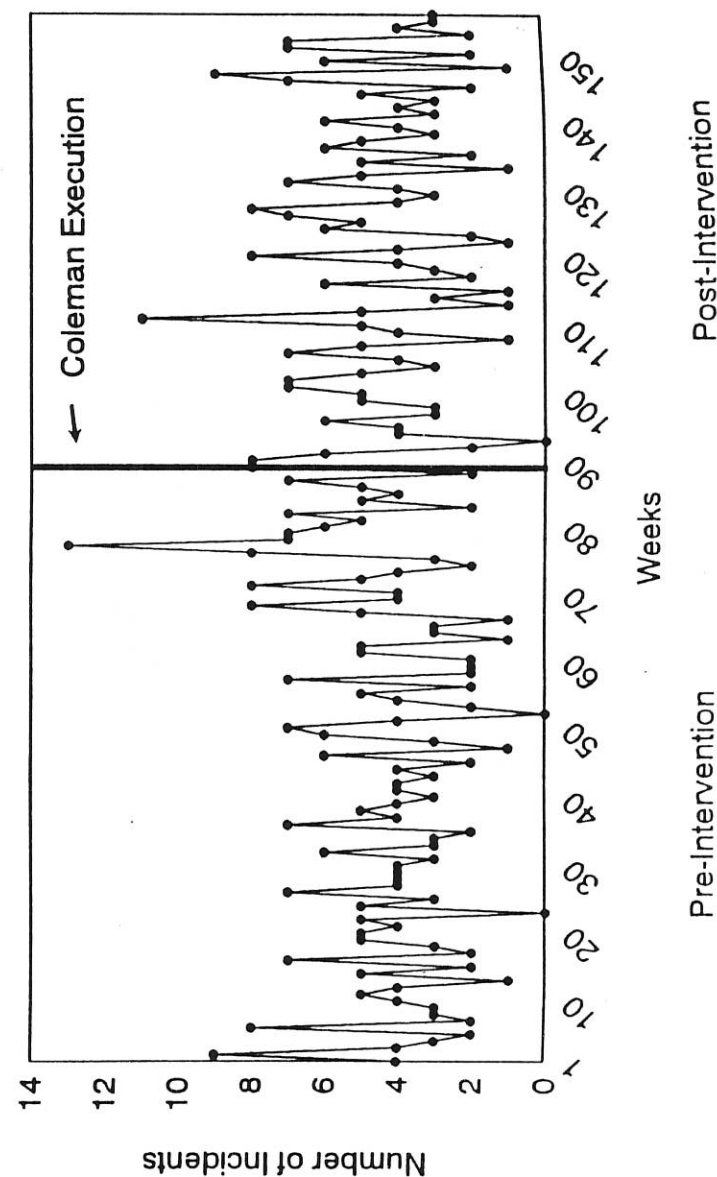
Nonetheless, several analyses have found evidence of a significant deterrent effect of the death penalty.⁴ Ehrlich (1975, 1977), Layson (1985), Phillips (1980), and Stack (1987, 1990) each report a statistically significant deterrent effect of executions. On the other hand, King (1978), Bowers (1988), Bowers and Pierce (1980), and Decker and Kohfeld (1990) each find evidence of a brutalization effect. As to the impact of execution publicity, the findings are equally mixed. Phillips (1980) and Stack (1987, 1990) each find evidence of a deterrent/death dip effect; King (1978) and Bowers (1988) find evidence of a brutalization effect. Bailey (1990), Bailey and Peterson (1989), and Peterson and Bailey (1991) find little evidence for any form of impact. Hence disagreement about the impact (if any) of executions and/or execution publicity is understandable.

This study adds to the extant literature by examining the impact of one very symbolic and highly publicized execution: Oklahoma's reintroduction of the death penalty with the execution of Charles Troy Coleman.⁵ Figures 1-3 plot the weekly counts of total, felony, and stranger homicides over the period examined. This was not the first to exploit the quasi-experimental value of specific executions (also see Lester, 1980; McFarland, 1983; Savitz, 1958). Whereas Lester (1980) found that Utah's execution of Gary Gilmore led to a marginally significant reduction in the nation's level of homicide for the two-week period following the execution, both Savitz (1958) and McFarland (1983) failed to observe any deterrent effect for the highly publicized executions they examined. Moreover, Lester (1980) and McFarland (1983) also examined the impact of the reintroduction of executions after the long moratorium in the late 1960s and early 1970s: Gilmore's 1977 execution in Utah (studied by both Lester and McFarland) and the three other cases (studied by McFarland): (1) John Spinklink, Florida 1979; (2) Jesse Bishop, Nevada 1979; and (3) Steven Judy, Indiana 1981. Yet none of these studies has considered

4. Ehrlich (1975), Layson (1985), Phillips (1980), and Stack (1987) each report a significant deterrent effect, but others have discredited their works. For instance, Bowers and Pierce (1975) and Klein et al. (1978) both refuted Ehrlich's (1975) findings with further analyses of his data. Likewise, Bowers (1988) found evidence of a brutalization effect in a reexamination of Phillip's (1980) data, Bailey and Peterson (1989) refuted Stack's (1987) findings, and Fox (1986; Fox and Radelet, 1990) offered a blistering critique of Layson's (1985) study.

5. Although the Coleman execution was the only execution in Oklahoma during the period examined (1989-1991), executions took place in other states that are contiguous with Oklahoma. Texas had 13 executions during these years, Missouri had six, and Arkansas had two. Possibly these other executions had some impact on homicides in Oklahoma. These executions, however, were distributed rather evenly over the period in question. Hence, it is exceedingly unlikely that they might confound the effects of the Coleman execution on homicides in Oklahoma. Moreover, Bailey (1983) makes a convincing argument against an investigation of the extralocal effects of other executions.

Figure 1. Total Homicides



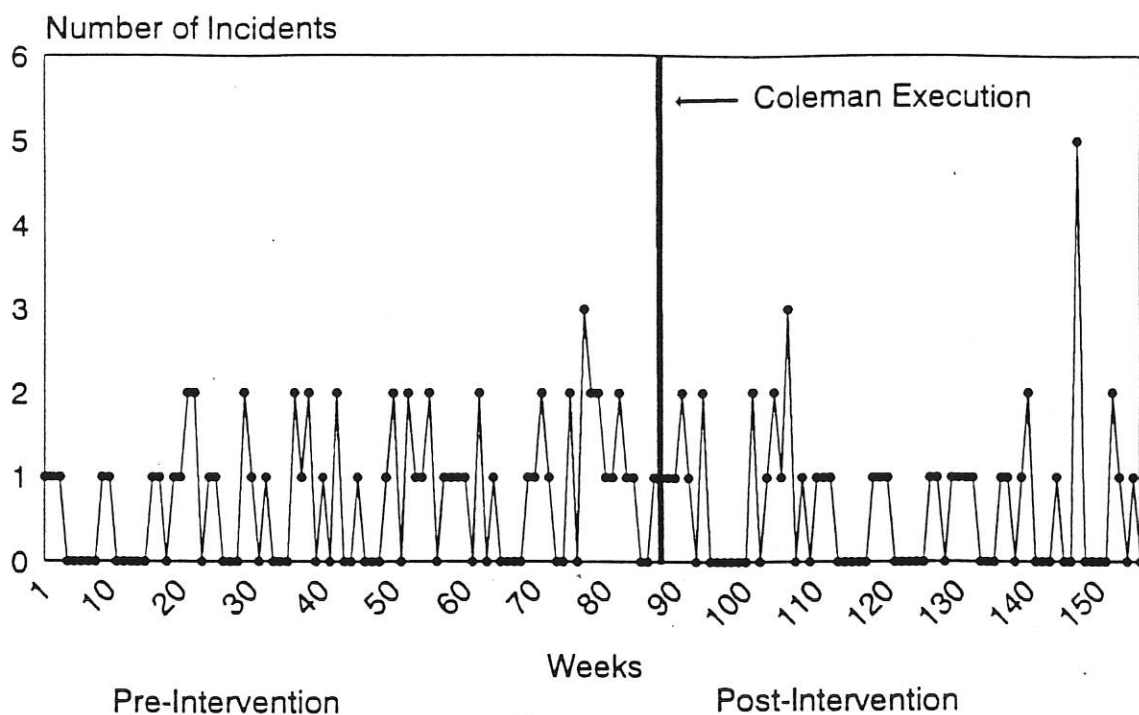
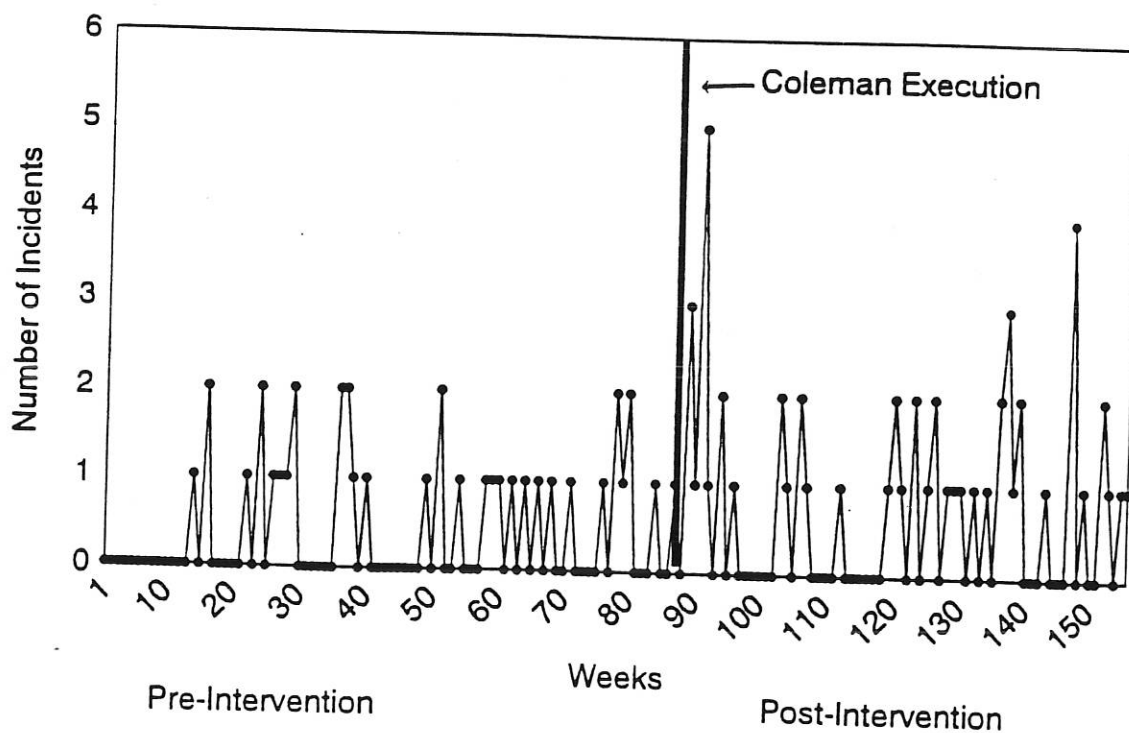


Figure 3. Stranger Homicides



the issue of offense aggregation bias in the measurement of criminal homicide (Bailey, 1983; Chamlin et al., 1992; Peterson and Bailey, 1991).

Chamlin and his colleagues (1992) argue, with regard to macrosocial deterrence research in general, that the measure of the dependent variable (i.e., the level or rate of crime as reported in official statistics such as the Uniform Crime Reports) tends to be confounded by excessive heterogeneity in the official crime categories. That is, the compilation of official counts of crime tends to include many disparate types of behaviors in their offense categories. This offense aggregation bias has been identified specifically as a problem in the examination of the impact of executions (Bailey, 1983; Peterson and Bailey, 1991). Official measures of criminal homicide include both murder and voluntary manslaughter. Likewise, they lump together first- and second-degree murder; within the former, they mix capital with noncapital murders. This aggregation of different behaviors may mask strong deterrent and/or brutalization effects and perhaps explains why null findings are so common in death penalty research.

In this study we address the problem of offense aggregation bias by disaggregating the measure of criminal homicides in the UCR *Supplemental Homicide Reports* into two forms of criminal homicide: felony murder and stranger homicides. These two types of murder are not mutually exclusive, nor do they exhaust all forms of murder. They are, however, two of the more common forms of murder and are highly likely to be affected by capital sentencing in the state of Oklahoma. Moreover, the theoretical arguments and subsequent research from the deterrence and brutalization perspectives reviewed above make opposing predictions about the impact of highly publicized executions on each type. We predict that highly publicized executions produce a deterrent effect on felony murder but exert a brutalization effect on stranger homicides. Mixing these two different forms of criminal homicide conflates these opposing effects and possibly accounts for the common observation that executions have no measurable impact on the level of criminal homicide in general.

In sum, we test the following hypotheses concerning the impact, if any, of the Coleman execution on the level of homicides in the state. First, we expect the execution to decrease the level of felony-murders (a deterrent effect). Second, we expect the execution to increase the level of stranger homicides (a brutalization effect). Finally, however, given the mix of behaviors included in the count of total homicides, we do not expect the Coleman execution to have any impact on the level of aggregate criminal homicide.

DATA AND METHODS

Our study uses autoregressive integrated moving average (ARIMA)

DETERRENCE OR BRUTALIZATION?

techniques to assess the impact of the Coleman execution on the number of total, felony, and stranger homicides in Oklahoma. These data were produced weekly; they cover the years 1989 through 1991. By restricting our data to weekly time-series data on specific types of criminal homicides in Oklahoma we avoid problems of offense, spatial, and temporal aggregation biases (Chamlin et al., 1992; Decker and Kohfeld, 1990; Greenberg et al., 1981; Peterson and Bailey, 1991). Each of the homicide time series was obtained from the *Supplementary Homicide Reports (SHR)* of the Oklahoma *Uniform Crime Reports*; the official codes and designations used in the *SHR* are employed in our disaggregations of criminal homicides. The *Supplementary Homicide Reports* data cover 97% (672/693) of the criminal homicide incidents in the state for this period as reported in the *Uniform Crime Reports*. Whereas, figures 1-3 plot the weekly counts of total, felony, and stranger homicides over the period examined; Table 1 presents descriptive statistics on these data. These will be discussed below.

Table 1. Descriptive Statistics for Weekly Homicides, 1989-1991, by Intervention Period and Type

	Total Series (156 weeks)		
	Total Homicides	Felony Homicides	Stranger Homicides
Mean	4.31	0.69	0.57
S.D.	2.22	0.82	0.86
N	672	108	88
	Pre-Intervention Series (88 weeks)		
	Total Homicides	Felony Homicides	Stranger Homicides
Mean	4.20	0.73	0.42
S.D.	2.19	0.77	0.66
N	361	64	36
	Post-Intervention Series (68 weeks)		
	Total Homicides	Felony Homicides	Stranger Homicides
Mean	4.44	0.65	0.76
S.D.	2.27	0.89	1.04
N	311	44	52
Difference in Means: Pre- and Post-Intervention			
Diff.	0.24	-0.08	0.34*

* $p < .05$.

INTERRUPTED TIME-SERIES ANALYSIS

Three basic steps are involved in developing a model to assess the causal impact of an intervention on a time series by using an ARIMA approach.

In the first step, the dependent series (in this case, each homicide incident series) is transformed into a new set of observations that are distributed independently and normally with a mean of 0 and a constant variance (i.e., a white noise process). In the language of ARIMA modeling, this procedure is known as "prewhitening." In the second step, an appropriate transfer function is selected to estimate the impact of the intervention (i.e., the Coleman execution) on the prewhitened dependent series. In the third and final step, the final model is subjected to a number of diagnostic checks. If it is found to be inadequate, a new model is estimated. This procedure continues until a statistically adequate model is constructed.

PREWHITENING THE HOMICIDE SERIES AND IDENTIFYING THE UNIVARIATE ARIMA MODELS

Typically, two raw time series (e.g., the weekly homicide incident series and the intervention series) are correlated spuriously because of common sources of trend, drift, and autocorrelation (Granger and Newbold, 1986). Hence, before estimating the impact of the intervention series on the homicide incident series, it is necessary to remove within each homicide incident series the variation that can be explained by prior observations in that series (i.e., prewhitening). Prewhitening entails identifying and estimating an appropriate univariate ARIMA model for each series, and inverting and applying these ARIMA models to their respective raw series. If these univariate ARIMA models are satisfactory, the residuals within each series should be uncorrelated (i.e., "white noise").

