

Kansas House Corrections & Juvenile Justice Committee  
March 15, 2012

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

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KACDL is a 300-plus member organization dedicated to justice and due process for those accused of crimes. Roughly 80 of our current members are public defenders (some of whom work exclusively as capital defenders), and many other members accept appointments to criminal cases under contract with BIDS.

**KACDL supports abolition of the death penalty in Kansas.** KACDL has twice in recent years submitted testimony in support of abolition—once in 2009, and once in 2010.<sup>1</sup> That testimony is now resubmitted and attached; materials accompanying KACDL's 2010 testimony will be submitted separately.

Little has changed in the past two years. Capital punishment continues to be an ineffective and wasteful system in Kansas. The Kansas courts have yet to confirm any death sentence on appeal. Kansas continues to have a 100% reversal rate with respect to death sentences—putting Kansas's modern total at *six* death sentences vacated out of *six* death sentences challenged.<sup>2</sup>

For summaries of flaws identified in death-penalty systems around the country, one need only scan the "What's New" section on the front page of the Death Penalty Information Center website ([www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)). Other states with much greater experience than Kansas continue to discover that their systems are broken. KACDL predicts that future developments will only add to the many considerations in favor of abolition.

Respectfully submitted on behalf of KACDL,

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<sup>1</sup> See January 19, 2010, Testimony of the Kansas Association of Criminal Defense Lawyers in Support of SB 375; February 26, 2009, Testimony of the Kansas Association of Criminal Defense Lawyers in Support of SB 208.

<sup>2</sup> This number includes Gary Kleypas (currently challenging his second death sentence); Michael Marsh (now sentenced to life); Gavin Scott (twice sentenced to death, twice awarded resentencing; now sentenced to life); Phillip Cheatham (currently challenging his conviction, his death sentence having been vacated); and Stanley Elms (death sentence vacated by agreement during direct appeal; now sentenced to life).

Senate Judiciary Committee  
January 19, 2010

Testimony of the Kansas Association of Criminal Defense Lawyers  
in Support of SB 375

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The Kansas Association of Criminal Defense Lawyers is a 300-person organization dedicated to justice and due process for those accused of crimes. Roughly 80 of our current members are public defenders (some of whom work exclusively as capital defenders), and many other members accept appointments to criminal cases under contract with BIDS.

Last year, KACDL submitted testimony in support of Senate Bill 208, the predecessor to Senate Bill 375.<sup>1</sup> KACDL's position has not changed. KACDL **supports** Senate Bill 375, insofar as it would prospectively abolish the death penalty in Kansas.

In the year since Senate Bill 208 was introduced, developments on both the state and national level have added to the many considerations in favor of abolition.

Locally, yet another death sentence appears to be on the brink of reversal. The Shawnee County District Court is currently considering whether Phillip Cheatham—sentenced to death in 2005 for a double homicide—received constitutionally effective assistance of counsel at his capital trial and sentencing. The state has stipulated that Cheatham's lawyer wholly failed to prepare for sentencing and was constitutionally ineffective during that phase of Cheatham's trial.<sup>2</sup> All that remains is for the District Court to accept the stipulation and vacate Cheatham's sentence. KACDL is aware of no reason that the District Court would do otherwise. As KACDL pointed out last year, the Kansas courts have yet to confirm any death sentence on appeal. The vacation of Cheatham's sentence will continue Kansas's 100% reversal rate with respect to death sentences—putting

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<sup>1</sup> See February 26, 2009, Testimony of the Kansas Association of Criminal Defense Lawyers in Support of SB 208, attached at 4.

<sup>2</sup> See Steve Fry, *Resentencing would be complex*, TOPEKA CAP. JRNL. (Dec. 13, 2009), attached at 10.

Kansas's modern total at *six* death sentences vacated out of *six* death sentences challenged.<sup>3</sup>

In other local news, Gavin Scott's capital resentencing has been delayed for nearly a year by budget concerns.<sup>4</sup> Scott's is a case that might have been resolved quickly, quietly, and with finality if the death penalty had not been on the table. Instead, here it is more than thirteen years after the charged killings, and the defendant stands, again, unsentenced.

National developments over the last year included:

- New Mexico's abolition of the death penalty.<sup>5</sup>
- The resignation of Washington's execution team in the midst of a court battle over lethal injection—a cautionary tale for a state like Kansas that has yet to endure the costs and chaos that accompany the actual execution process.<sup>6</sup>
- A former prosecutor's carefully considered public call for Montana to repeal its death penalty. John Connor—who served as Montana's chief special prosecutor for 21 years—reversed his previous position in favor of the penalty only after years of working with corrections officials taught him that life inmates are not the primary threat to prison officials; rather, “[p]rison safety depends on proper staffing, equipment, resources and training.” Connor concluded that “[c]ertainly the money spent on trying to put someone to death for over 20 years could find better use in addressing those practical needs of our correctional system.”<sup>7</sup>

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<sup>3</sup> This number includes Gary Kleypas; Michael Marsh; Gavin Scott (who has thus far twice been sentenced to death, and twice had that sentence vacated); Phillip Cheatham, and Stanley Elms (whose death sentence was vacated by agreement during his direct appeal).

