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Judiciary, Corrections, and Juvenile Justice

G-4 Death Penalty in Kansas

Background

On June 29, 1972, the U.S. Supreme Court, in *Furman v. Georgia*, 408 U.S. 238 (1972), held the imposition and execution of the death penalty, or capital punishment, in the cases before the court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the *U.S. Constitution*. Justice Stewart remarked that the death penalty was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” That case nullified all capital sentences imposed without statutory guidelines.

In the following four years, states enacted new death penalty laws aimed at overcoming the Court’s *de facto moratorium* on the death penalty. Several statutes mandated bifurcated trials, with separate guilt and sentencing phases, and imposed standards to guide the discretion of juries and judges in imposing capital sentences. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld the capital sentencing schemes of Georgia, Florida, and Texas. The Court found these states’ capital sentencing schemes provided objective criteria to direct and limit the sentencing authority’s discretion, provided mandatory appellate review of all death sentences, and allowed the judge or jury to take into account the character and record of an individual defendant.

The death penalty was reenacted in Kansas, effective on July 1, 1994. Governor Finney allowed the bill to become law without her signature.

The Kansas Supreme Court, in *State v. Marsh*, 278 Kan. 520, 534–535 (2004), held that the Kansas death penalty statute was facially unconstitutional. The Court concluded the statute’s weighing equation violated the Eighth and Fourteenth Amendments to the *U.S. Constitution* because, “[i]n the event of equipoise, *i.e.*, the jury’s determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required” (*Id.*, at 534).

The U.S. Supreme Court reversed the Kansas Supreme Court’s judgment and held the Kansas capital sentencing statute is constitutional. In June 2006, the Court found the death penalty

statute satisfies the constitutional mandates of *Furman* and its progeny because it “rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. It does not interfere, in a constitutionally significant way, with a jury’s ability to give independent weight to evidence offered in mitigation.”

Kansas Capital Murder Crimes

In Kansas, the capital murder crimes for which the death penalty may be invoked include the following:

- Intentional and premeditated killing of any person in the commission of kidnapping, or aggravated kidnapping, when the kidnapping or aggravated kidnapping was committed with the intent to hold the person for ransom;
- Intentional and premeditated killing of any person under a contract or agreement to kill that person or being a party to the contract killing;
- Intentional and premeditated killing of any person by an inmate or prisoner confined to a state correctional institution, community correctional institution, or jail, or while in the custody of an officer or employee of a state correctional institution, community correctional institution, or jail;
- Intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, the crime of rape, criminal sodomy, or aggravated criminal sodomy, or any attempt thereof;
- Intentional and premeditated killing of a law enforcement officer;
- Intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or
- Intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping, or aggravated kidnapping, when the kidnapping or aggravated kidnapping was committed with intent to commit a sex offense upon or with the child or with the intent that the child commit or submit to a sex offense.

According to Kansas law, upon conviction of a defendant of capital murder, there will be a separate proceeding to determine whether the defendant shall be sentenced to death. This proceeding will be conducted before the trial jury as soon as practicable. If the jury finds beyond a reasonable doubt that one or more aggravating circumstances exist and that such aggravating circumstances are not outweighed by any mitigating circumstances that are found to exist, then by unanimous vote the defendant will be sentenced to death. The Kansas Supreme Court will automatically review the conviction and sentence of a defendant sentenced to death.

If mitigating circumstances outweigh the aggravating circumstances, a defendant convicted of capital murder will not be given a death sentence but will be sentenced to life without the possibility of parole. A defendant sentenced to life without the possibility of parole is not eligible for parole; probation; assignment to a community correctional services program; conditional release; postrelease supervision; or suspension, modification, or reduction of sentence.