Variance stationarity is a requisite precondition of ARIMA models. Thus an initial task of prewhitening is to examine a plot of the raw time series to determine whether its variance is constant throughout its length—that is, whether the series is stationary in its variance. A series that is not stationary in its variance may be made so by a natural log transformation of its observations.

Once it is concluded that a time series is stationary in its variance, or is made so by a log transformation of the data, the next task is to ensure that the series is stationary in its level. That is, it is necessary to remove the effects of "trend" or "drift" from the series. If a systematic increase or decrease is present in the values of the observations throughout the length of the series, the series is said to be "trending." Trend can be removed by including the arithmetic mean of the series as a constant (Θ_0) in the univariate ARIMA model. If the observations of the time series appear to move upwards and downwards for discrete intervals of time, the series is said to be "drifting." This pattern is produced when effects of prior observations accumulate over time, and is known as an "integrated" process. The influence of an integrated process can be removed by subtracting the

value of prior observations in the series from the current observation (i.e., differencing the time series).

A time series that is stationary in both its variance and its level still can contain systematic associations among its observations. Two additional processes, the autoregressive process (δ) and the moving average process (Θ), can account for the remaining correlations among the observations. The presence of an autoregressive process indicates that the current observation of a stationary series is influenced by the infinite sum of the exponentially weighted past observations. That is, the current observation in the series is affected by prior observations at a decreasing rate. Thus the effect of past observations becomes negligible rather quickly. In contrast, the presence of a moving average process indicates that the current observation of a stationary series is influenced by a finite number of past observations. Thus the effect of any prior observation is of limited duration and disappears completely after a specified period of time.

Finally, the current observation of a time series also can be affected by a corresponding observation from a preceding cycle or period. In short, a "seasonal" relationship may exist among the observations in the series. The length of this cycle depends on the length of time between observations. For example, monthly data are characterized by a seasonal cycle of 12 observations, whereas weekly data are characterized by a seasonal cycle of 52 observations. For each of the three processes discussed above (the integrated process, the autoregressive process, and the moving average process), there may be a corresponding seasonal process which also must be taken into account in univariate ARIMA modeling.

In sum, the general form of the univariate ARIMA model is (p, d, q) (P, D, Q); where p = the order of the autoregressive process, d = the degree of differencing, q = the order of the moving-average process, P = the order of the seasonal autoregressive process, D = the degree of seasonal differencing, and Q = the order of the seasonal moving-average process. In addition to the specification of a parameter for the constant, if a trend is present, the final univariate ARIMA model may include any of the six processes described above.

Identification and specification of an appropriate univariate model for a time series that is stationary in its variance are based on an examination of the autocorrelation function (ACF) and the partial autocorrelation function (PACF). The former is a measure of the correlation between observations of a series at time t and preceding time lags; the latter is a measure of the correlation between time-series observations k units apart after the correlation at intermediate lags has been controlled or partialled out. Inspection of the ACF and the PACF shows whether the series is stationary in its level (i.e., requires differencing) and/or is contaminated by

autocorrelation (i.e., requires the specification of autoregressive or moving-average parameters). As is common with ARIMA time-series analyses, competing models are estimated and assessed according to the researcher's interpretations of the ACFs and PACFs. The final model selected is that in which there no longer exist any systematic correlations among the observations (i.e., the model residuals are white noise).

IMPACT ASSESSMENT: SELECTING THE APPROPRIATE TRANSFER FUNCTION

Once the raw time series has been reduced to a white noise process, the impact of the intervention series can be assessed. That is, the intervention series (I_t coded 0 for the weeks preceding the execution and 1 for the week of the execution and beyond) is added to the model, and a transfer function (i.e., a measure of association between the intervention and the prewhitened series) is estimated.

Ideally, the selection of the appropriate transfer function should be rooted in theory. More often than not, however, one cannot anticipate the appropriate functional form of the impact of the intervention. Fortunately, an appropriate transfer function can be derived empirically. One may choose from a variety of functional forms to estimate the effect of an intervention on the series of interest; in practice, however, the selection may be restricted to one of three common patterns of impact, each of which is determined by an alternative transfer function (McCleary and Hay, 1980: 168–171). These are (1) an abrupt, permanent change in the level of the series estimated by a zero-order transfer function ($w_0 I_t$); "permanent" is defined here as the length of the series under investigation; (2) a gradual, permanent shift in the level of the series estimated by a first-order transfer function $[(w_0/1-\delta_1 B) I_t]$; and (3) an abrupt but temporary shift in the level of the series estimated by applying a first-order transfer function to a differenced intervention series—that is, a pulse function $[(w_0/1-\delta_1 B) (1-B) I_t]$.

By successively estimating each of these transfer functions and subjecting the results to a number of diagnostic tests, one can determine the most accurate model. To be sure, it is possible to fit, in somewhat mechanical fashion, higher-order transfer functions to the data, but typically the results of such "dredging expeditions" are uninterpretable. Moreover, previous research consistently reveals that most, if not all, social science interventions can be represented effectively by the lower-order processes delineated above (see Hilton, 1984; Loftin et al., 1983; McCleary and Hay, 1980).

RESULTS

A visual examination of the plots presented in Figures 1–3 reveals no clear evidence of any impact of the Coleman execution on either the total or the felony homicide series. Yet a slight brutalization effect of the Coleman execution seems to be suggested by the higher spikes evident in the post-intervention portion of the stranger homicide series reported in Figure 3. In addition, a comparison of pre- and post-intervention means reported in Table 1 shows a statistically significant increase in the level of stranger homicides after the Coleman execution (diff. = .34; $t = 1.874$). None of the other differences are statistically significant. These findings suggest that the impact of the Coleman execution may be restricted to a brutalization effect for stranger homicides. We employ various ARIMA intervention models to test whether these mean differences withstand a more sophisticated analytic technique.

We begin by estimating zero-order transfer function intervention models. To reiterate, this type of model tests whether the Coleman execution produced an abrupt, permanent change in the level of the murder series examined. Findings from these models are presented in Table 2.

As an inspection of Table 2 makes clear, the Coleman execution had no appreciable impact on the level of total or felony homicide incidents in Oklahoma; none of the t -statistics for the zero-order transfer function (w_0) attain an absolute value of 2.0 or more (i.e., the t -value necessary to make the parameter estimate statistically significant at the .05 level). In keeping with the predictions of the brutalization hypothesis, however, the reintroduction of executions in Oklahoma produced a small but significant increase in the level of stranger murders ($w_0 = .344$, $t = 2.526$). Specifically, after Coleman's execution the state of Oklahoma experienced an abrupt, permanent increase of approximately one stranger murder every three weeks.

It is possible that any change in the level of homicides due to the Coleman execution is modeled more appropriately by a gradual pattern of impact than by an abrupt pattern. To evaluate this alternative functional form, we respecified the intervention models presented in Table 2, replacing the zero-order intervention components with first-order transfer functions. The results of these analyses are presented in Table 3.

In addition to specifying a parameter to measure the degree of change in the process level of each homicide series (w_0), the first-order transfer function also includes a parameter that estimates the amount of time required for this change to be realized (δ_1). When δ_1 is small, the asymptotic impact of the intervention is realized within a few observation periods. When δ_1 is large, however, the level of the dependent series changes relatively slowly. While the value of w_0 is unbounded, δ_1 is constrained

Table 2. Zero-Order Intervention Models by Type of Homicide

Homicide	Final Model	Parameter Estimates
Total	$Y_t = w_o I_t + \Theta_o$	$w_o = .236 \quad t = .659$ $\Theta_o = 4.204 \quad t = 17.742$ $Q = 48.32 \quad df = 36$ $p > .08$
Felony	$Y_t = w_o I_t + \Theta_o$	$w_o = -.080 \quad t = -.602$ $\Theta_o = .727 \quad t = 8.263$ $Q = 31.26 \quad df = 36$ $p > .60$
Stranger	$Y_t = w_o I_t + \Theta_o$	$w_o = .344 \quad t = 2.526$ $\Theta_o = .420 \quad t = 4.674$ $Q = 34.54 \quad df = 36$ $p > .50$

Notes: Θ_o = Constant w_o = Zero-order input parameter of a transfer function Q = Box-Jenkins test statistic for the null hypothesis that the models' residuals are distributed as white noise I_t = Intervention series

within the bounds of system stability (i.e., $\delta_1 \leq \pm 1$). If the value of δ_1 is greater than ± 1 , the intervention model is unstable and must be respecified. (For a more detailed discussion of this issue see McCleary and Hay, 1980:154-160.)

In line with the initial findings, these models reveal that the Coleman execution had no appreciable impact on total or felony homicides. There is some evidence to suggest that the Coleman execution produced a gradual, permanent change in the level of stranger homicide incidents ($w_o = .721, t = 2.884; \delta_1 = -.815, t = 2.512$). Even so, the 95% confidence interval about the estimate of δ_1 lies beyond the bounds of system stability ($-.145 \leq \delta_1 \leq -.18$). Hence we can safely reject the hypothesis that Oklahoma's reintroduction of capital punishment resulted in a gradual, permanent increase in the level of stranger murders.

Finally, we explored the possibility that the Coleman execution produced an abrupt, temporary shift in the level of each of the homicide incident series under investigation (see Table 4). As one might anticipate on the basis of the findings produced from the first two model specifications, we found no evidence of either deterrent or brutalization effects of the Coleman execution on the level of total or felony homicides. The results

Table 3. First-Order Intervention Models by Type of Homicide

Homicide	Final Model	Parameter Estimates
Total	$Y_t = \frac{w_o}{1 - \delta_1 B} I_t + \Theta_o$	$w_o = -.042 \quad t = -.089$ $\delta_1 = -1.026 \quad t = -4.582$ $\Theta_o = 4.316 \quad t = 20.904$ $Q = 47.80 \quad df = 36$ $p > .09$
Felony	$Y_t = \frac{w_o}{1 - \delta_1 B} I_t + \Theta_o$	$w_o = .276 \quad t = .330$ $\delta_1 = -.358 \quad t = -.428$ $\Theta_o = .724 \quad t = 8.135$ $Q = 30.97 \quad df = 36$ $p > .70$
Stranger	$Y_t = \frac{w_o}{1 - \delta_1 B} I_t + \Theta_o$	$w_o = .721 \quad t = 2.844$ $\delta_1 = -.815 \quad t = -2.512$ $\Theta_o = .396 \quad t = 4.447$ $Q = 32.71 \quad df = 36$ $p > .62$

Notes: Θ_o = Constant w_o = Zero-order input parameter of a transfer function δ_1 = First-order output parameter of a transfer function Q = Box-Jenkins test statistic for the null hypothesis that the models' residuals are distributed as white noise B = Backward shift operator where $B(Y_t) = Y_{t-1}$ I_t = Intervention series

for stranger homicides, however, are less clear. Although the parameter estimate for δ_1 is statistically significant ($\delta_1 = .710, t = 6.432$) and supports the brutalization hypothesis, the higher end of the 95% confidence interval about the coefficient lies extremely close to the limits of system stability ($.494 \leq \delta_1 \leq .926$). Hence we conclude that the "best" model for stranger homicides is probably the zero-order transfer function (i.e., an abrupt, permanent change).

In sum, Oklahoma's return to the death penalty with the highly publicized execution of Charles Troy Coleman, after a 25-year hiatus, does not produce any significant deterrent effect on the level of criminal homicides. Rather, it seems that the reactivation of capital punishment produces an

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Table 4. First-Order Intervention Models Applied to Pulse Functions by Type of Homicide

Homicide	Final Model	Parameter Estimates
Total	$Y_t = \frac{w_o}{1 - \delta_1 B} (I - B)I_t + \Theta_o$	$w_o = 4.375 \quad t = 2.010$ $\delta_1 = .420 \quad t = 1.107$ $\Theta_o = 4.261 \quad t = 23.655$ $Q = 52.00 \quad df = 36$ $p > .04$
Felony	$Y_t = \frac{w_o}{1 - \delta_1 B} (I - B)I_t + \Theta_o$	$w_o = .609 \quad t = .825$ $\delta_1 = .677 \quad t = 1.228$ $\Theta_o = .678 \quad t = 9.836$ $Q = 31.34 \quad df = 36$ $p > .68$
Stranger	$Y_t = \frac{w_o}{1 - \delta_1 B} (I - B)I_t + \Theta_o$	$w_o = 2.624 \quad t = 3.732$ $\delta_1 = .710 \quad t = 6.432$ $\Theta_o = .516 \quad t = 7.590$ $Q = 22.44 \quad df = 36$ $p > .96$

Notes: Θ_o = Constant

w_o = Zero-order input parameter of a transfer function

δ_1 = First-order output parameter of a transfer function

Q = Box-Jenkins test statistic for the null hypothesis that the models' residuals are distributed as white noise

B = Backward shift operator where $B(Y_t) = Y_{t-1}$

I_t = Intervention series

abrupt and permanent increase in the likelihood that citizens of Oklahoma will die at the hands of a stranger.

SUPPLEMENTARY ANALYSES

We emphasize the preliminary nature of our findings. It is possible that these findings, especially the null effects of the Coleman execution on total and felony homicides, might be tainted by model specification error. Hence we performed a number of additional analyses. First, one might contend that the onset of execution publicity, rather than the date of the execution, is the more appropriate point at which to assess the impact of

Oklahoma's return to executions. Therefore we reestimated our equations employing the last week in August 1990 as the onset of the intervention. The results from these analyses are virtually identical to those reported previously.

Second, it is possible that time aggregation bias might account for some of our null findings (Chamlin et al., 1992). In an effort to assess the influence of this potential source of bias in the parameter estimates, we aggregated the data to months and reexamined the models. Because the sample size (N) precludes the use of ARIMA techniques to model the data, we used Cochran Orcutt procedures to account for autocorrelation among the error terms and included monthly unemployment rates as a control variable in the analyses. Once again we found evidence of a brutalization effect for stranger homicides and null effects for both total and felony homicides.

Third, we reexamined the weekly data, using Cochran Orcutt procedures to determine the extent to which our initial findings were sensitive to our decision to use ARIMA techniques to model the data. As anticipated, we found a statistically significant brutalization effect for stranger homicides and null effects for total and felony homicides. These results are not reported here, but are available on request.

Finally, our failure to find a significant deterrent effect for the Coleman execution on felony homicides may reflect, in part, the fact that in Oklahoma not all felony homicides are death-eligible. Moreover, insofar as some categories of death-eligible, felony homicide, particularly robbery, are more likely than others to be influenced by a state's return to executions (Peterson and Bailey, 1991), still further disaggregation may be warranted. Similarly, the findings for stranger homicides, though consistent with our theoretical arguments, require additional elaboration. To reiterate, we interpret the initial results for stranger homicides as indicating that a return to the implementation of the death penalty weakens socially based inhibitions against the use of deadly force to settle disputes and thereby "frees" the offender to kill in response to some perceived wrong. If this is the case, one should expect brutalization effects to be most pronounced in expressive/conflictive offender-victim interactions. Alternatively, in more instrumental encounters involving strangers, such as some forms of felony homicide, rational decision-making processes might have a greater influence on an offender's behavior.

Therefore, in an attempt to explicate the processes that underlie our initial findings, we performed a number of supplementary impact assessments of Oklahoma's return to capital punishment on disaggregated measures of felony and stranger homicides. The results of these analyses are presented in Table 5.

Death-eligible homicides (rape, arson, robbery with a weapon, first-degree burglary, kidnapping, and escape) account for approximately 88%

Table 5. Disaggregated Analyses of Felony and Stranger Homicides by Type of Intervention

Homicide Type	Zero-Order Intervention	First-Order Intervention	Pulse Function
Felony			
Death-Eligible	$W_o = -.123$ $t = -.752$	$W_o = -.014$ $t = -.260$ $\delta_1 = .925$ $t = 2.744$	$W_o = -.092$ $t = -.404$ $\delta_1 = 1.011$ $t = 20.372$
Robbery	$W_o = -.057$ $t = .492$	$W_o = .104$ $t = .335$ $\delta_1 = -.644$ $t = -.150$	$W_o = .865$ $t = 1.429$ $\delta_1 = .727$ $t = 2.665$
Stranger Felony	$W_o = .166$ $t = 1.828$	$W_o = .268$ $t = .906$ $\delta_1 = -.567$ $t = -.351$	$W_o = 1.145$ $t = 2.650$ $\delta_1 = .792$ $t = 6.960$
Robbery	$W_o = .120$ $t = 1.511$	$W_o = .212$ $t = 1.034$ $\delta_1 = -.661$ $t = -.482$	$W_o = .007$ $t = .234$ $\delta_1 = 1.057$ $t = 14.372$
Nonfelony	$W_o = .237$ $t = 2.545$	$W_o = .564$ $t = 3.420$ $\delta_1 = -.926$ $t = -11.726$	$W_o = 1.544$ $t = 2.884$ $\delta_1 = .593$ $t = 3.032$
Argument	$W_o = .208$ $t = 3.265$	$W_o = .468$ $t = 4.174$ $\delta_1 = -.946$ $t = -22.520$	$W_o = .856$ $t = 2.342$ $\delta_1 = .641$ $t = 2.989$

Notes: W_o = Zero-order output parameter of a transfer function
 δ_1 = First-order output parameter of a transfer function

of the total felony homicides in Oklahoma during the period under investigation. Approximately 74% of these are armed robberies. Thus we examined the effect of the Coleman execution on both death-eligible felony murders and armed robbery homicides; we continued to find no support for the deterrence hypothesis. Regardless of functional form, the impact assessments revealed no significant effects for either of these disaggregated series of felony homicides.