<sup>4</sup> See Jeannine Koranda, *Kansas trials delayed as public defender funds run low*, WICHITA EAGLE (Sept. 21, 2009), attached at 13.

<sup>5</sup> See Trip Jennings, *Richardson abolishes N.M. death penalty*, NEW MEXICO INDEPENDENT (Mar. 18, 2009), attached at 14.

<sup>6</sup> See Sara Jean Green, *State's execution team resigns, fearing identities would be revealed*, THE SEATTLE TIMES (April 2, 2009), attached at 17.

<sup>7</sup> See John Connor, *Death penalty drains justice system resources*, BILLINGS GAZETTE (March 22, 2009), attached at 19.

- The release of a survey of leading criminologists demonstrating “an overwhelming consensus among these criminologists that the empirical research conducted on the deterrence question strongly supports the conclusion that the death penalty does not add deterrent effects to those already achieved by long imprisonment.”<sup>8</sup>
- The United States Justice Department’s release of death penalty statistics from 2008. Notably, 119 inmates were “removed from under sentence of death” in 2008. Only 37 of those were actually executed; 82—more than two thirds—“were removed by other methods, including sentences or convictions overturned, commutations of sentence, and deaths by means other than execution.”<sup>9</sup>
- The Death Penalty Information Center’s release of its annual report, which notes a decline in death sentences, summarizes legislative abolition efforts across the nation, and observes that a number of prominent law-and-order spokespeople have recently begun to question the efficacy of the death penalty.<sup>10</sup>
- The American Law Institute’s withdrawal of any death-penalty statute from its Model Penal Code, in light of “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”<sup>11</sup>

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<sup>8</sup> See Michael L. Radelet and Traci L. Lacock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489 (2009), attached at 21.

<sup>9</sup> See CAPITAL PUNISHMENT, 2008—STATISTICAL TABLES (DOJ Dec. 2009), attached at 39.

<sup>10</sup> See The Death Penalty in 2009: Year End Report (DPIC Dec. 2009), attached at 60.

<sup>11</sup> See MESSAGE FROM ALI DIRECTOR LANCE LIEBMAN (reporting October 23, 2003 vote), available at [http://www.ali.org/\\_news/10232009.htm](http://www.ali.org/_news/10232009.htm); REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (April 15, 2009), available at [http://www.ali.org/doc/Capital%20Punishment\\_web.pdf](http://www.ali.org/doc/Capital%20Punishment_web.pdf).

Senate Judiciary Committee  
February 26, 2009

Testimony of the Kansas Association of Criminal Defense Lawyers  
in Support of SB 208

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The Kansas Association of Criminal Defense Lawyers is a 300-person organization dedicated to justice and due process for those accused of crimes. Roughly 84 of our current members are public defenders (some of whom work exclusively as capital defenders), and many other members accept appointments to criminal cases under contract with BIDS. For the reasons set forth below, KACDL **supports** Senate Bill 208, which would prospectively abolish the death penalty in Kansas.

1. **The Kansas public defender system is in crisis.** If money is to be spent on criminal justice, Kansas must shore up the core requirements of effective assistance of counsel to every person accused of crime before it invests in a costly capital system. Abolishing the death penalty is necessary so that Kansas may avoid the experience of Georgia, where a single capital case (the Brian Nichols courthouse shooting)—whose costs were driven up in large part by the prosecution—essentially bankrupted that state's public defender system. *See* Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, THE NY TIMES (Mar. 22, 2007), <http://www.nytimes.com/2007/03/22/us/22atlanta.html>.; Molly McDonough, *Prosecutors Drove Cost of Ga. Death Penalty Case*, ABA JOURNAL (Aug. 9, 2008), [http://abajournal.com/news/annual\\_meeting\\_coverage\\_elsewhere/](http://abajournal.com/news/annual_meeting_coverage_elsewhere/).
2. **The costs of maintaining the death penalty will increase exponentially over the next few decades.** In the fifteen years since Kansas brought back the death penalty, Kansans have had to bear the cost of various original capital trials and sentencing proceedings, a handful of completed direct capital appeals (Kleypas, Marsh, and Scott), one United States Supreme Court case argued on the merits (Marsh), and one completed re-sentencing proceeding (Kleypas). Over time, as more death sentences are either reversed or affirmed on direct appeal, Kansans will see costs increase exponentially as the state continues to charge and try new capital cases while *retrying* those cases in which convictions and/or death sentences have been reversed. Meanwhile, cases in which convictions and death sentences are affirmed on direct appeal will begin winding their way through the cumbersome but necessary state and federal postconviction process, with multiple visits to the United States Supreme Court a given in any capital case.