Costs

Costs in Kansas death penalty cases have been examined in a 2003 Performance Audit by the Legislative Division of Post Audit (LPA) and in 2004 and 2014 reports by the Kansas Judicial Council Death Penalty Advisory Committee. Each of these studies indicates costs for death penalty cases tend to be higher than non-death penalty cases at the trial and appellate stages. For instance, the 2014 Judicial Council report indicated that Kansas Board of Indigents’ Defense Services costs in death penalty trial cases filed between 2004 and 2011 averaged

\$395,762 per case, as compared to \$98,963 per trial case where the death penalty could have been sought but was not. More detail regarding the costs in death penalty cases may be found in the 2003 Performance Audit report and in the 2004 and 2014 Judicial Council reports, which are available on the LPA and Judicial Council websites, respectively.

The Board of Indigents' Defense Services has three units that participate in the defense of capital cases. The approved budget for these units in FY 2019 is \$3,122,507. Actual expenditures for the unit in FY 2018 were \$2,430,626. The agency estimates FY 2019 expenditures of \$3,461,691 for capital defenses.

Death Penalty and Intellectual Disability

At the national level, the U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), stated capital punishment of those with "mental retardation" is cruel and unusual punishment under the Eighth Amendment to the *U.S. Constitution*. Various states subsequently attempted to draft legislation that would comply with the Atkins decision. In the Atkins decision, there is no definition of "mentally retarded," but the Court referred to a national consensus regarding mental retardation.

In 2012, the Legislature passed Sub. for SB 397, which replaced statutory references to "mental retardation" and similar terms with "intellectual disability" and directed state agencies to update their terminology accordingly. Thus, the concept of "mental retardation" as addressed by the U.S. Supreme Court in *Atkins* will be discussed here as "intellectual disability."

Kansas law defines "intellectual disability" in the death penalty context to mean a person having significantly subaverage general intellectual functioning to an extent that substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law. [See KSA 21-6622(h).]

In 2016 Senate Sub. for 2049, the Legislature amended the definition of "significantly

subaverage general intellectual functioning." This legislation was introduced in response to the U.S. Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1886 (2014).

Under Kansas law, counsel for a defendant convicted of capital murder, or the warden or sheriff having custody of the defendant, may request the court to determine if the defendant has an intellectual disability. The court shall then conduct proceedings to determine if the defendant has an intellectual disability. If the court determines the defendant has an intellectual disability, no sentence of death, life without the possibility of parole, or mandatory term of imprisonment shall be imposed. [See KSA 21-6622.]

Death Penalty and Minors

In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court invalidated the death penalty for all juvenile offenders. The majority opinion pointed to teenagers' lack of maturity and responsibility, greater vulnerability to negative influences, and incomplete character development, concluding juvenile offenders assume diminished culpability for their crimes.

KSA 21-6618 mandates that, if a defendant in a capital murder case was less than 18 years of age at the time of the commission of the crime, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed. Thus, the death penalty or capital punishment cannot be imposed on a minor in Kansas.

Method of Carrying Out Death Penalty

The method of carrying out a sentence of death in Kansas must be by intravenous injection of a substance or substances in sufficient quantity to cause death in a swift and humane manner, pursuant to KSA 22-4001. No death penalty sentence has been carried out in Kansas since the death penalty was reenacted in 1994.

On November 17, 2004, the death sentence of Stanley Elms of Sedgwick County was vacated

Inmates in Kansas Under Sentence of Death					
Defendant's Name	Race	Date of Birth	Date Capital Penalty Imposed	County	Case Status
Kyle Trevor Flack	White	06/18/85	05/18/16	Franklin	Appeal Pending
Frazier Glen Cross, Jr.	White	11/23/40	11/10/15	Johnson	Appeal Pending
James Kraig Kahler	White	01/15/63	10/11/11	Osage	Sentence upheld; See below
Justin Eugene Thurber	White	03/14/83	03/02/09	Cowley	Conviction upheld; remanded for redetermination of intellectual disability; See below
Scott Dever Cheever	White	08/19/81	01/23/08	Greenwood	Sentence upheld; See below
Sidney John Gleason	Black	04/22/79	08/28/06	Barton	Sentence upheld; See below
John Edward Robinson, Sr.	White	12/27/43	01/21/03	Johnson	Sentence upheld; See below
Jonathan Daniel Carr	Black	03/30/80	11/15/02	Sedgwick	See below
Reginald Dexter Carr, Jr.	Black	11/14/77	11/15/02	Sedgwick	See below
Gary Wayne Kleypas	White	10/08/55	03/11/98	Crawford	Sentence upheld; See below

pursuant to a plea agreement. He was removed from administrative segregation and sentenced to the Hard 40 term, which is life in prison with no possibility of parole for 40 years.