As might be expected, felony and stranger homicides are not mutually exclusive categories. In fact, felony homicides account for approximately 67% of stranger homicides, while stranger homicides account for approximately 70% of felony homicides. In view of this overlap, it becomes necessary to examine more carefully the effects of Oklahoma's return to the death penalty on disaggregated measures of stranger homicides so that we may understand more fully the processes that produce our divergent findings for these two forms of murder. Therefore we investigated the effects of the Coleman execution on four additional stranger homicide incident series. In the first two, felony and robbery, the offender may be more likely to employ rational decision-making processes. The remaining two, nonfelonies and those involving arguments, are more likely to involve situations where conflictive, expressive factors may influence the offender's behavior.

In brief, we find no evidence of a deterrent effect for either stranger felonies or stranger robberies. At first glance it may appear that the Coleman execution increases the level of stranger felonies. Yet the parameter estimate associated with the zero-order transfer function for stranger felonies approaches, but fails to reach, statistical significance ($w_o = .166$, $t = 1.828$). Although both parameter estimates associated with the pulse function are statistically significant, the confidence intervals about the first-order parameter estimate exceed the bounds of system stability ($.569 < \delta_1 < 1.012$). Hence we are forced to conclude that there is no brutalization effect for stranger felonies.

In keeping with our preliminary analyses for stranger homicides, we find again that the Coleman execution produces an abrupt, permanent increase in both the nonfelony ($w_o = .237$, $t = 2.545$) and the argument ($w_o = .208$, $t = 3.265$) subcategories. Although the pulse function also yields statistically significant parameter estimates, the confidence intervals about the coefficient exceed ($.222 < \delta_1 < 1.06$) or approach ($.209 < \delta_1 < .977$) the bounds of system stability for the stranger nonfelony and the stranger argument series, respectively. Therefore we conclude that the zero-order transfer function is the most appropriate model for each of these forms of stranger homicide.

We also explored the possibility that the reported brutalization effect for argument-related stranger homicides reflects processes which operate at a higher level of offense aggregation. We derived null effects, however, from our analyses of the effect of the Coleman execution on the argument homicide incident series and on the total nonfelony homicide incident series. Thus it would appear that the impact of the Coleman execution on argument-related stranger homicides cannot be explained by its influence on either argument-related homicides per se or the total nonfelony homicide incident series. Moreover, we examined all of the models in Table 5,

using the onset of execution publicity rather than the date of the execution as the point of intervention. Again, our findings are identical to those reported in Table 5. The results of these additional analyses also are available on request.

In sum, the supplementary analyses add credence to our interpretation of the initial findings. Further disaggregations of felony homicides continue to produce null findings, thus supporting the conclusion that there are no observable deterrent effects. Similarly, the disaggregation of stranger homicides into those which may be deterrable (stranger-felony and stranger-robbery) and those in which brutalizing effects are most likely to occur (stranger-nonfelony and stranger-argument) yields results that are consistent with our explanation for the effects of the Coleman execution on the original stranger homicide series. We find no evidence of a deterrent effect for either the stranger-felony or the stranger-robbery homicide series. For stranger-nonfelony and stranger-argument homicides, however, which are more likely to involve offender-victim interactions characterized by affronts to honor *and* by weakened social constraints against the use of deadly force, we find significant and lasting increases in the level of homicide after Coleman's execution.

Taken together, the preliminary and the supplementary analyses suggest the following conclusion: the reintroduction of capital punishment, at least in Oklahoma, seemingly has produced a brutalizing effect in situations where the relational distance between offender-victim pairs minimizes socially derived inhibitions against killing and where the dynamics of the encounter are likely to enhance the perpetrator's perception of being wronged (i.e., nonfelony and argument-related stranger homicides).

CONCLUSION

Both the deterrence and the brutalization hypotheses, albeit for different reasons, predict that the return to capital punishment will produce a change in the level of criminal homicides in the jurisdiction of interest. The former perspective assumes that potential offenders, including those who may be contemplating murder, rationally weigh the costs and benefits when deciding whether to engage in illegal behavior. Therefore, insofar as the gains associated with criminal homicide do not increase, the reimplementation of the death penalty is expected to influence some potential offenders to refrain from murder. Alternatively, the brutalization perspective suggests that state-sponsored killing, regardless of its political legitimacy, is likely to have a dehumanizing effect on the populace. As a result, the return to capital punishment is expected to weaken socially based inhibitions against the use of deadly force to settle disputes, thereby

encouraging some segments of the population to kill in response to perceived wrongs and/or affronts to honor. Exploiting the quasi-experimental qualities of Oklahoma's first execution in more than 25 years, this study employs interrupted time-series analyses to assess the relative efficacy of these two competing theoretical orientations.

We argue that deterrence and brutalization processes are more likely to affect some types of criminal homicide than others. Specifically, we expect the deterrent effect of executions to be most evident in situations where the offender may anticipate the need for lethal force for the successful completion of another crime (Peterson and Bailey, 1991). Thus one would predict finding a deterrent effect primarily for felony murders, especially those which are death-eligible. Alternatively, one might expect a brutalization effect to be most pronounced in situations where the relational distance between offenders and victims already minimizes socially derived strictures against killing. That is, during stranger-related interactions involving affronts to honor, the example set by the state is most likely to facilitate the use of deadly force to settle disputes.

Contrary to the predictions of the deterrence hypothesis, we find no evidence that Oklahoma's reintroduction of execution produced a statistically significant decrease in the level of criminal homicides during the period under investigation. Regardless of the functional form specified for the model, the analyses show that the execution of Charles Troy Coleman had no effect on either total, total felony, stranger-felony, death-eligible felony, or robbery-felony homicides. Thus our findings are consistent with a growing body of research that typically fails to find a significant deterrent effect for the exercise of the death penalty (Peterson and Bailey, 1991).

Our preliminary analyses, however, provide some evidence of a brutalization effect on stranger homicides. This interesting finding is observed in each of the three functional forms modeled, though the most appropriate model appears to be the zero-order transfer function. This functional form shows that the Coleman execution produced an abrupt and lasting increase in the level of stranger homicides in Oklahoma. Specifically, the results show that Coleman's execution led to an increase of approximately one additional stranger-related homicide incident per month ($.344 * 4 = 1.376$ stranger-related homicides per month).

We interpret these findings for stranger-related homicides as an indication that a return to the exercise of the death penalty weakens socially based inhibitions against the use of lethal force to settle disputes and thereby allows the offender to kill strangers who threaten the offender's sense of self or honor. Admittedly, this explanation could be viewed with some skepticism. After all, stranger-related homicide is a rather heterogeneous category encompassing various sorts of events, including felony

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murders. In recognition of this limitation, we further disaggregated the stranger homicide incident series and performed a number of supplementary intervention analyses.

In brief, we find that the Coleman execution produced null effects on both stranger-felony and stranger-robbery homicides. These results, however, should not be particularly surprising given that these two subcategories of stranger-related homicides are likely to be affected by instrumental concerns, as well as by the actors' social distance. More important, these supplementary analyses also reveal that the Coleman execution produced an abrupt and lasting increase in the level of both nonfelony and argument-related stranger homicides. Thus, in line with our initial speculation, it appears that the return to the death penalty, at least in Oklahoma, produces a brutalization effect in situations where prohibitions against killing are weakest and where the offender perceives having been wronged (i.e., nonfelony and argument-related stranger homicides).

Certainly one must be exceedingly careful about the inferences one draws from examining the relatively short-term effects of a single execution in one jurisdiction. Nonetheless, two observations seem noteworthy. First, when data are available, future research on the effects of capital punishment and execution publicity on criminal homicide should examine further disaggregations of criminal homicides. As suggested by our analyses of different subcategories of homicides, executions simultaneously might produce both deterrent and brutalizing effects (inhibiting some while inspiring others), thereby producing null effects when substantively interesting associations in fact may be present. Second, further theoretical development of the brutalization thesis is needed. On the basis of previous works (Bowers and Pierce, 1980; King, 1978), we began with a rather facile hypothesis concerning the brutalization effects of capital punishment on stranger homicides. Although we found support for our speculations, we must continue to explicate the links between the implementation of the death penalty and changes in the level of both total and disaggregated measures of stranger homicides.

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12
January 26, 1994

TO: THE FEDERAL AND STATE AFFAIRS COMMITTEE

"RACISM AND THE DEATH PENALTY"

Ladies and gentlemen, as a long time educator, I am aware that too often, specifically African-American males are given two rooms in life. A special education room, and a prison cell. Now, we are looking at two death penalties. An educational death as well as execution.

If the victim is white, and the defendant is black, poor, uneducated, uninformed, and have a court-appointed attorney, the chances that you will be one of those selected for execution increases dramatically each year.

In Florida, killers of whites are 37 times more likely to get the death penalty than killers of blacks. In Georgia, the rate is 10 times higher, Maryland six times. The evidence is irrefutable: Black life is cheap, white life valuable.

In 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks.

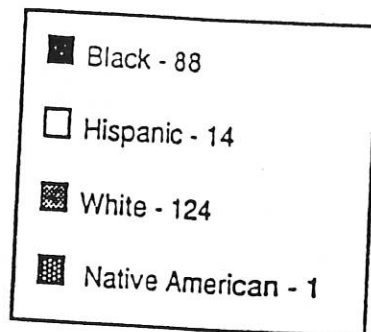
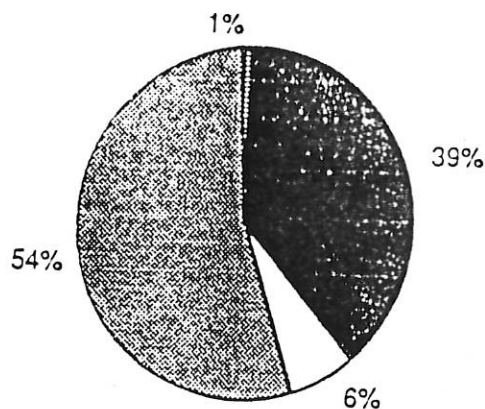
If Kansas is to follow the national trend in the application of the death penalty as it has in the application of imprisonment, Kansas will continue to follow this racial disparity. Given these statistics, it is clearly stated that approximately 50% of death row is black, when only 12% of the American population is black.

In my conclusion, I appeal to your sense of racial fairness and justice. Keep Kansas alive and free of a racist law.

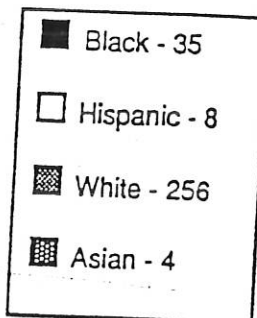
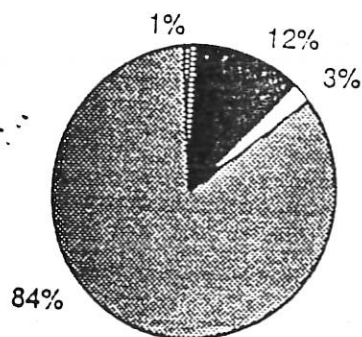
Sandra K. Lassiter,
Concern Citizens for Equal Justice

Sandra K. Lassiter
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RACE AND THE DEATH PENALTY - RACE OF DEFENDANTS EXECUTED



RACE OF VICTIMS:

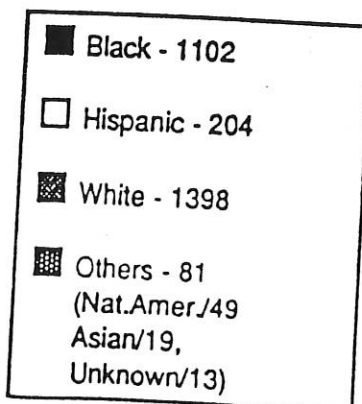
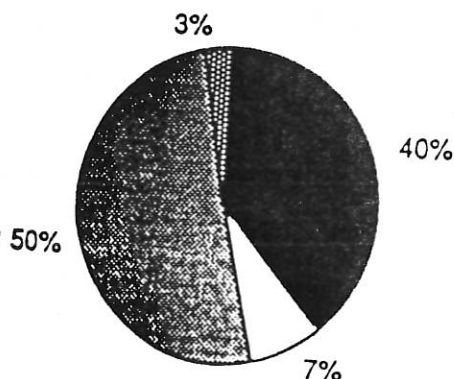


84% of the victims in death penalty cases are white even though 50% of murder victims in the U.S. are black.

"In 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks." - U.S. General Accounting Office, Death Penalty Sentencing, February, 1990.

TOTAL NUMBER OF DEATH ROW INMATES: 2,785 (as of October, 1993)

Breakdown by race: Half of those on death row are from minority populations.



#18

THE COST OF THE DEATH PENALTY

Testimony by Professor David J. Gottlieb
University of Kansas School of Law

Kansas Legislature
February 18, 1994

I am here today to testify on the cost of the death penalty. Seven years ago, when I first researched and testified on this subject, this issue was somewhat controversial. Today, there is no reason it should be. Over the past seven years, the issue of cost has been reviewed in detail by states that employ the death penalty and has been studied carefully by neighboring states that have considered reintroducing capital punishment. Based upon this data and experience, the following assumptions can be made to an extremely high degree of certainty.

1) The death penalty is an expensive "add-on" to a criminal justice system which produces significant additional costs, and no measurable savings. 2) While the magnitude of the additional costs is impossible to determine with precision, since we cannot know in advance how many cases prosecutors choose to charge as death penalty cases or the means the State will choose to implement defense services for capital cases, if the penalty is charged more than a couple of times a year, the additional costs will measure in the millions of dollars per year. 3) We should expect each case in which the death penalty is imposed after a guilty verdict to cost, at a minimum, hundreds of thousands of dollars more than each similar non-death penalty case. We should also expect to spend millions to tens of millions of dollars per each case that finally

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results in an execution. 4) We should expect that the State will spend at least tens of millions of dollars before, sometime in the next 10 to 20 years, the State witnesses its first execution.

We should expect these things to occur for the very simple reason that they have occurred across the board in those states that have reintroduced the death penalty since 1977. Those individuals who tell you that the cost "is a wash" (because of presumed savings) or that "the system to handle capital cases is already in place" are engaged in either fantasy or willful deception. Again, I emphasize that, like the wind in this state, the amount of cost may be difficult to predict, but the fact of the increase is essentially certain.

Those who help administer your budget and who will help administer capital punishment already understand this reality. Our Division of the Budget has produced a fiscal note estimating an additional \$4.2 million for H.B. 2578, and an additional cost of \$2.4 million for FY 1995 for S.B. 473.¹ That is just the cost for the first year. The cost per year will rise steadily and dramatically in succeeding years. The Kansas Legislative Research Department has also estimated increased costs of over \$683,792 for each capital case, and a figure of over \$4 million for each case actually taken to execution.² This week, our Chief Justice warned

¹State of Kansas, Division of the Budget, Fiscal Note for HB 2578 by Representative Parker, Et al., Jan. 24, 1994; Kansas Legislative Research Department, Memorandum, Feb. 7, 1994.