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Testimony of the Kansas Association of Criminal Defense Lawyers  
in Support of SB 208

While defendants in noncapital cases have the same rights to the state and federal postconviction process, noncapital cases rarely receive the same level of scrutiny beyond direct appeal that capital cases receive.

The American Bar Association has reported that in one study of the Florida capital postconviction process, it was concluded that “on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari through that state’s post-conviction proceedings.” ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>. And while *defense* costs may be federally funded in federal postconviction proceedings, the *state* (whether the AG office or the local prosecutor) must still expend a considerable amount of resources to appear in those proceedings.

- 3. The high error rate in capital cases guarantees that the cycle of expensive capital litigation will continue in Kansas.** In 1991, the Chair of the U.S. Senate Committee on the Judiciary asked Columbia University School of Law Professor James Liebman to research the error rates in capital cases around the country. In 2000, Professor Liebman published nine years of “painstaking” research. He described the “capital error rate” as “the proportion of fully reviewed capital judgments that were overturned at one of the three stages [direct appeal, state postconviction, and federal postconviction] due to serious error.” He concluded that “[n]ationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%.” James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman/>.

In Kansas, the error rate has so far been 100% on direct appeal. With such an inauspicious beginning, Kansas has a long way to go before it even approaches Liebman’s 68%, which is itself disheartening. Each time a capital case has to be retried, the costs of that case double, public faith in the justice system diminishes, and system resources are stretched that much thinner.

- 4. Every Kansas death sentence reviewed to date has been deemed infected by constitutional error.** Some may be under the mis-impression that both Gary Kleypas’s and Michael Marsh’s death sentences were erroneously reversed because the weighing equation that a majority of the Kansas Supreme Court invalidated in those cases was later upheld by the United States Supreme Court. But the Kansas Supreme Court found

other constitutional errors in those cases, as well as in the more recent case of Gavin Scott. Specifically, the death sentences reviewed to date were infected by at least the following constitutional errors:

- In *State v. Kleypas*, 272 Kan. 894 (2001), the Kansas Supreme Court unanimously held that the prosecutor committed extensive misconduct during Gary Kleypas's sentencing phase by, among other things, making comments that "were clearly improper and reflect a complete lack of understanding of the concept of mitigating circumstances." 272 Kan. at 1103. The Court concluded that at least some of the prosecutor's misconduct was intentional, and probably resulted from the corruptive influence of the death penalty:

Many of the instances of prosecutorial misconduct appear to stem from a misunderstanding of the law regarding the imposition of the death penalty and cannot be characterized as intentional. Others, however, would be improper in any proceeding and can only be explained by the pressure put on the prosecutor to secure the death penalty in a high profile case.

*Id.* at 1123. While the Court reversed Kleypas's death sentence because of the weighing equation, it also held that "the net cumulative effect of the prosecutorial misconduct might very well have provided an additional basis for reversal." *Id.*

- In *State v. Marsh*, 278 Kan. 520 (2004), the Kansas Supreme Court reversed Michael Marsh's death sentence not just on grounds that the weighing equation was unconstitutional, but also because the Court unanimously concluded that Marsh's trial on capital murder was infected by judicial error, and thus his capital-murder conviction could not stand. Specifically, the Court held that when the trial judge excluded Marsh's evidence that somebody else committed the capital murder with which Marsh was charged, the judge thereby "violated Marsh's fundamental right to a fair trial." 278 Kan. at 533.
- In *State v. Scott*, 286 Kan. 54 (2008), the Kansas Supreme Court reversed Gavin Scott's death sentence after unanimously holding that the trial judge failed "to provide the jury with a proper standard for determining mitigating circumstances." 286 Kan. at 107. (The Court also found "numerous instances of improper comment" by the prosecutor during Scott's guilt phase, and observed that "reasonable minds may disagree as to whether the sheer number of such remarks demonstrate ill will

on the part of the prosecutor.” *Id.* at 84. The Court nonetheless upheld Scott’s conviction as supported by overwhelming evidence.).