On April 3, 2009, the death sentence of Michael Marsh of Sedgwick County was vacated pursuant to a plea agreement. He was removed from administrative segregation and sentenced to two life sentences, with parole eligibility after 55 years, but with 85 months to serve for additional convictions if paroled.

On March 24, 2010, the death sentence of Gavin Scott of Sedgwick County was vacated pursuant to a plea agreement. He was removed from administrative segregation and sentenced to two life sentences.

In 2010, a Shawnee County district judge granted Phillip D. Cheatham, Jr., who was under sentence of death, a new sentencing hearing. In January 2013, before this hearing was held, the Kansas Supreme Court found Cheatham's trial counsel was ineffective, reversed Cheatham's convictions, and remanded the case for a new trial.

In January 2015, Cheatham legally changed his name to King Phillip Amman Reu-El. During jury selection for his retrial in February 2015, Amman Reu-El pleaded no-contest to capital murder and attempted murder charges. At a sentencing hearing in March 2015, the district court denied Amman Reu-El's request to withdraw his pleas and sentenced Amman Reu-El to the Hard 25 term (life in prison with no possibility of parole

for 25 years) for the capital counts and 13 years, 9 months for the attempted murder count, to be served consecutively. In May 2015, Amman Reuel filed an appeal of the district court's denial of his motion to withdraw his pleas. The Kansas Supreme Court affirmed the district court's denial in May 2017. In September 2015, Amman Reuel filed a pleading in district court claiming he received ineffective assistance of counsel in making his pleas, and repeated these claims in a supporting affidavit and KSA 60-1507 *habeas* motion filed with the district court in August 2017. This motion was denied by the district court in October 2017. As of September 2018, an appeal from this denial was pending in the Kansas Court of Appeals.

In August 2012, the Kansas Supreme Court reversed the capital murder convictions of Scott Dever Cheever and ordered the case remanded for a new trial. Cheever was under sentence of death for the convictions. The State appealed the case to the U.S. Supreme Court, which issued an opinion December 11, 2013, vacating the judgment of the Kansas Supreme Court and remanding the case for further consideration by Kansas courts of possible error under the Fifth Amendment or Kansas evidentiary rules. The Kansas Supreme Court heard further oral argument in September 2014 but stayed release of a decision pending the U.S. Supreme Court's review of the *Gleason* and *Carr* cases (see below). Following the U.S. Supreme Court's release of the decisions in those cases, the Kansas Supreme Court released, in July 2016, a decision upholding Cheever's convictions and death sentence. As in the *Robinson* decision (see below), Justice Johnson was the lone dissenting justice. Cheever's petition for writ of *certiorari* was denied by the U.S. Supreme Court in December 2017. As of September 2018, Cheever was being held in special management at Lansing Correctional Facility. Cheever's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues.

In July 2014, the Kansas Supreme Court vacated death sentences in three cases. The Court vacated Sidney John Gleason's death sentence and remanded for resentencing. In the

appeals of Jonathan Daniel Carr and Reginald Dexter Carr, Jr., the Court reversed all but one of each defendant's capital murder convictions, vacated each defendant's death sentence for the remaining capital murder conviction, and remanded to the district court for further proceedings. However, the U.S. Supreme Court granted the Kansas Attorney General's petition for writ of *certiorari* in all three cases and heard oral argument in the cases in October 2015. In January 2016, the U.S. Supreme Court released decisions in all three cases reversing the Kansas Supreme Court's judgments (thereby reinstating the death sentences) and remanding to the Kansas Supreme Court for further proceedings. In February 2017, the Kansas Supreme Court affirmed Gleason's death sentence. Gleason's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues. As of September 2018, further proceedings are pending before the Kansas Supreme Court on additional issues in the Carr brothers' cases.