²Kansas Legislative Research Department, Memorandum--Cost Considerations of Implementing the Death Penalty, Jan. 25, 1994.

that he was "deeply concerned" over the fiscal impact on the judicial and executive branches of government. He stated: "Adoption of a death penalty law, with all the constitutional and statutory protections and procedures inherent therein, will have a tremendous fiscal impact on the judicial branch of government."³

It is critical that those of you considering supporting this penalty recognize that it is going to cost a great deal of money, and that the costs will increase from year to year. It is critical that you be prepared to spend that money. It is important that you also understand that by doing so you will be spending money on a penalty that does not reduce, and indeed may increase violent crime. At the same time, you will be unable to use the dollars invested in capital punishment to spend on criminal justice programs that could do much, much more to control violent crime. Given the difficulty the Legislature has experienced in funding the indigent defense services that are required for our current system you should ask some very hard questions about whether capital punishment is something we should or can afford.

I. THE REASON FOR THE HIGH COSTS OF CAPITAL CASES

While it may seem logical that it would cost less to execute a person than to imprison him for life, that assumption is wrong. As the late Supreme Court Justice Thurgood Marshall explained in Furman v. Georgia, 408 U.S. 238, 357-58 (1972):

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even

³Ferguson, Chief Justice Warns War on Crime Costly, Topeka Capital Journal, Feb. 9, 1994.

assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.

At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money and effort of the state....

When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.

Every study that has been done since Justice Marshall's writing supports his assertion. Capital cases are very expensive. There are five reasons why this is so.

First, capital cases take far more time to litigate before a jury verdict of guilt can be obtained. Because the stakes are life and death, guilty pleas tend to be less common. For similar reasons, the defense contests every potential issue. Preparation for trial is more extensive, with two to five times as many pretrial motions filed. Jury selection takes longer, since the jury must be qualified not only to rule on the question of guilt, but also to decide on the death penalty. The trial itself also takes longer than an ordinary homicide prosecution, with far more

extensive use of experts and investigators.⁴

Second, death penalty cases require a second, separate trial on the sentence of death if the jury returns a guilty verdict. There is no equivalent to this procedure in a regular murder cases. The jury must sit for days, in some cases weeks, to hear evidence concerning whether the defendant should live or die. A host of expert witnesses may be required for this determination. As a result of this second phase, the time taken for the death penalty is further expanded. The most extensive recent study of cost, in North Carolina, found that the impact of the expanded guilt and sentencing proceedings extended the number of days in a capital trial at approximately four times the length of a non-capital trial, with more than four times the number of attorney hours spent in preparation.⁵

Third, if the jury imposes a death sentence, a long appeal process will begin. The process will include an appeal to the Kansas Supreme Court, a petition for certiorari to the Supreme Court of the United States, post-conviction applications in the Kansas State Courts, appeals of those applications, post-conviction applications in the federal courts, appeals of those applications to the United States Court of Appeals for the Tenth Circuit, and a

⁴See, e.g., Garey, The Cost of Taking A Life: Dollars and Sense of the Death Penalty, 18 U.C. Davis L. Rev. 1221, 1245-62 (1985); Gradess, Execution Does Not Pay, Wash. Post, Feb. 28, 1988, at C5, col. 3; New York State Defenders Association, Capital Losses: The Price of the Death Penalty For New York State (1982).

⁵Cook and Slawson, The Costs of Processing Murder Cases in North Carolina (Sanford Institute of Public Policy, Duke University) (May, 1993).

petition for certiorari to the Supreme Court of the United States. The process, which can take up to a decade to accomplish, will involve ten times the cost of ordinary appeals. In fact, the post-conviction stage is often the most expensive of the entire process.⁶ Obviously, a defense attorney is obliged to pursue every possible legal means to avoid execution of her client. Unlike the normal case, there is no occasion of an attorney to recommend to her client that he not take further appeals.

Fourth, during the time of the appeals, the defendant is typically housed in a death row. These facilities cost money to build and are also more expensive to staff and maintain than normal prison facilities.

Fifth, executions have so far occurred in fewer than one in 10 cases when a death penalty has been imposed. Thus, these costs will be borne in more than 10 cases for each case that ultimately results in an execution.

All of these steps cost money. It is critical that the legislature recognize that in virtually every case, these expenses will be borne by the taxpayers. The prosecution, judicial, and prison costs, of course, are borne by the taxpayers. As well, the defense costs in most cases must be paid by the State, since most criminal defendants in death penalty prosecutions are indigent and

⁶Id. at 75-84. See also The Spangenberg Group, A Caseload/Workload Formula for Florida's Office of Capital Collateral Representative (Sponsored by ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Info. Prog.) (Feb. 1987); The Spangenberg Group, Study of Representation in Capital Cases in Virginia (Final Report, Nov. 1988).

cannot afford counsel. Moreover, these costs have occurred even in States, such as North Carolina and Texas, that have been least concerned about protecting due process or fair procedures in capital cases. The costs incurred in northern states have been far greater.

Finally, in no study has there been any documented evidence of any savings produced by the death penalty. The argument made by some capital punishment supporters in 1987 that the presence of the penalty will increase the number of guilty pleas in non-capital cases is not documented by a single study. The other "savings" produced by the penalty, the savings produced by the State's not being required to incarcerate any individual executed, will occur only in a decade, and will, in any event, be entirely hypothetical. Our Department of Corrections will not request or spend any less money on housing or feeding its 6000 inmates because of the possibility that one inmate less may reside in a facility by reason of his execution.

III. SUMMARY OF OTHER STATE STUDIES

As noted previously, in 1987, the question of whether the death penalty was more expensive than a system of life imprisonment was somewhat controversial, and the estimate of the extent of the cost differential was necessarily tentative.⁷ In the ensuing seven years, the issue has been studied in academic reports, fiscal notes in State legislatures, and in newspaper and magazine series.

⁷See U.S. General Accounting Office, Limited Data Available on Costs of Death Sentences (Sept. 1989).

While the studies differ in their accounts of the magnitude of the increase that will occur if we move to a system of capital punishment, they are consistent.

The most important recent study was completed in North Carolina. The study is a comprehensive report which required several years of effort by the North Carolina Administrative Office of the Courts under a grant from the State Justice Institute.⁸ The report exhaustively analyzed data from 1991-92 and found that the average additional cost of a capital trial and sentencing was \$67,000.⁹ For appellate and post-conviction costs, the report found amounts of over \$200,000 for a fully-litigated death penalty case. The study thus found the additional cost of litigating a capital case to be over \$300,000 per case. The study then computed hypothetical "savings" of approximately \$160,000 resulting from reduced prison costs/inmate, and arrived at a total figure of \$163,459 of additional costs per capital case. Adding in cases that began as capital but in which the death penalty was not imposed, the study concluded the extra cost per death penalty judgment was over a quarter million dollars. Since fewer than 10% of the cases in which the death penalty is imposed result in executions, the cost per execution was calculated at over \$2 million. It should be noted that these figures occurred in a state that is ruthless in pursuing the death penalty and is has done

⁸Cook & Slawson, The costs of Processing Murder Cases in North Carolina (Sanford Institute of Public Policy, Duke University) (May 1993).

⁹Id. at 2, 59.

little in insuring the fairness of its proceedings.

The North Carolina findings have been supported, in broad outline, from at least three other states. In Florida, each execution has been calculated to cost the state \$3.2 million,¹⁰ and in Texas, a figure of 2.1 million has been cited. The report is also supported by a recent study in Maryland.¹¹

While these figures may seem high, they are dwarfed by the amounts of money spent in Northern and Western states which spend more effort to assure that the decision of who is to die is made fairly and accurately. For example, New Jersey, which has yet to execute a prisoner, spends \$16 million per year on capital punishment.¹²

Two neighboring states have also studied the question in connection with resumption of capital punishment. In Iowa, the legislature's fiscal director concluded that the cost for the State "for the first defendant" taken through the process would be approximately \$2 million for the State. The Iowa study projected trial costs of some \$400,000 per case, and appellate costs of close to \$1,000,000.¹³ In Wisconsin, the State did not project a total

¹⁰Drehle, Bottom Line: Life in Prison One-Sixth as Expensive, The Miami Herald, July 10, 1988, at 12A.

¹¹The Report of the Governor's Commission on the Death Penalty: An Analysis of Capital Punishment in Maryland: 1978 to 1993 (Nov. 1993).

¹²Benien, No Savings in Lives or Money with Death Penalty, The New York Times, Aug. 7, 1988.

¹³Fiscal Note, Senate File 384, State of Iowa, at 3 (April 9, 1991); Fiscal Note, House File 19, State of Iowa (March 4, 1993).

cost for the penalty. However, it did produce estimates of \$285,000 in defense costs (trial and appeals) per case, a yearly Department of Corrections Budget increase of \$500,000 to staff a death row, and a capital request of \$1.4 million from the Department to construct a death row.¹⁴

IV. AN ESTIMATE ON THE COST OF THE DEATH PENALTY IN KANSAS

As noted, the cost of the penalty will turn, to some degree, on the number of cases actually filed. Obviously, the more cases pursued, the more the cost, the fewer cases the lower the cost (and the lower the likelihood that the State would actually see a resumption of executions). Under HB 2587, every first degree murder case is a potential capital case prior to arraignment. Under SB 473, only cases charged as premeditated murder can be brought as death penalty cases. Last year, there were 59 murder cases paid for by the Board of Indigent Defense Services, 37 of which were premeditated murder cases. Thus, under the House Bill a number close to 60 would be the maximum number of cases possible; under the Senate Bill, the number would be 37. The actual numbers of death penalty prosecutions under either of these bills is far more difficult to determine. In Oklahoma, estimates are that approximately 50% of first-degree murder cases were charged as death penalty cases in the first few years after the penalty was

¹⁴Bob Lang, Legislative Fiscal Bureau, State of Wisconsin, Fiscal Note, October 13, 1993.

reintroduced.¹⁵ If we have a similar experience, and half of the cases now charged as murder cases are charged as death penalty cases, we could expect from 18 to 30 prosecutions, depending on which bill passes. If our prosecutors are less aggressive, and only one eligible case in five is charged as a death penalty case, the numbers could range from 7 to 12, depending on the bill.

I do not believe there is any way to predict with precision the number of cases per year that prosecutors will choose to bring as death penalty cases. My guess is that, given the public revulsion with violent crime that is spurring support of the death penalty, there will be far more pressure on prosecutors to charge the penalty than there currently is on them to charge the "Hard 40" life sentence. I believe, therefore, that we will experience more death penalty prosecutions than we currently experience "Hard 40" prosecutions, but that we will have fewer cases than the total number of murder prosecutions.

A. Trial Costs

The Board of Indigent Defense Services has produced per case estimates of defense costs. Including attorney time and expert costs, the Public Defender estimates per-case defense costs of approximately \$100,000 per case, an increase per case of over \$85,000. The estimate from the Legislative Research Department is almost the same--\$91,370. The defender's estimated increase in attorney hours and expert costs assumes that a capital trial will

¹⁵Telephone interview with Robert Ravitz, Executive Director, Public Defender of Oklahoma County, Oklahoma, January 24, 1994.

be approximately four times as long as a non-capital murder prosecution, and that attorney compensation rates will be required to be higher.

The Board of Indigent Defense Services figures are consistent with other recent estimates of defense costs. For example, Iowa recently considered death penalty legislation. The fiscal note in that State predicts actual costs of \$165,000 per case, and additional costs of over \$120,000 per case for defense services at trial.¹⁶ In Wisconsin, the Office of the Public Defender estimated trial costs of \$134,000 per case when that office submitted a fiscal note concerning death penalty legislation considered in that case. The six-figure amounts for defense trial expenses are consistent with other figures that have been reported for Northern death penalty states.¹⁷

Even states that have been ruthless about implementing the death penalty and have done everything possible to reduce defense costs have incurred substantial additional costs in paying for death penalty cases. North Carolina's extensive study reported defense costs of approximately \$40,000 per trial engaged in by the public defender's office, an increase of close to \$30,000 for defense costs at trial in capital cases.¹⁸ The figures are also

¹⁶Iowa Legislature, House File 19, Fiscal Note (Dennis Prouty, Fiscal Director) (March 4, 1993).

¹⁷Even as long as ten years ago, New Jersey budgeted \$100,000 per case for defense costs for each capital case. Telephone interview with Tom Smith, Assistant Public Defender, Trenton, N.J. (Jan. 13, 1986).

¹⁸See Cook and Slawson, supra note 2, at 67-68.

comparable to those reported in a recent Maryland study. Thus, even if the State chooses to fund defense services in the most economical means possible, through a new public defender's office, it must expect additional defense expenses per case of tens of thousands of dollars.

B. Prosecution Costs

Since prosecution costs are borne locally, it is more difficult to construct precise estimates on such costs. However, anecdotal evidence suggests they will be substantial. Just as the defense must file more pretrial motions, so must the prosecution. The prosecutor, like the defense attorney, must prepare for and present a trial that is several times as long as the typical trial. Although the State now spends far more money on prosecution than on indigent defense costs, the operating assumption in recent fiscal notes is that the increase in costs for the prosecution will be similar to that for the defense. Thus, it should be anticipated that localities may spend an additional \$40,000 to \$100,000 per case for each capital case brought. Our estimate from the Legislative Research Department of additional prosecution expenses of \$51,242 is in this range.

In other states, these additional costs have produced severe burdens on local governments. Sierra County California authorities were required to cut police services in 1988 in order to fund death penalty prosecutions. The County Auditor said that if death

penalty expenses kept piling up the county would soon be broke.¹⁹ In Mississippi, two counties recently conducted a border battle to avoid responsibility for a capital murder trial. Facing a \$100,000 trial, each county wanted the other to be the venue for prosecution. The losing county is now determining how to raise taxes to pay for the prosecution.²⁰

C. Judicial Costs

Death penalty cases also result in increased judicial costs. There are at least three kinds of additional costs that may be incurred: jury costs, security costs, and the cost of additional judges, if such are needed. The juror costs result from the additional time involve in selecting a jury, the disproportionate time spent in prosecuting a capital case, the additional time spent in the sentencing, and the larger panels typically required for voir dire of jurors. While this cost has not recently been measured, in 1987, the Legislative Research Service predicted an increase of \$729,750 per year in increased juror costs. That figure was based upon a higher number of trials than I expect we will experience and undoubtedly can be revised downward if we have fewer trials. However, for each trial, there will be several thousand dollars of additional expenses.

In addition, there will surely be additional costs for

¹⁹Magagnini, Sierra County Robs Police to Pay Lawyers, The Sacramento Bee, March 28, 1988.

²⁰Maxwell Murder Trial May Up Kemper Taxes, Meridian (Miss.) Star, July 21, 1992; see Death Penalty Information Center, Millions Misspent: What Politicians Don't Say About the High Cost of the Death Penalty (Wash. D.C. 1992).

security borne by the counties. The costs of security have occasionally been difficult for rural counties even in non-capital litigation. For capital cases, they will increase dramatically.

Finally, the increase in trial time will eventually require increased judicial resources. Whether the "cost" is borne by all of us in reduced access to the justice system, because of the press of capital litigation, or by expenses of hiring new judges, costs there will be. The recent study in North Carolina found courtroom costs to amount to 32% of total costs for death penalty prosecutions.²¹

D. Total Trial Costs

As I have said before, the total added costs per year at the trial stage will turn on the number of cases. However, it would be a mistake to believe it is possible to litigate these cases at trial for less than an additional \$100,000 to \$200,000 per case. The Legislative Research Department's estimate was \$145,592. The recent North Carolina study posited additional expenses of \$67,402 for each capital trial going to the sentencing jury, and \$185,428 for each death sentence imposed.²²

E. Appellate Defense Costs

The Appellate Defender Office has prepared estimates for appeals expenses in Death Penalty Cases. The office uses an estimate of seven possible appeals per year. The estimate also attempts to account for some post-conviction costs. The Defender

²¹Cook and Slawson, supra note 2, at 66.

²²Id. at 69.

Office prediction is for total additional expenses of up to \$1,669,000 per year, or a figure of close to \$240,00 per case. If appeals were to be prepared by a new appellate office rather than by appointing counsel, the office would require the hiring of four attorneys, one secretary and a paralegal. While the ADO has not calculated the cost of this new office, it would obviously run hundreds of thousands of dollars a year in personnel costs alone.

These figures are generally consistent with or even below figures from some neighboring states. In Wisconsin, the public defender office estimated a cost of \$151,900 per case for appeals.²³ In Iowa, the cost was put at up to \$500,000 for the defense.²⁴ The recently-completed study in North Carolina, one of the least generous states in the country in funding appellate and post-conviction remedies, reported per case appellate and post conviction costs of \$216,387 and \$293,393 in two cases studied.²⁵ In Ohio, which has yet to execute a prisoner, the State spends 3.5 million dollars a year to fund a Capital Litigation Unit with some 45 employees, whose primary responsibility is to litigate appeals and state post-conviction proceedings.²⁶ In Oklahoma, the state

²³Legislative Fiscal Bureau, State of Wisconsin, Joint Committee on Finance, Fiscal Note at 12 (Copy attached).