5. **Abolition will reduce costs to the Attorney General’s office.** The state budget division has submitted a fiscal note for HB 2351, reporting that the AG’s office “indicates no fiscal effect” as a result of abolishing the death penalty. This makes no sense. Just this week, the Saline County District Attorney explained that she asked the Kansas Attorney General’s office to assist with a capital prosecution in her jurisdiction because “[i]t will be very time consuming. We do not have enough staff to cover a death penalty case.” See Erin Matthews, *California Man Could Face Death Penalty*, SALINA JOURNAL (Feb. 21, 2009), <http://www.saljournal.com/rdnews/story/Capital022109>. Is the AG truly suggesting that there is no cost associated with staffing and resources when the AG’s office handles capital cases? Surely there was some cost to that office when it briefed and argued the constitutionality of the weighing equation before the United States Supreme Court. Surely there was some cost to that office when it handled the resentencing hearing of Gary Kleypas. Does the AG expect his office’s lawyers to volunteer their time to defend death sentences that are eventually challenged in state and federal postconviction proceedings? Would the AG approve if this body designated that no funds allotted to the AG’s criminal division be used toward capital litigation, or to pay the salaries of lawyers for their time spent prosecuting capital cases?

Capital cases require more person hours than noncapital cases for myriad reasons. For example, they require weeks of in-court hours conducting jury selection to probe potential jurors about issues that are not present in noncapital cases (specifically, whether potential jurors are capable of returning a death sentence); they require extensive preparation for sentencing trials that do not occur in noncapital cases; and they often involve detailed consultation with experts about sentencing issues not present in noncapital cases (for instance, the state relied on an expert neuro-radiologist to rebut certain brain-scan evidence offered as mitigation during sentencing in the Carr case). It may be that the county, and not the AG’s office, bears certain costs of litigation, such as expert fees. But presumably when the AG is handling a case, its lawyers spend significant hours working with their experts before putting them on the witness stand. And, of course, both expert fees and lawyer salaries are ultimately borne by Kansans no matter who signs the checks.



6. **The unavailability of the death penalty for BTK, Kansas's most notorious and feared serial killer, allowed for his speedy conviction, his certain incarceration, and the near-guarantee that he will be unable to challenge his conviction.** The contrasting cases of Dennis Rader and Justin Thurber provide just one illustration of the cost savings that abolishing the death penalty will accomplish. Justin Thurber, accused of murdering Jodi Sanderholm in January 2007, offered to plead guilty in exchange for a life sentence. His offer was rejected by a state eager to impose the ultimate punishment. Thurber's case dragged on for two years before he was convicted and sentenced to death, and Kansans now have decades of appellate and postconviction litigation to endure (and fund) while Thurber exercises his rights to challenge the fairness of the process that resulted in his death sentence. In contrast, Dennis Rader pled guilty and was given ten life sentences within six short months after his arrest for the murders he was charged with committed during his confessed reign of terror as Wichita's most notorious and feared serial killer. By pleading guilty, Rader waived any legal avenues for challenging his convictions and sentences. Kansans can thus rest assured that the man known as BTK now has no further legal options, and will simply die in prison. Had the state been able to pursue the death penalty in Rader's case, it would surely have done so, thereby ensuring Rader's longevity in the annals of Kansas capital litigation, and costing millions of Kansas dollars in the process.
  
7. **Arguments that prosecutors need the threat of death to force defendants into pleas resulting in life sentences do not reflect reality.** Prosecutors have argued that they need the death penalty on the books so that they can threaten defendants with death in order to force them to plead guilty. They claim that this "hammer" allows the state to save money by avoiding trial when defendants otherwise would not voluntarily plead guilty and accept a life sentence. But this argument does not reflect reality. Such a hammer was not necessary to induce Dennis Rader to plead guilty to multiple murders, even while knowing that his plea would result in multiple life sentences. And if the state were truly interested in avoiding the costs associated with capital litigation, it would have accepted the plea offers of Gary Kleypas, Justin Thurber, and others who were willing to waive their trial rights and accept life sentences (some of whom ultimately received life sentences anyway from juries unwilling to return death verdicts). Finally, the fact that the state does in some cases accept defendants' plea offers merely serves to illustrate the arbitrariness inherent in the system. For instance, it is difficult to square one prosecutor's refusal to accept Justin Thurber's plea with another prosecutor's acceptance of Edwin Hall's plea. Hall was, like Thurber, also accused of kidnapping, raping, and murdering a teenage girl (Kelsey Smith). Finally, the hammer of death can result in the high cost of inducing innocent people to plead guilty. The state of Nebraska recently learned this

lesson the hard way, with the exonerations of five defendants who confessed to a murder they did not commit and pleaded guilty “to escape the threat of the death penalty.” Paul Hammel, *Pardons Granted To Five In Murder They Didn’t Commit*, OMAHA WORLD-HERALD (Jan. 27, 2009). The Nebraska legislature is now considering a bill that would award to the wrongfully convicted \$50,000 for each year spent in prison. *Id.*

Respectfully submitted,

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