In November 2015, the Kansas Supreme Court upheld a capital murder conviction and death sentence of John Edward Robinson, Sr., for one of the counts of capital murder charged against him. This marked the first death sentence upheld by the Court since the reenactment of the death penalty in Kansas. The Court reversed two other murder convictions as multiplicitous and affirmed remaining convictions. The lone dissent from the Court's decision was by Justice Johnson, who disagreed that the State had properly charged and proven the count of capital murder upheld by the Court. The dissent also stated that the death penalty is both "cruel" and "unusual" and therefore violates § 9 of the *Kansas Constitution Bill of Rights*.

The Court subsequently denied Robinson's motion for rehearing and modification of judgment, and Robinson's petition for writ of *certiorari* was denied by the U.S. Supreme Court in October 2016. Robinson's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues.

In October 2016, the Kansas Supreme Court upheld Gary Kleypas' capital murder conviction

and death sentence. It reversed a conviction for attempted rape and remanded the case for resentencing on a conviction of aggravated burglary. Justice Johnson dissented, citing his dissenting opinions in *Robinson* and *Cheever*.

In February 2018, the Kansas Supreme Court upheld James Kahler’s capital murder conviction and death sentence. Justice Johnson dissented, stating he would vacate and remand for resentencing based upon cumulative guilt-phase errors that undermined the jury’s death sentence determination. Citing his *Robinson* dissent, he again stated the death penalty is an unconstitutional cruel or unusual punishment. In April 2018, Kahler filed a notice of intent to file a petition for writ of *certiorari*.

In June 2018, the Kansas Supreme Court upheld Justin Thurber’s convictions for capital murder and aggravated kidnapping, but reversed the district court’s determination that there was not reason to believe Thurber was intellectually disabled such that Thurber could not be sentenced to death. The Supreme Court remanded the issue of the determination of Thurber’s intellectual disability to the district court for reconsideration in light of U.S. Supreme Court decisions and Kansas statutory changes that had occurred while Thurber’s case was on appeal. Justice Rosen dissented, stating he would uphold the district court’s intellectual disability determination

and proceed to other penalty phase issues. In a separate dissent, Justice Johnson stated he would reverse Thurber’s death sentence and resentence to life in prison on the cruel and unusual punishment grounds he has outlined in previous cases or on the basis of the majority’s finding that the intellectual disability statute in effect when Thurber was sentenced was unconstitutionally restrictive.

As of September 2018, ten inmates under a death penalty sentence are being held in administrative segregation because Kansas does not technically have a death row. Inmates under sentence of death (other than Cheever) are held in administrative segregation at the El Dorado Correctional Facility (EDCF).

State-to-State Comparison

Kansas is one of 30 states that has a death penalty. The following tables show the states with a death penalty and the 20 states without such penalty. According to the Death Penalty Information Center, as of November 2016, four states with a death penalty (Colorado, Oregon, Pennsylvania, and Washington) also had an existing gubernatorial moratorium on the death penalty. (The Washington Supreme Court subsequently struck down the death penalty in that state.)

Jurisdictions with the Death Penalty				
Alabama	Idaho	Montana	Oregon	Virginia
Arizona	Indiana	Nebraska	Pennsylvania	Wyoming
Arkansas	Kansas*	Nevada	South Carolina	U.S. Government
California	Kentucky	New Hampshire*	South Dakota	U.S. Military*
Colorado	Louisiana	North Carolina	Tennessee	
Florida	Mississippi	Ohio	Texas	
Georgia	Missouri	Oklahoma	Utah	
* Indicates jurisdiction with no executions since 1976.				