²⁴Dennis Prouty, Fiscal Director, State of Iowa, Fiscal Note, Senate Bill 384 (April 10, 1991), at 16.

²⁵These figures include both defense, prosecution and judicial costs, as far as I can determine. See Cook & Slawson, supra note 2, at 82-83.

²⁶National Legal Aid and Defender Association, Cornerstone Vol. 15, No. 3 (Fall, 1993) at 19 (Job Announcement for Director of Unit).

has hired more attorneys to litigate capital appeals and post-conviction cases than to litigate all other criminal appeals.²⁷

As a result of the lack of resources in Oklahoma to litigate non-capital cases, Oklahoma criminal defendants have secured writs of habeas corpus against the delays in processing their appeals.

F. Prosecution Appellate Costs

As with trial level costs, there is no reason to believe that the increases in prosecution cost for appeals will be any less than the increase for the defense. Thus, the State should be prepared to spend hundred of thousands of dollars more per year for appellate and post-conviction costs if the death penalty is implemented and if it is charged more than a couple of times per year. Our Legislative Research Department's estimate is for additional prosecution costs for appeals of \$181,100 per case.

G. Prison Costs

Last, but not least, the state may be required to fund increased costs to set up and staff a death row. In 1987, the State Department of Corrections estimated that the cost of renovation and staffing of a death row, which would commence a year or two after the capital punishment legislation became effective, would be \$922,682 per year.²⁸ While here again, the more limited death penalty legislation introduced may permit a scaling-down of

²⁷Telephone interview with Randy Bauman, Chief Attorney, Capital Post Conviction Division, Oklahoma Appellate Defender & Acting Director, Death Penalty Resource Center, Norman, Oklahoma, January 24, 1994.

²⁸Kansas Fiscal Note, at 7.

the Department's plans, there is every reason to believe the Department will find it necessary to house at least a few individuals in a death row over a period of time. Since the cost of cell construction in this country is from \$75,000 to 100,000 per bed, even a small death row should be expected to cost in the hundreds of thousands of dollars to build and maintain.

H. Summary

In sum, a review of this information should demonstrate that, for as few as a dozen capital prosecutions per year, the State should expect to spend several million dollars in additional defense, prosecution, judicial, and prison costs. Those of you who are inclined to support death penalty legislation must understand that the law will not be free. You will have decided to spend scarce resources on a penalty that has never been shown to be effective in reducing crime. And unless you increase taxes to pay for this legislation, your decision to support capital punishment will surely drain resources from spending on programs that are effective in combatting crime.

#14
Calhoun

REMARKS TO THE SENATE JUDICIAL AFFAIRS COMMITTEE

February 18, 1994

Dear Senators:

Observe the words of John Dixon, Chief Justice Retired
of the Louisiana Supreme Court:

"The people have a constitutional
right to the death penalty and
we will do our best to make it
work rationally. But, you can see
what it is doing. Capital punishment
is destroying the system."

Thanks for the opportunity to appear and express my
views on certain aspects of the subject involving death penalty
legislation pending before you. I do not propose in my remarks
to address the moral or ethical issues involved in such
legislation. I do not propose to address issues relating to
cause and effect or consequences on criminal activity relating
to the death penalty. My comments are solely directed at the
issue of whether or not enacting the death penalty is the
wisest use of the money resources the State has available,
and the consequences that may affect each one of us if concerns
about adequate funding or implementation of a death penalty
bill are not realized and met. I am informed that others will
address the issue of the cost of such legislation in terms of
dollars for prosecution and defense functions. I think those
consequences will be terribly significant, and terribly
expensive. Estimates range in the various studies that I have
seen of between \$500,000 and \$1,500,000 for each death penalty
prosecution. If the potential costs in terms of dollars and
cents for the prosecution and defense are added up, it is a

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potentially tremendous outlay of funds. Quite frankly, if the funds are not allocated or a commitment to allocate the funds is not made at the outset, the legislation does not accomplish any of its desired objectives.

I want to take a few moments of your time to talk about an often overlooked effect of legislation of this sort, the impact on our justice system. And, I do not mean impact just on the criminal justice system, I mean impact on the justice system, that system that affects each one of us sooner or later in our lives. That system that involves civil litigation, probate litigation, litigation concerning children and protecting their rights as well as traditional criminal litigation.

Let me introduce myself. I am a private attorney. I practice in Lawrence, Kansas, in a small law firm of four attorneys. I have been practicing in Lawrence and Douglas County for about 22 years, in a typical small town firm. We have three attorneys in our office who are and have been members of the assigned counsel panel for the defense of indigent felony defendants, and two attorneys on the same type of panel for misdemeanor defendants. I have tried murder cases. I have tried murder cases that probably would have been capital cases had there been such a law in effect at the time they were tried.

I was an Assistant Attorney General for Attorney Generals Londerholm, Frizell and Miller, two Republicans and one Democrat, for about 4-1/2 years. During that time, I was chief of the litigation division of the Attorney General's office for

four years, and at the same time, chief of the criminal division for about 3/4 year. Included in my responsibilities was representing the interests of the State of Kansas in any case in which an inmate of a State of Kansas correctional facility was trying to claim that he had been convicted in violation of the Constitution of the United States. Included in my responsibilities was representing the State of Kansas at the trial court level in direct prosecutions and/or attacks on the validity of sentences. I handled those cases in state district courts, the state Supreme Court, federal District Court, 10th Circuit Court of Appeals, and the Supreme Court of the United States. During the time that I was in that office, I participated in developing the response of the state court system to the onset of federal habeas cases and collateral attacks on convictions following a number of United States Supreme Court decisions applying the federal constitution to state court cases.

After I started in private practice, I became involved in work with the judicial branch of government as examiner for the Commission on Judicial Qualifications, the agency which processes complaints against judges. I have been engaged in that capacity for 19 years. As a result of that, I believe have become acquainted with about every aspect of the judicial system in the State of Kansas. I want you to know that the opinions I express here today are mine and mine alone, and made as an individual citizen of the State of Kansas, and only in that respect.

I believe that in the past 20 years, the quality of the judicial branch of government in the State of Kansas has improved tremendously. I believe, based on my experience listening to reports of the judicial systems of some of our sister states, that ours must rank near the top in quality. For the dollars that we spend on our judicial system, we get more than most. I believe that by virtue of my experience, I know the stresses and strains that have been placed upon our judicial system in the last few years, and I believe that there will be additional, and perhaps very serious, even catastrophic stresses put on the system unless the impact of legislation like the death penalty on the judicial system is seriously considered and adjustments made.

THE JUDICIAL SYSTEM:

Let me start off with a few statistics concerning the judicial system. When I speak of the judicial system, I speak of all the business that our courts handle, not just criminal cases. All of us are likely to have some business in the court system at one time or another. That system involves processing criminal cases, civil cases, limited civil cases, small claims cases, traffic cases, probate cases, adoption cases, juvenile cases, child in need of care cases, and even more categories.

1. Total criminal/civil filings statewide increased 10% between fiscal year 1990 and fiscal year 1993, the fiscal year which ended June 30, 1993.

2. The total number of felony prosecutions increased 9% between the fiscal year 1990 and fiscal year 1993.

3. The total amount of money available in the judicial branch budget for fiscal year 1990 to fiscal year 1992 declined -1%. If we add fiscal year 1993, the total available in the judicial budget from fiscal year 1990 to fiscal year 1993 was increased 4%. The number of judges did not change in this period.

4. In 1990, we had 218 trial judges, including 148 district court judges. In 1993, we had 218 trial judges, including 149 district court judges. The last time previously there was an increase in the number of district court judges was fiscal year 1988. Obviously, judges are a lot busier.

6. In Douglas County, my home county, we had an increase of 29% in new filings in fiscal year 1989 to fiscal year 1993, and no new judicial resources. We had lawyers serving without pay (none is available) in small claims and state traffic cases.

7. 2 of the 31 judicial districts in the State have law clerk positions available on a half-time basis at the trial judge level. Not every trial judge in the State of Kansas has a secretary or administrative assistant position. Not every judicial district has a complete law library. Not every judge who is required to make transcripts of proceedings has his or her own court reporter. Not all trial judges have their own courtrooms or offices.

Work on the appellate level faces the same kind of problems in terms of workload.

1. In 1975, it was necessary to create a Court of Appeals. In 1987, the number of judges on the Court of Appeals had to be increased. The number of appellate judges, 10 for the Court of Appeals and 7 for the Supreme Court, has remained constant since 1987.

2. Appeal case filings between fiscal year 1990 and fiscal year 1993 increased 12%.

3. Filings in criminal cases doubled in last two months over the previous year's average.

These figures all demonstrate the workload of the judicial branch of government is regularly increasing. Some of the increases have been dramatic; others steady. The one constant, however, is that the business of the court system continues to increase but the resources available to handle the workload do not increase correspondingly.

There are additional hidden factors that have to be considered on the subject of workload. In the last few years, the responsibility and time it takes a judge to adjudicate one proceeding has increased tremendously. Last fall, I was shocked to discover that there had not been an impact study of the effect of sentencing guidelines on the time expenditures of the trial courts, or for that matter, for the appellate courts. The attorneys with whom I have spoken, as well as the experience of the first seven months of sentencing guidelines would suggest to me that we will have a tremendous impact for at least

two years or so and then we will continue to have an impact, but it will not be as great. From the experience we have had locally, I would say that in our district, we have approximately 50 new cases, although they are not tabulated as new cases, concerning sentencing guideline issues that do not even involve utilizing the guidelines in a sentencing case if the crime was committed after July 1, 1993. In other words, we are talking about retroactivity questions concerning sentences of current inmates. When we get to significant application of the guidelines themselves in criminal cases, we have had a new adjudicative portion of a proceeding introduced. It is quite conceivable and many times likely that there will be an evidentiary hearing on the criminal history of the defendant. There will be, I believe, a significant impact to be felt because there will be more criminal jury trials because of sentencing guidelines. Figures available suggest maybe a 20% increase in jury trials. Every time there is a jury trial in a normal criminal case, a judge has less time available to handle other judicial duties. Every year, the legislature seems to create new things for our trial judges to do. That is not going to stop this year with or without the death penalty.

CAPITAL CASES:

What impact are death penalty cases going to have on the court system? I am not now talking about the tremendous expense for defense and prosecution to be involved in such cases. Now I am simply talking about the time that it is going to take the court system to handle such cases that a judge or

the system will have to take away from performing other duties. And let me explain to you how the system must work. Criminal cases, because of speedy trial rights of both the federal and state constitution, get priority in consideration. There are time limits within which such cases must be tried.

Next after the most serious cases come the remainder of criminal cases. Subsequent to that, courts take up other business that they have including all the civil action, domestic actions, probate actions, juvenile actions, and others. By the nature of things, therefore, if the system gets bogged down with the first group of cases, serious criminal cases, it is not the criminal prosecutions that suffer the most, it is everything else that happens in court. Those are the things that affect all of us.

Let me tell you some things that we know from experience over the country about capital cases. First, they are extremely complex. Different things are involved in capital cases, especially the penalty phase, than are found in other criminal cases, so we have a whole new body of law. In many of the cases, we find federal courts, including United States Supreme Court, deciding those cases 5 to 4. That means even the justices who spend a lot of time working on these issues are not positive about the answers. As Professor Gottlieb observed in his article in Volume 37, Number 3 of the University of Kansas Law Review:

"In a long and complex series of cases, the Court has struck down death sentences when instructions on aggravating circumstances have been too vague, when instructions on mitigating circumstances have not properly been given, when arguments have minimized the jury's responsibilities in fixing the death penalty and when excessive attention has been focused upon the status of the victim. All of these requirements, unknown to criminal litigation outside of the death penalty, are designed to assure that the selection of the small class of first degree murderers that actually receive capital punishment is made in an accurate manner. This heightened scrutiny is justified as the Court has noted on many occasions because as a punishment, death is 'different'". Gottlieb, *"The Death Penalty In the Legislature: Some Thoughts About Money, Myth and Morality"*, 37 Kan. L. Rev. 443, 447.

Again, in describing the attitude of the Court toward these cases:

"From the point of view of the defendant it [death as a form of punishment] is different in both its severity and its finality. From the point of view of society, the action of the sovereign of taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

Suffice it to say that the law issues, as well as the factual issues, in capital cases are extremely complicated.

That means not only are the attorneys busy, but the courts are extremely busy.

From an article attacking the death penalty, "*Toward a Renewed Strategy 20 Years After Furman*", Columbia Human Rights Law Review, Michael D. Hintze, at page 18:

"One private court-appointed attorney stated: 'I have been involved both as plaintiff's counsel and defense counsel, in major protracted litigation of several different types No case I have every handled compared in complexity with my Florida death penalty case. The death penalty jurisprudence is unintelligible In short, there is nothing more difficult, more timeconsuming, more expensive, and more emotionally exhausting than handling a death penalty case after a conviction.'"

Capital cases affect the attitude of the attorneys who are handling them. Again, from Professor Gottlieb:

"In addition to changing the jurisprudence of a criminal trial, the possibility of a death penalty also has a profound impact on the conduct of attorneys. As Justice Marshall stated more than a decade ago 'Defense counsel will reasonably exhaust every possible means to save his client from the execution' Lawyers help zealously to represent their clients in every case. The recognition that a case literally involves life and death, however, produces extraordinary effort." Gottlieb, "*The Death Penalty In the Legislature: Some Thoughts About Money, Myth and Morality*", 37 Kan. L. Rev. 443, 447.

In a study prepared by the New York Defenders Association for the New York State Senate entitled "*Capital*"

Losses; the Price of the Death Penalty for New York State",
the authors observed:

"Pre-trial motions play an important role in most criminal cases. However, the death penalty trial is strikingly different than other felony trials because of the length of the procedural stage and its overall importance to the ultimate objective - preventing the imposition of the sanction of death. Extensive pre-trial motions play, therefore, a crucial role in every death penalty case . . . The usual number of pre-trial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions. Many pre-trial motions will relate solely to the unique aspects of the defendant's underlying criminal case. Others will be specifically a function of there being a death penalty statute in existence." p. 12.

The 1986 Report to the Kansas Board of Indigent Defense Services by the Kansas Death Study Committee makes the same observation. Report of June 3, 1986, p. 3.

Again, from page 20, starting at page 23 of the Columbia Human Rights Law Review, Michael D. Hintze stated:

"Closely related to the higher cost of the death penalty, is the inordinate amount of time and other judicial resources that are consumed by death penalty cases. Because of the built-in incentives to exhaust every possible avenue of appeal and to employ tactics of delay, combined with the complexity of the doctrine and the greater procedural safeguards surrounding the death penalty, the judicial proceedings in death penalty cases take an extremely long time."

We know there are a lot of delays, extended delays, in death penalty cases caused by the extensive reviews.

Associate Justice Louis Powell of the Supreme Court of the United States at the 11th Circuit Judicial Conference stated in 1983:

"Perpetual disrespect for the finality of convictions [brought on by these delays] disparages the entire criminal justice system.

A county prosecutor in Florida recently stated that:

"[W]e've got to do something about capital punishment. Clean it up or abolish it because it is eroding confidence in our entire justice system when there is no punishment."

And, the author concludes by saying this:

"A court, confronted with the reality that it cannot maintain the current system and that it cannot retreat to the past, may well come to the conclusion that abolition is the only reasonable solution."

Recent information available in a study of the capital system in North Carolina and from other sources indicates that we can reasonably expect the length of a capital trial to be four times that of the next most serious criminal trial, solely because the death penalty is involved. I tried a first degree murder case in 1989 which probably would have been charged as a capital offense if that were possible. The trial itself lasted two weeks. Compared to a death case, it was relatively simple. Using those projections, that means a two month trial.

I do not tell you all of these things about the trial of a capital case because I want you to think it is hard work.

I want to convince you by this discussion to agree with my conclusion that a capital trial is a tremendously significant use of court time in our judicial system. I want you to think that there is some validity in the conclusion that I urge that for every capital case that is tried, a minimum of six months to a maximum of nine months or perhaps more of the time of one judge is going to be taken and utilized almost exclusively for that case. That means that for every capital case, a judge is taken out of the regular service of his judicial duties for a time period that probably is at least six months. Now, that does not necessarily mean he or she cannot do anything else, but it does mean that anything lengthy cannot be done; that nothing can be scheduled on a regular basis; that evidentiary hearings in any kind of case probably can be heard. Remember, I am just talking about the trial stage.

While we can add up the dollars and cents in cost of defense and prosecution, and that figure is a relatively astronomical figure, you and I can look at that figure and say, well that is dollars we will have to spend to arrive at an end, and while we do not like spending the money, we may conclude that it is a justified expense, and go on about our business. The impact of the cost does not affect each one of us separately, except as we pay taxes. Personally, I think that is a pretty big consequence. However, when we start tying up court time in protracted litigation like the death penalty cases, a by-product is a result that affects every one of us directly if we have any business that has to go before

the court. If we have automobile accidents, medical malpractice cases, traffic cases, if we are robbed, if our house is burgled, if we or our children have divorces, if we have child custody problems, if we have all of those other problems that the court systems must address every day of every year. In those cases, because we may not have a judge available, each one of us is affected. I believe if that happens then the concept of justice for everyone is severely impacted.

DOUGLAS COUNTY:

I know what would happen in Douglas County in such a situation. We have three judges who regularly try criminal cases. They set criminal cases every single week of the year except when they are allowed a vacation. Today, because they are so busy and because their dockets are so full, if you want to put on evidence in a child support case, you may have to wait as long as two months. Today, if you want to have any kind of an evidentiary hearing on any kind of issue, you are probably looking at a two-month delay between the time you make the request and the time it is heard. That is extraordinary for us. Take one of those three judges out of service for six months for all practical purposes and see what happens to your sytem then.

I inquired of Administrative Judge Michael J. Malone his impression of the effect of a capital case in Douglas County. His letter to me is enclosed in the documents I have submitted with my testimony. But in part, he stated:

"The four judges who serve Douglas County handle the largest caseload per judge of any non-urban county in the state, and we have a larger caseload per judge than two of the four urban counties. However, since we have only four judges, there is a 25% reduction in the number of judges to hear other cases whenever one of our judges is hearing a jury trial.

"In 1991 we heard 34 jury trials; in 1992, 34; and last year we heard 60 jury trials that lasted a total of 123 days."

The average jury trial therefore was two days. Judge Malone suggests that the average length of a capital jury trial is four weeks. And, he concludes:

"In other words we are already too busy, understaffed, and underfunded to operate as we should like. One capital case would have a severe impact on our ability to do our job. Of course, we'd do our duties as best we could, but I'm afraid the other 99% of our business would be seriously and adversely impacted."

I personally think Judge Malone is underestimating the time of a capital jury case. At least the murder trial in which I participated would have been a two-month capital case. And, if you consider all of the necessary pre-trial proceedings, you are talking about judge time significantly in excess of that which is spent in a normal case, which is why I arrive at a conclusion of six to nine months of judge time. One such capital case would reduce Douglas County's available judge time from 12-1/2% to 18-3/4%. Judge Malone comments that in 1993, we had five likely capital cases. Prospects for the rest of the business of our justice system would look bleak.

WESTERN KANSAS:

Believe it or not, those of you who live in western Kansas, if you have a capital case will be conceivably impacted the most. There are 31 judicial districts in the state. In 9 of them, mostly in western Kansas, one or two district judges serve a multi-county district. In the following counties, two judges serve multi-country districts: 2nd District (Jackson, Jefferson, Pottawatomie, Wakarusa); 15th District (Cheyenne, Logan, Rawlins, Sheridan, Sherman, Thomas, and Wallace); 16th District (Clark, Comanche, Ford, Gray, Kiowa, Meade); 22nd District (Brown, Doniphan, Marshall, Nemaha); 23rd District (Ellis, Gove, Rooks, and Trego); 24th District (Edwards, Hodgeman, Lane, Ness, Pawnee and Rush); 26th District (Grant, Haskell, Morton, Seward, Stanton, Stevens). In two districts, one district judge serves a multi-county district. 12th District (Cloud, Jewell, Lincoln, Mitchell, Republic and Washington); 17th District (Decatur, Graham, Norton, Osborne, Phillips and Smith). What happens to your system if one of those judges is taken out of action for six months or more. Are there resources available to cover his or her regular docket? Probably not. We have not found a whole lot of relief available in Douglas County. Most of the judges are extremely busy.

The impact of these cases on judicial systems in other states has been noted. A series of articles in the Miami Herald over the years have suggested problems in the State of Florida created by capital cases. The Florida

Supreme Court spends about half its time on death penalty cases. An article in the Sacramento newspaper September 5, 1993, states:

"There is another cost. Death penalty cases now consume 50% of the state Supreme Court's [California] time. As a result, there is an enormous number of unresolved legal issues affecting civil law that the court no longer has time to decide. So, in addition to wasting a billion dollars, the death penalty also prevents the courts from deciding civil disputes in which more billions of dollars are at stake."

My message to you is simple. Our judicial system is today straining to be able to effectively and efficiently take care of its business. Business that you and your co-legislators seem to increase every single time you meet. In the last two years, you have made one extremely time-consuming addition to the work of the courts and that was with sentencing guidelines. Capital punishment is another, even more significant, factor affecting the way the system runs. Before you seriously consider adopting a proposal that will have the impact that this proposal will have, please thoroughly study the effects that you are going to reek with such legislation. I do not say this because I am concerned about the individual defendants who may be affected by the legislation, but because as a citizen of this state and as a person who represents clients who have rights that they wish to pursue in our court system, I am concerned that all of us will be able to continue to have our day in court.

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Let's look at a comparative approach to the time and cost features of capital punishment.

Two Kansas legislative reports, one in 1987 and one in 1994, suggest that the trial and initial appeal costs range from \$600,000 to \$700,000 per case. Based on processed claims and public defender records, the Board of Indigents' Defense Services projected approximately 60 capital cases were possible under House Bill 2578 in fiscal year 1993, and approximately 38 under Senate Bill 473. The 1994 legislative research projection was an approximate 4.267 million per execution cost under the House bill and an approximate 2.733 under the Senate bill. I personally believe those estimates of the trial and appeal times are extremely low. They also do not include post-trial proceedings.

In the fiscal year 1995 budget request of the judicial branch of government, a request was made for an additional judge for Douglas County (there were a total of four additional judge positions requested). That one judge for Douglas County was budgeted with supporting staff at a cost of \$149,230. The reviewing subcommittee in the House and the Ways and Means Committee itself did not support funding for any additional judge positions. It is difficult to believe that there are funds available to commit our judiciary to hear the five potential capital cases in 1993 at a projected cost of approximately 3 million dollars, but there is not enough funding available to establish in the County one additional judge, fully staffed, whose

need has already arrived without capital punishment, for \$149,000. In my book, that is not a wise expenditure of dollars.

Sacrificing the other components of the justice system to capital case expenditures does not make sense. There appears to be a consensus that we need more police officers to either address the new needs of crime prevention or crime investigation or to shore-up the battle against the same old problems that have been bothering us for years. I am sure you as legislators every year see requests from prosecution offices and from investigation agencies for more funding to perform existing duties. We have existing needs for prison space. We have existing needs to improve the situation of our correctional officers. Specifically because of sentencing guidelines, we need increased resources in the area of court services officers. We currently need additional funding to provide defense services and, it is fairly clear that we currently need additional resources for the judicial branch. How can we commit millions of dollars in an attempt to execute five or ten persons a year when these needs are already present?

Two years ago, you embarked on the adoption of a sentencing guidelines method of disposing of criminal cases. That has and will continue to take time out of existing judicial resources. This year, consider the impact of legislation in the crime area that you propose to enact, adding additional crimes to the list of those things that will be considered by prosecutors, defense lawyers, and the courts; and adding additional cases to the criminal system by changing the

rules of the game involving juveniles who commit serious crimes. All of those proposed actions are going to cost money, perhaps millions of dollars, and are going to take the time and resources of the judicial system. I would submit that if the State's coffers are full of extra money, take a shot at capital punishment and see if it will do anything, even though statistics indicate it does not. On the other hand, if we have a limited number of dollars available to address crime problems, spend it where it will do the most good.

Does it do any good to have capital punishment? If we are interested in revenge, maybe we feel better. If we are interested in safety, it is debatable whether we are any better off. But, at least we know for sure that we have not spent any of those dollars for capital punishment in an attempt to reduce the homicide rate because that does not happen. Russell Millen, former United States Attorney in Missouri accumulated these statistics. The murder rate in Missouri per 100,000 inhabitants is 10.5. In Louisiana, it is 17.4. In Texas, it is 12.7. In Florida, it is 9. In Georgia and Alabama, it is 11. These are all death penalty states. In Kansas, the murder rate is 6 per 100,000. The national average in states that do not have the death penalty is 4.8 per 100,000.

In the event anyone wants to ask me what we should do to attack the crime problem, I am not sure I have a good answer. I can tell you from my experience, I have observed two things. One, more of our citizens every year do not believe that there

are any consequences from violating the law. Two, every year more of our citizens believe they have no future regardless of what they do. Why does it make any difference if they break the law, even if they are killed so doing. As a lawyer, the only one of those I can speak to is the first. If we had more resources that we can devote towards the administration of justice, then I say by golly, devote it now. Give the courts, the prosecutors, and the defense lawyers the resources they need to make the system work better and quicker because only if the system works as efficiently as possible so that there is speedy justice for the defendant, the victim, and the public, will the message get out that there are consequences for violating the law. I do not think there is anything else that is going to work concerning the first of those two problems. That is what I would urge you to consider.

I leave you with the words of the American Bar Association's study published August, 1992, at ii, 3:

"A justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding.

"The very notion of justice in the United States is threatened by a lack of adequate resources to operate the very system which has protected our rights for more than two centuries."

I would submit that spending millions of dollars to get those things we want out of that system, and to make our streets safer, is not going to be accomplished by spending dollars on a capital punishment system. If that much money is there to be spent, spend it on improving the efficiency and swiftness of

justice so that punishment becomes a swift successor to the
commission of a crime.

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A P P E N D I X

Documents Presented by Edward G. Collister, Jr. to the Senate Judicial Affairs Committee February 18, 1994

1. Letter from Hon. Michael J. Malone, Administrative Judge, 7th Judicial District, dated February 17, 1994.
2. *"Innocence and the Death Penalty, Assessing the Danger of Mistaken Executions"*, Staff Report by the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, One Hundred Third Congress, First Session.
3. Letter to Editor from F. Russell Millin.
4. Newspaper article from "The Highlander", Highlands, North Carolina, dated June 30, 1993.
5. Newspaper article from "The Sacramento Bee", Sacramento, California, dated September 5, 1993.
6. *"The Costliest Punishment - A Corrections Administrator Contemplates the Death Penalty"*, by Paul W. Keve.
7. *"The Cost of Killing Criminals"*, by Alan F. Blakley.
8. *"Capital Punishment or Life Imprisonment? Some Cost Considerations"*, by Robert L. Spangenberg and Elizabeth R. Walsh.
9. *"Attacking the Death Penalty: Toward A Renewed Strategy Twenty Years After Furman"*, Columbia University School of Law, Summer, 1993, by Michael D. Hintze.
10. *"Cost Considerations of Implementing the Death Penalty"*, Memorandum from the Kansas Legislative Research Department, January 25, 1994.
11. *"Costs of Implementing the Death Penalty"*, Memorandum from the Kansas Legislative Research Department, February 11, 1987.
12. Judicial Branch Budget Overview.
13. Subcommittee Report of Judicial Branch Budget.

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Testimony before the Senate Judiciary Committee
February 18, 1994
House Bill 2578 and Senate Bill 473

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before your committee today. My name is Lloyd Moore, and I am here on behalf of Bishop Fritz Mutti, Bishop of the Kansas Area for the United Methodist Church which is comprised of more than 180 thousand Kansans.

We appear in opposition to the reinstatement of the death penalty under any and all circumstances.

First and foremost, we believe the death penalty is contrary to God's will. The position of the United Methodist Church states that we support governmental measures designed to reduce and eliminate crime, consistent with respect for the basic freedom of persons. We reject all misuse of these necessary mechanisms, including their use for the purpose of persecuting or intimidating those whose race, appearance, lifestyle, economic condition, or beliefs differ from those in authority, and we reject all careless, callous, or discriminatory enforcement of law. We support measures designed to remove the social conditions that lead to crime and we encourage continued positive interaction between law enforcement officials and members of the community at large.

It is only through a shared responsibility of the community, the churches, the schools and government working together that such problems can be corrected. Our time and energy should be directed at finding ways we can all work together to save lives rather than destroy them.

We urge the creation of a genuine system created for the care and support of the victims of crime, and for rehabilitation that will restore, preserve, and nurture the humanity of the imprisoned.

As you are called upon to enter into the final stages of discernment on this issue, we urge you to vote "no".

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2-18-94
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WHY THE DEATH PENALTY IS UNJUSTIFIED

Submitted to:
The Senate Judiciary Committee

February 18, 1994

Senate Judiciary
2-18-94
Attached 16-1

Consider the term "premeditated murder": the planned taking of a human life that involves no self defense or other justifiable means. The very thought of this should sicken all of us, but we are actually here today to determine whether or not the state of Kansas should engage in such activities.

Capital punishment is unequivocally unjustified for a myriad of reasons. To begin, the death penalty is not a serious deterrent. History proves this point, and logical analysis supports the claim. Murder in the first degree involves premeditation and plans of coverup. A would be killer has already decided that he/she will not get caught, so no penalty can stop the crime. Crimes of passion that lead to the death of police officers involve emotional responses--which do not take penalties into account--by the offender.

Empirically, the death penalty has failed. When Great Britain and other Western European nations executed criminals, their violent crime rates actually increased. They learned from experience, and we should not repeat their error.

Florida and Texas have the two highest execution rates and interestingly, have severely high crime rates. Why? The death penalty devalues human life. If a premeditated murder can be justified by the state, the mindset of its citizens must be altered to accept this. Linear analysis thereafter shows why crime must increase in a pro-death state. When life loses its overall value, respect for others is completely lost. The only real reason to pass the death penalty would be some irrational desire to increase crime.

Life is the prerequisite for all other human activities. Life in prison with NO possibility of parole is definitely the best solution because it allows a criminal to pay his debt to society and at the same time allow a lifetime to correct the error the judicial system may have made in convicting him. Executing an innocent person is perhaps the greatest evil a state could perpetrate.

In summary, do we want to stoop down to the criminals level? The state of Kansas should not equate itself to the common thug by adopting draconian legislation in the spirit of "an eye for an eye". Let's take a stand and actually do what is right rather than what some people think feels good. Reject the death penalty for the sake of the future of our state.

Paul Helmut Kindling, MD
1220 Urish Road
Topeka, KS 66615

January 26, 1994

Senator Jerry Moran, Chairman,
Senate Judiciary Committee

Re: Senate Bill 473
Mr. Chairman and Members of the Committee:

My name is Paul Helmut Kindling. I have lived in Topeka since 1967. I am a heart surgeon. I was born in Germany and lived there during the time of the holocaust. I remember November 9, 1938, "Kristallnacht", the beginning of the holocaust. I was eight years old then and did not understand what it all meant until years later. As you may know the present German federal constitution, the "Basic Law", prohibits any state from passing a death penalty bill.

Yesterday you heard comments from supporters of this bill as well as of House Bill No. 2578. There can be no question that much of what was said was indeed quite powerful. It was powerful because it was emotional. I can understand the emotions involved because, as a surgeon, I have been there to comfort relatives of murder victims.

There can be no question that in large part the sentiment for bringing back the death penalty is related to the "revenge factor". One of the proponents yesterday specifically denied this. However, again and again we heard statements like: "Let the punishment fit the crime" ; "Murder is not pretty, so the punishment should not be pretty". To act on one's desire for revenge is really not very civilized. And we all know if we have revenge, it does not really help in the long run.

SB 473 Section 10 (a) provides: *"... the mode of carrying out a sentence of death in this state shall be by intravenous injection of a substance or substances in a quantity sufficient to cause death in a swift and humane manner."*

Putting the gallows into a bottle, the guillotine into a syringe, requiring a physician to prepare and attend the execution of a human being can never be "humane".

SB 473 Section 11 provides: *"...the punishment shall be inflicted.....in such a manner as to exclude the view of all persons except those permitted to be present as provided in K.S.A.22-4003..."*

Yesterday you heard supporters of this bill speak about the death penalty as a deterrence. Would an execution then be a better deterrent were it videotaped for public display? In the past executions were public. They were carried out in broad daylight. Now they are done mostly in the middle of the night and out of sight. Is it perhaps that as a society we want to deny that we are then also killers. Is it: "out of sight, out of mind?"