Jurisdictions without the Death Penalty (year abolished in parentheses)		
Alaska (1957)	Maryland (2013)	New York (2007)
Connecticut (2012)	Massachusetts (1984)	North Dakota (1973)
Delaware ¹ (2016)	Michigan (1846)	Rhode Island (1984)
Hawaii (1948)	Minnesota (1911)	Vermont (1964)
Illinois (2011)	New Jersey (2007)	Washington ³ (2018)
Iowa (1965)	New Mexico ² (2009)	West Virginia (1965)
Maine (1887)	District of Columbia (1981)	Wisconsin (1853)
<p>1 In August 2016, the Delaware Supreme Court held the state's capital sentencing procedures were unconstitutional and struck down the state's death penalty statute. The Delaware Supreme Court subsequently applied the decision retroactively to the 13 people with active death sentences, who were resentenced to lifetime imprisonment without parole.</p> <p>2 In March 2009, New Mexico repealed the death penalty. The repeal was not retroactive, which left two people on the state's death row.</p> <p>3 In October 2018, the Washington Supreme Court held the state's death penalty was unconstitutional, struck down the state's death penalty statute, and converted the sentences of the eight people with active death sentences to lifetime imprisonment without possibility of release.</p> <p>Source: Death Penalty Information Center.</p>		

Recent Developments

In March 2009, the Senate Judiciary Committee held a hearing on SB 208 to repeal the death penalty in Kansas. The bill was amended and passed out of the Committee. The Senate Committee of the Whole re-referred the bill to the Senate Judiciary Committee for study by the Judicial Council during the interim. The Judicial Council formed the Death Penalty Advisory Committee to study SB 208 and concluded the bill presented a number of technical problems that could not be resolved by amending the bill. Instead, the Committee drafted a new bill, which was introduced in the 2010 Session as SB 375. SB 375 was passed, as amended, out of the Senate Committee on Judiciary. However, the bill, was killed on final action in the Senate Committee of the Whole.

Bills that would abolish the death penalty were again introduced in both chambers in 2011, 2013, 2015 (House only), 2016, and 2017. With the exception of 2017 HB 2167, which received a hearing in the House Committee on Corrections and Juvenile Justice, no further action was taken on these bills.

The 2012 House Committee on Corrections and Juvenile Justice held an "informational" hearing on the death penalty.

In 2013, HB 2388 was introduced and heard in the House Committee on Corrections and Juvenile Justice. This bill would have amended KSA 21-6619 to limit Kansas Supreme Court review in death penalty cases to properly preserved and asserted errors and allowing the Court to review

unpreserved and unassigned errors only to correct manifest injustice (as defined in the bill). Proponents of the bill indicated it was introduced in response to the Kansas Supreme Court's decision in *State v. Cheever*, 295 Kan. 229 (2012). A motion in the Committee to recommend the bill favorably as amended failed, and no further action was taken on the bill.

The 2013 Legislature passed Senate Sub. for HB 2043, which allows the Attorney General to file notice of intent to seek the death penalty in those cases where the county or district attorney or a court determines a conflict exists.

In 2014, the Senate Judiciary Committee introduced SB 257, which would have amended the procedure for direct appeals in death penalty cases by establishing statutory time limits and appellate brief page limits and limiting the scope of review. The bill would also have imposed

additional requirements and limitations on both KSA 60-1507 motions generally, as well as KSA 60-1507 motions specifically filed by prisoners under sentence of death. The Senate Judiciary Committee slightly modified the language of SB 257 and recommended a substitute bill for HB 2389 containing this language. Senate Sub. for HB 2389 passed the Senate with these provisions, but they were removed by the conference committee and the bill was passed without any specific death penalty-related provisions.

In 2016, the Legislature passed Senate Sub. for 2049, amending the definition of "significantly subaverage general intellectual functioning." This legislation was introduced in response to the U.S. Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), holding that Florida's threshold requirement for submission of intellectual disability evidence in the context of capital sentencing was unconstitutional.

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