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SB 473 Section 13 (a) provides: "*A person sentenced to death may make an anatomical gift in the manner and for the purposes provided by the anatomical gift act. To the extent deemed practicable by the secretary of correction, in the discretion of the secretary, a person making such a gift shall be executed in such a manner that such a gift can be carried out.*"

As a heart surgeon, I know something about transplantation. Therefore, I can explain how this might work. Blood and tissue typing, Hepatitis, HIV, etc. testing can be done some time in advance. The possible recipients will be notified and prepared. The execution will be carried out in such a manner that the organs can be kept alive after the convict's death. That means the convict must be brain dead yet kept on life support until organs are retrieved. I could describe the scene in more detail but I believe I have made my point that this provision proves that this statute is flawed.

There appears to be a lot of public sentiment in favor of capital punishment. It is viewed as doing something about crime. You, however, know that the serious problem of increasing violence in this society is not addressed by this bill. The public will think that you have done something about crime when, or if, you pass this bill. I hope that you will not stop there but will address the root causes of crime of which we should all be ashamed: poverty, discrimination, and for most of those who are involved in crime the lack of the opportunity to fully participate in the promise of America.

If we could transport ourselves into the next century, ahead into the future, none of us would expect that we would need to take along capital punishment. We would all expect that there would be no execution in this state or this country. We would expect that our civilization had advanced so that there would be little crime and few prisons. Surely that is what we would want for our children. The resurrection of capital punishment, bringing back the death penalty will not help us get there. It will not help advance society.

You have been elected to represent your constituents. Passing this bill would maybe look good to your constituents. But you have also been elected to be the Leaders. And as leaders it is your responsibility to look below the surface, to leave emotion behind, to reason so as to identify the way to the future and not to go back to the past.

Thank you for giving me your attention. I will be glad to answer any questions.

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LWVK

LEAGUE OF WOMEN VOTERS OF KANSAS

Testimony before the Senate Judiciary Committee
February 18, 1994

Re: H.B. 2578 and S.B. 473

Chairman Moran and Members of the Committee:

I am Elaine Mann, Lobby Corps Co-Coordinator for the League of Women Voters of Kansas. I appreciate the opportunity to testify before the Committee on behalf of the League of Women Voters in opposition to the death penalty provisions of H.B. 2578 and S.B. 473.

As you may know, the League of Women Voters is a non-partisan political organization of informed citizens who take positions on a variety of state and national public policy issues after extensive study and consensus. The Kansas League has opposed a death penalty in Kansas since it studied sentencing alternatives in the state in 1981 and 1982.

We oppose a death penalty for the following reasons:

- "1. It is not a deterrent to others.
2. A guilty person may be acquitted because juries may be less willing to return a guilty verdict if the sentence is death.
3. An innocent person may be wrongfully convicted.
4. It is too costly to the state in terms of legal fees and court time." (The League of Women Voters of Kansas, Study and Action 1993-5, p.8)

If the death penalty were a deterrent to would-be murderers, then one might expect Texas, the leader among U.S. states in executions and in the number of prisoners on death row, to have one of the lowest murder rates. In fact, it has one of the highest, ranking fourth. Moreover, of the twenty most murder-prone states, all but two have the death penalty. On the other hand, looking at the ten states with the lowest murder rates, six do not have the death penalty. Kansas has a lower homicide rate than Oklahoma, Arkansas, and Missouri, all states which have executed prisoners. (1992 homicide statistics from the Uniform Crime Report)

Neither H.B. 2578 nor S.B. 473 will deter crime in Kansas. In fact, if its implementation takes scarce resources away from other, more effective anti-crime measures, the death penalty may have just the opposite result. In Texas, for example, it has been estimated that a death penalty case costs about three times the cost of

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imprisoning someone in a single cell at the highest security level for 40 years. Yet other Texas prisoners are being released early to avoid overcrowding, and inmates serve only an average of one-fifth their sentences. Here in Kansas, the cost per execution for cases under S.B. 473 has been estimated at over \$2.7 million by the Kansas Legislative Research Department and over \$4.2 million per execution under the original form of H.B. 2578 {presumably something less under the amended version}. This would be an annual expense once the death penalty has been fully implemented. These millions would better be spent doing something real about the crime problem. Court services, community corrections, Parents as Teachers, programs for at risk kids -- the list goes on. We can ill afford to spend the additional monies required to prosecute and defend a capital case when there are so many other pressing state and county needs, and certainly more cost effective approaches to protecting the public.

H.B. 2578 and S.B. 473 may result in innocent persons being condemned and executed. Since 1973 at least 48 people have been released from prison with significant evidence of their innocence after serving time on death row. In 43 of these cases, the defendant was subsequently acquitted, pardoned, or charges were dropped. (Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions, Staff Report by the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, October 21, 1993, p.2.) Common sense tells us that the more we restrict the appeals and post-conviction process in an effort to reduce costs and delay, the more we increase the likelihood of mistake.

Passage of H.B. 2578 and S.B. 473 may result in guilty persons being acquitted because of a jury's reluctance to return a sentence of death. This argument seems particularly applicable to the House version. While it is true that under this bill a jury must find an aggravating circumstance not outweighed by a mitigating circumstance before a death sentence is imposed in the second penalty phase of the case, it is also true that this law may apply in the case of some felony murders, where the defendant may not have pulled the trigger. This factor alone might distort a juror's view of the evidence.

Moreover, as presently drafted, H.B. 2578 renders Kansas' first degree murder statute virtually incomprehensible to ordinary citizens. Exactly what murders would be capital crimes under Section 2 (a) (4)(c) and (d)? Whatever the intentions of the proponents, the result seems extremely obscure.

For all these reasons, we believe that H.B. 2578 and S.B. 473 represent bad public policy for the state of Kansas and should not be enacted.

As previously stated, the League formulates its positions on issues after a process of study and consensus. We have heard much in the media about public support for capital punishment in the polls. Unfortunately, it is not at all clear that the public sentiment on this issue is an informed opinion. In fact, last year a bipartisan opinion poll conducted by the Greenberg/Lake and Tarrance Group polling firms showed that when voters are offered a variety of alternative sentences, including a life sentence with no parole for 25 years plus mandatory restitution, support for the death penalty dropped dramatically, to under 50%. (Sentencing for Life: Americans Embrace Alternatives to the Death Penalty, a Report by the Death Penalty Information Center, April 1993, p.1.) Right here in the State House, we witnessed the sharp drop in support for H.B. 2578 when a "death by imprisonment" alternative was offered. We are counting on you, our elected representatives, to make an informed choice, one that weighs all the alternatives, that considers all the consequences, including financial ones, to this state and the people in it. The League of Women Voters believes that the choice is clear. We urge you to reject a death penalty in either form and to choose a better public policy for Kansas.

Thank you for allowing me to speak to you today.

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TESTIMONY BEFORE THE KANSAS
SENATE JUDICIARY COMMITTEE
February 18, 1994

HB No. 2578--Am.
SB No. 473

DEATH PENALTY

by

E. Jay Greeno
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I appear before this committee at the request of and in my capacity as the Vice President of the Kansas Association of Criminal Defense Lawyers. I have practiced criminal defense law in Kansas for more than ten years, most of them spent representing the indigent accused, as a public defender. I have practiced primarily in Shawnee and Sedgwick Counties, although I have consulted with and advised attorneys throughout the state. I am here to give you a perspective from a practical point of view.

As an attorney who has represented individuals charged with the types of crimes addressed by these bills, I can assure the committee, that the perception of the public that this system is skewed in favor of the criminally accused is simply not true. The government spends millions more to prosecute it's citizens than to defend them. Judges who are responsible for the legal propriety of a criminally accused's trial, whom the public perceives as a vicious killer, may also have to rely on the same public's perception at election time to maintain their position. As the seriousness of the allegation against the accused increases, the standard for "proof beyond a reasonable doubt" decreases because jurors, as citizens, are afraid of the current dilemma our society faces with violent crime. Mistakes will be made. Some of them will be detected and rectified on appeal, some will not. We will eventually execute an innocent person.

Any process which involves the human factor can never be flawless. I have seen it, you have seen it, we all know it exists. Even with "super due process" mistakes will be made, innocent people will be convicted, condemned, this State will have perpetrated the same conduct that it seeks to punish.

No matter how hard you work, how much money you spend, how very, very carefully you craft the laws, you cannot legislate a perfect system. Certainly, I am not saying that we should just

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scrap the present criminal justice system and start over. However, until there is a death penalty, there is still an opportunity to correct the mistakes we will inevitably make. Execution will make out mistakes a moot point.

I have personally known and represented many people who have committed what would be considered "capital crimes" and I can say without exception that not one of them ever considered the possible punishment they might receive before the commission of the crime. A forensic psychiatrist, who has examined many people accused of capital crimes, recently told me that the perpetrators never consider the possible penalty. Capital punishment is not a deterrent and will not prevent any further senseless murders, except the ones the government deems "just" under the law.

As a father of two small children who attend public schools in Wichita, I would be the first to change my position if I thought for a second that either of these bills would make my children safer. It simply will not. It will only decrease the money that the State would have to support their education, health care, and other social programs our society so desperately needs right now.

Please do not let this most final of all punishments attempt to serve as satisfaction for the "blood lust" which has resulted from this state's crime problem. The taking of a human life can never be justified simply because it is done in the name of the state.

"No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some." Furman v. Georgia, 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring).

Testimony of Sue Norton Against the Death Penalty

January 8, 1990 my daddy and step-mother were shot to death in their rural farmhouse, in Tonkawa, Oklahoma. As I cleaned up the pools of blood where my parents had lain, an impression of horror overwhelmed me. The double funeral and the duties of all of the affairs that are involved could not let me forget and get away from it.

I sat through five and one half weeks of preliminary hearing and jury trial. During that time, I came to realize that the hate that society expected me to have COULD consume me, if I let it.

The offender had already spent 30 of his 48 years in prison or some type of lock-up, and each time he was out, went back. This time he was sentenced to death by lethal injection.

Knowing the offender is going to have to die, is comforting to some, but I found it very disturbing. Through much prayer and the help of God, I forgave the man. I had never known the man, but made it my business to get to know him and to figure out why he had chosen to commit yet another crime.

I am in my 3rd year of prison ministry, have not only studied the individual who murdered my parents, but many others also. I have studied the effects of murder on the family members and understand the hate, and hurt that they feel. I also understand that when the offender is executed that the hurt and hate never go away. When you have lived with it so long, it is by then too hard to put to rest.

If the offender is executed by legal murder, then we are putting yet again, another family of people in the position of hurt, anger and hate. Remember that the executed have mommies, daddies, brothers and sisters, also. It seems that we create a never ending circle with the death penalty.

With the death penalty we create a financial problem, spending our state monies on trying to get to the ultimate execution itself. We need to be focusing on trying to prevent crime BEFORE it happens, with parenting the "unparented", and mentoring the parolees back into society in a positive manner, give them self respect, self-esteem and a job position and therefore remove their reason to resort back to crime.

I am not naive enough to think that we can rehabilitate all offenders or prevent all murders, but if we can prevent one, we will have contributed to a safer society. Two wrongs do not make a right, and we were all taught that we should "DO UNTO OTHERS AS WE WOULD WANT TO BE DONE UNTO." Legalized murder only puts the state and me on the level of the offender who murdered my parents.

We, as the "family of murdered victims", will never stop hurting, I miss daddy and Virginia very much. Execution will only add another hurt to the pile of hurts I already have. I know that this individual can never be released into society, but many others will be, and we need to concentrate on them.

Sue Norton
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I BEG YOU -- AS A "DOUBLE MURDER" VICTIM'S FAMILY MEMBER, DO NOT
LEGALIZE MURDER! Kansas can be a leader in our Nation that helps
prevent crime, rather than create more murder!

Sue Norton
Chairperson
FIFTH AVENUE FOUNDATION

Herbert Callison
3600 SW Burlingame
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913-266-6422

February 17, 1994

Testimony on the Death Penalty*

Darrell Wayne Hill was convicted of capital murder in July, 1980, at Mt. Ida, Arkansas. He was found guilty of killing a service station attendant during a robbery. He readily admits his guilt.

Prior to 1980, Hill served 24 years in prison for robbery (twice), possession of firearms, and unauthorized use of a vehicle. In his autobiography, he claims to have killed another inmate while in prison. He is an admitted addict, using drugs from age 11 until his confinement on death row.

Darrell Wayne Hill still resides on death row in Cummins Prison Farm near Little Rock, Arkansas. He has received three stays of execution beginning in October, 1980. During this time the state of Arkansas has fed him, clothed him, and provided him medical treatment. In 1990, he required triple bypass surgery. On June 25, 1993, a United States District Court Judge ordered the state of Arkansas to hold a new trial for Darrell Wayne Hill within 120 days or set him free

He was found guilty by a jury and the jury recommended the death penalty. The prosecution recommended the death penalty. The judge sentenced Darrell Hill to death. Why is Darrell Hill still alive? The District Court Judge ruled that Hill received ineffective assistance from defense counsel so his conviction was overturned.

It appears that the issue of capital punishment may be an unresolvable dilemma. The United States Supreme Court ruled in opposition to an arbitrary execution of a convicted murderer. They have classified this act as 'cruel and unusual punishment.'

On the other hand, members of the Supreme Court have also ruled that

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a death penalty law that is not arbitrary but allows for discretion at both the trial and sentencing levels is not cruel and unusual punishment.

However, the very fact that Darrell Wayne Hill is still alive (thirteen years after his sentence of death) attests to the difficulty in putting to death a convicted murderer. During the ten years ending in 1990 state and federal courts reversed death sentences in 1,094 cases because of significant mistakes at trials or flaws in the laws themselves. In California, the state Supreme Court had 140 appeals on capital crimes pending in 1989. In one day during the 1984 Federal Supreme court session 14 cases were decided-- one murder was scheduled for review and 13 requests for review were denied.

If there were no recourse to appeal once a sentence of death was handed down, an execution would take place in this country every 36 hours just to keep even with capital convictions.

If capital punishment was mandatory for all murder convictions, multiple executions would be a daily event. In 1985 there were 21,509 homicides. Since some were multiple killings there may have been 15,000 murderers. According to the Uniform Crime Reports, the clearance rate for homicide was 72.3 percent. Thus, only 10,845 murderers would be convicted and sentenced. Assuming 250 working days a year, 43 men, women, and children would be executed each day.

The arguments for and against capital punishment are relevant as they relate to Darrell Wayne Hill's trial. There is no question that an execution will incapacitate or deter the murderer. As one witness to an execution recently stated: "I've never known one to get the death penalty and commit another crime." If Darrell Hill is dead he can not commit another crime. There is little argument that an execution will also serve as an equal retributive reaction-- it is "an eye for an eye." except when the murderer kills more than one victim.

The most controversial argument is whether executing one person prevents others from committing capital crimes. To be a deterrence, the threatened punishment must be carried out. Many believe, to be an effective deterrent, the punishment must be swift and certain. Darrell Wayne Hill has not been executed. With each passing day he is alive, the certainty of his execution is lessened. The stays of execution have greatly diminished any deterrent effect of his conviction.

It is quite possible that a method of execution could be devised that would be a deterrent to other potential murderers. If the sentence and appeals could be processed quickly--within a week or two--thus allowing a swift execution. The process could be covered extensively by the media so people will know the process is moving at great speed. If the laws were written and the trial conducted in such a manner as to minimize the odds that grounds for an appeal or stay of execution would exist, then the execution would be certain. But more important, if the execution could be held in a public place--a town square or an auditorium or better yet, if it was televised. Then people could see the convicted murderer's death, then there would be a greater chance the conviction would serve as a deterrent.

There is no evidence that murderers calculate the risks they take when they kill someone. In conversations with convicted killers, most indicate their acts were impulsive, committed during a time of passion, frequently after consuming drugs--with little or no thought of the consequences. The only exceptions they say may be instances where pre-meditation is possible, i.e., kidnappers killing their victims or inmates murdering prison employees during the an escape attempt.

Investigations have shown that murder rates are no lower in states whose laws permit the death penalty for capital crimes. For instance, the homicide rate per 100,000 population averaged 3.49 between 1940 and 1955 in

Michigan, while in the neighboring state of Indiana, which executed nine people during that same period, the homicide rate was 3.5 per 100,000 population.

The death penalty is irreversible. It is quite unlike a prison sentence which is revocable. Death is irrevocable. Since 1900 48 persons have been released from death row following the introduction of evidence of their innocence. In the spring of 1984 the U.S. Court of Appeals for the 11th circuit in Mobile, Alabama struck down the death sentence of Wayne Eugene Ritter and entitled him to a sentencing hearing. The court said the 1976 law under which he was convicted and condemned to death was unconstitutional because it required that juries order the death penalty for all murder convictions. One year later, Ritter's accomplice, John Louis Evans III, was electrocuted under the same law for his part in the murder. Unfortunately, the court decision did not permit Evans a new trial. In 1975, two men, Freddie Pitts and Wilbert Lee, were released from prison after 12 years awaiting execution for a murder they never committed.

Even if capital punishment is not cruel and unusual punishment, the waiting may be. Gary Gilmore asked to go before a firing squad rather than continue waiting. At the time of his request, he did not know the ultimate decision on his appeals. He refused to wait anymore on death row. One might believe that the psychological pain of waiting on death row for a judicial decision may be worse than an execution. If death is inflicted, it must be carried out as humanely as possible.

Operating death row is expensive. The extra attention that must be given death row residents is exceptional. The cost of housing death row inmates and a ready electric chair or gas chamber is \$21.24 a day in Tennessee to nearly \$600 a day in Wyoming. This cost includes five security guards, utilities, food, and maintenance. Other prisoners cost from \$13.00 a day to

\$36.00 a day to keep. It is estimated the death penalty costs a state over 2 million per execution. At the end of 1993, 2,787 men and women were housed on death row. Only 227 executions have taken place since the death penalty was reinstated in 1976, 38 in 1993.

Was the sentence of death for Darrell Wayne Hill, cruel and unusual punishment? The Supreme Court ruled in 1968 that any arbitrary sentence of death is cruel and unusual. The new laws permitting capital penalties are not arbitrary. However, the question has been raised that Darrell Hill's sentence, in view of the anger of the community and the 'atmosphere' present at the trial precluded any hope of a life sentence and thus became arbitrary. Even Chief Justice Hughes of the Supreme Court has said "90 percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections"

* The information used in this testimony was gathered during the research for an unpublished manuscript. Specific references can be obtained by contacting the author.

TESTIMONY BEFORE THE KANSAS
SENATE JUDICIARY COMMITTEE
February 18, 1994

HB 2578/SB 473
DEATH PENALTY

by

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*"Held to be a crime when committed by individuals,
homicide is called a virtue when committed by the state."
--St. Cyprian, Bishop of Carthage (200-beheaded 258).*

I come to you in my capacity as a private citizen and member of the Kansas Association of Criminal Defense Lawyers. I bring to you 15 years of experience defending criminal cases in the courts of the State of Kansas in the hope that I can convince you that establishment of a death penalty, in any form, is not right for Kansas.

I have defended citizens who have been charged with murder as often as any practicing lawyer in this State. Some of those I defended committed terrible crimes--ones for which death penalty states would have sought the death penalty. I have supervised my employees in the defense of other such cases, and I have consulted with other attorneys across the state on still other similar cases. Even with this experience, I have doubts that I am sufficiently prepared to give the quality of defense necessary to satisfy the "super due process" required by the Courts in a death penalty prosecution.

The passage of a death penalty is unwise for many reasons, but I will confine my testimony to the following:

- The impact of a death penalty bill on public defenders and counsel who volunteer to defend the indigent citizen charged with crime will be severe; it will cripple the entire criminal justice system or cost so much that the death penalty will be clearly unwise.
- The risk of convicting and executing an innocent person is real. This risk is not worth any perceived benefits of execution of a few guilty persons.
- The death penalty does not accomplish any reduction in crime, and it may even increase violent crime through its demonstration that the government itself has no respect for life.

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Death is different. The defense of a case in which the death penalty is sought requires four to six times the effort and resources as a non-death case for the same crime. Counsel assigned to defend a death case must understand a whole different body of law which has grown up in death penalty cases, and they must prepare the defense of such a case in a more meticulous manner than any other case, including the current "Hard 40" case. Justice McFarland, writing for a majority of the Kansas Supreme Court in a "Hard 40" case has said that court decisions in death penalty cases are "of limited precedential value" in non-death cases because the death penalty differs so significantly from other cases, regardless of the length of imprisonment involved in the non-death case.¹

Because "death is different" defense counsel must (1) file two to six times as many motions; (2) take more time selecting a "death-qualified jury"; and (3) prepare and present two trials, one on the issue of guilt, one on the question of punishment. In summary, the death penalty trial is extremely complex. It requires experienced counsel,² to make a record for possible appeal of every issue that may arise,³ to investigate mitigating factors for a penalty trial,⁴ and to try a case that will last two to three times as long as the same case without the death penalty.

Monetary Cost. The "death is different" rule that permeates a death penalty case translates into expense to both the state and local governments. Increased local costs include increased expenses for jury,⁵ transcripts,⁶ police⁷ and prosecutors⁸. These

¹ State v. Bailey, 251 Kan. 156 (1992), citing United States Supreme Court cases Woodson v. North Carolina, 428 U.S. 280, 303-05, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976) and Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980).

² The ABA Standards for Criminal Justice recommends that two attorneys be assigned to all death penalty cases.

³ Matters which would be handled on a handshake between the prosecutor and the defense counsel in non-death cases must be placed on the record by way of motions and hearings to preserve all issues for appeal.

⁴ Typically the accused's background from time of birth on will be combed for information which would serve to convince a jury that the death sentence should not be imposed. This often means travel across the United States to interview people who knew the accused.

⁵ Because there must be a "death-qualified" jury, more jurors must be called for jury selection, jury selection takes longer, the trial is much longer, and sequestration of the jury occurs much more often in death cases. Counties are responsible for these costs.

⁶ With three to six times more motions, there will be many more pretrial hearings. Transcripts of many of these hearings will be necessary for counsel to prepare for trial, and the county must pay for these. In a non-death case, the only cost is usually a transcript of the preliminary hearing.

matters are beyond the scope of my presentation, but are important enough that this Committee should be reminded that there are many costs to be considered in any fiscal note. I wish only to address the cost to the Board of Indigents' Defense Services.

The indigent defense system is chronically underfunded without a death penalty. BIDS has required a supplemental appropriation to pay for defense costs for the last five years. This year, BIDS will run out of money to pay assigned counsel in March if no supplemental appropriation is passed. A death penalty will consume scarce funds at a fantastic rate. Already over-worked public defenders will be forced to refuse more cases, and assigned counsel costs for non-death cases will increase further. All of this to execute a few people.

The amount of court time required to litigate a death penalty case will take time from other serious criminal matters and will further clog our court dockets. Eventually more judges, support staff and courtrooms will be required, especially in the urban counties.

An informal survey of experienced members of the Kansas Association of Criminal Defense Lawyers in January, 1994 disclosed none who would be willing to defend a death penalty case for the current rate of \$50 per hour. The average amount quoted was \$185 per hour. This figure is not surprising since surveys of states with a death penalty uniformly show that defense of a death case takes 400 to 1600 hours of defense counsel time. 400 hours translates to 10 weeks of an attorney's time. \$50 per hour barely covers overhead for many attorneys, therefore it is clear that it would be a financial hardship on anyone who regularly bills \$100 per hour or more for their time to paying clients.

This means that the fees paid to private counsel assigned to death penalty cases must be raised, or all cases must be handled by public defenders. If the public defender system is to take over all death cases, more defenders must be hired. Presently, an individual public defender each handles over of 150 felony cases per year. Public defenders handling death penalty cases in states with the death penalty can handle only two to four cases per year, and two attorneys should be assigned to each death penalty case. It follows that with only 10 death penalty cases per year⁹, five additional attorneys must be hired. To attract qualified counsel,

⁷ The increased number of motion hearings will require the presence and testimony of investigating officers, thereby increasing overtime pay for officers. A "hidden" cost is the removal of police from regular duties while in court, resulting in decreased police presence on the streets.

⁸ Prosecutors will also experience the need for additional staff to handle the increased litigation generated by a death penalty case.

⁹ We can expect far more cases to be filed. In FY 93 BIDS records disclose that public defenders and assigned counsel closed 59 first degree murder cases, 37 of which were premeditated murder cases. BIDS estimates that 40% of cases may be filed as capital cases.

a premium salary will likely be necessary. Additional support staff including clerical, investigative and paralegal must be added to the pure attorney expense.

Other costs which the state will pay include expert witness fees, investigative expenses and appellate costs, all of which are significantly higher in a death penalty case.

Finding qualified counsel. As noted above, very few, if any criminal defense lawyers in Kansas have defended a modern death penalty case. I personally know only one Kansas attorney who has worked on a death penalty case. Because "death is different" new skills must be learned in order to qualify to defend a death case. This means training must be instituted, and/or experienced counsel must be lured from death penalty states.

Some may discount this issue by noting that "experience will come with time." While this is true, cynics should recognize that failure to provide qualified counsel will increase the mistakes made in the trial. Mistakes in a death case mean reversal on appeal, a new trial, and all of the expenses attendant thereto. The most economical response is to provide qualified counsel "up front" to minimize the chances that the case will be reversed on appeal.

Keeping qualified counsel. "The thing I hear these days, particularly from the most conscientious lawyers, is, 'I will never take another death-penalty case.' It's enormously expensive, and you take an emotional beating. Why do it?"¹⁰

Public defenders, with a few exceptions, currently leave the business after about three years--just as they have become experienced enough to handle complex or serious cases. The emotional toll taken on defense attorneys handling high case loads without the added burden of a death penalty is enormous. I have met many attorneys across our nation who handle death cases, and they are "different." A part of them has been taken away. Even non-death cases reduce strong adults to tears of frustration--I have been there. The fear that an innocent person will have to go to prison is tough enough, but imagine the pressure of defending someone who may be killed if the attorney makes a mistake!

It is clear that most attorneys assigned to defend death cases will not last long in the job. Again, this translates into additional expense of training and pay to attract people to take on such a daunting task.

Innocent people are convicted. "At least 48 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence. (See M. Radelet, H. Beadon, & C. Putnam, "In Spite of Innocence (1992); H. Beadon, & M. Radelet, "Miscarriages of Justice in Potentially Capital Cases," —

¹⁰ Wall Street Journal, 12/21/92, page B-2, quoting Stephen B. Bright, head of the Southern Center for Human Rights.

Stanford L. Rev. 21 (1987), and the files of the National Coalition to Abolish the Death Penalty.) In 43 of the cases, the defendant was subsequently acquitted, pardoned or charges were dropped. In three of the cases, a compromise was reached and the defendants were immediately released upon pleading to a lesser offense. In the remaining two cases, one defendant was released when the parole board became convinced of his innocence, and the other was acquitted at a retrial of the capital charge but was convicted of a lesser related offense."¹¹

I have personally experienced the agony of having a client wrongfully convicted. It took me seven years to finally free an innocent man, and other attorneys who looked at the case told me that I had tried a near perfect case from a defense standpoint. There were no trial errors which would result in a reversal, but the jury found the man guilty in spite of his innocence, and the Kansas Supreme Court affirmed that conviction. Had this been a death penalty case, the State might have killed him before the DNA technology which eventually proved his innocence was developed.

I am familiar with other cases in which innocent people are convicted. One of these cases occurred as a result of prosecutorial misconduct through withholding of exculpatory evidence. In numerous other cases the prosecution has withheld evidence, relied on perjured testimony, and otherwise cheated for a conviction. See Congressional Subcommittee Report, note 11.

It is clear that our criminal justice system is imperfect, and perfection cannot be legislated. To impose such a final solution as death based on our imperfect system is the height of unfairness.

If you must pass a death penalty, give the defense the tools with which to combat the danger of convicting an innocent person. This should include expansion of the right to take depositions of witnesses; broadening the discovery rules to require full disclosure of evidence to the defense with sanctions for failure to do so; funds to permit full investigation; time to prepare for each case, etc.

The death penalty does not work. No credible expert can be found who will say that a death penalty will deter crime. The only reason for it is vengeance for an atrocious offense. Yet many cases must be tried for a death sentence before one is adjudged, and of those that are adjudged, several will be reversed. According to a public defender who handles death penalty cases in Colorado, the State has failed in its last 13 attempts to impose a death sentence in Colorado, but the expense of each was still there. In the case of Ralph Takemire, a capital case prosecuted in Englewood, Colorado, the county was nearly bankrupted, and in the end the state was forced to give up its request for a death sentence. When one factors in the length of time it takes to get

¹¹ "INNOCENCE AND THE DEATH PENALTY: Assessing the Danger of Mistaken Executions," Staff Report, 10/31/93, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103rd Congress, First Session.

a case from charging to execution approaches 10 years, even the vengeance motive is attenuated. Victims' families must live with the case without closure for too long. In reality, the death penalty increases the suffering of those affected by the crime itself.

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1. a simple fact - 'no' solution is ever 100%
successful* in effects; but
virtually 'any' solution has
times when it is appropriate.
Wisdom is knowing when something is / and isn't appropriate
; * (or, 100% 'wrong')

2. as such - (a.) the death penalty is not a 100% deterrent!.. But it
'will' deter some people... Only God could ever count
the number of crimes that weren't committed - but if it deters
just one person from doing rape or murder; - then innocent
people who would've been victims, will be spared!!

(b.) - In another state a man was convicted of a series of
serial-rape/murders.. pleading insanity, he was sentenced to a
mental institution - later, judged "cured." -- Released --- and
committed another string of rape-murders! - This time, he
was sentenced to death!! -- If he'd been sentenced to death
the first time; the victims he killed the second time, would've been
spared!... The death penalty does deter hardened repeat offenders
of the 'worst' outrages - because once they're dead;... they'll
never inflict harm on new victims (- unless you believe in zombies
and vampires)!!

3. The death penalty is to the judicial arm; what it is for law-enforcement
when we give guns to policemen... It's 'hoped' a policeman will never
have to use his or her gun (- many don't!...) - But sometimes.. they are
needed!!... And- for those rare instances; it's better to have something
and not need it; - than need something, and not 'have' it!!!

A politician in another state, said: "He felt the death penalty
should be considered like 'major surgery' -- not to be used unless
absolutely necessary!... - But "if" necessary! Not to be flinched
from-!!!" The members of this legislature were not elected to be
the 'conscience' of their constituents --- those voters have their own consciences
& judgement!! The senators here were elected to represent the wishes of
their constituency --- 'All' of their constituents!! - Not just the
ones they agreed with-!!" (-!!) Being elected to office is not being given
carte blanche to ignore the will of the
majority... Snatt Jeldness
2-18-94 attached at 23-

4. When people in 'it on 'spitting against the wind', on "principles" - often... some of it is due to the pain of denial (- like a wounded soldier; who doesn't want to 'accept' the fact that his injured leg has to be amputated!...)

I once saw a notice on a bulletin board, with an "11th Commandment," that too many 'good' people break, when problems demand solutions that they never wanted to agree with....

" - Thou Shalt Not Deceive Thyself! - "

- When previous solutions have failed, and a crisis has developed to a degree that existing solutions don't answer; it 'hurts' for any person to have to face the possibility that -

(a) - Their ideals have failed them... (!)

(b) - Or, that they've failed their ideals... (!)

(- Like the dumb hillbilly kid who joined the Navy and tried to 'save' a sinking ship by drilling holes in the bottom, to let the water out !!!)

When a rabid dog is killed, it's not an act of revenge!... It's done to 'protect' the innocent whom it might harm... There are people who're worse than rabid dogs!! -- The dog is a poor, miserable, suffering, wretched animal!... Killing it is taking it out of its misery!! The humans who would be excited would be something the dog could not be Evil!

Some have said: "Let God punish them!..." -- maybe this is His way!..... Vex Populi Mandamus Dei ("the voice of the people, is the judgement of God").

- Perhaps this is.

There are criminals who are dangerous - even behind bars - men who do evil out of malice and idle egotism - if you gave 'some' people mercy... - They'd take it..... and snar in your face and think you a fool for giving it to them - !! ... (and be right),

- It's not a question of people dying everyone dies sooner or later!! It's a decision - only to be made after the verdict, in a separate trial by a jury as to whether or not a sentence of death was in this particular case; - justified!

Of whether or not they're entitled to further life...?!!

- If a death penalty bill is passed! --- As Long as No Criminals Commit a Crime Deserving of It - !!! No One Suffers !!! 292