

House Corrections and Juvenile Justice Committee
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HB 2282

Testimony of Bill Rich, James R. Ahrens Professor, Washburn University School of Law¹
In Support of Abolishing the Kansas Death Penalty

Thank you for giving me the opportunity to submit testimony in support of the Death Penalty Repeal Bill. My interests and concerns regarding this legislation result from study of underlying legal issues including many years of personal involvement with issues in Kansas prisons. We have learned a great deal in the 25 years since this state restored capital punishment. We now know in ways that could not have been fully understood in 1994 that capital punishment should be abolished in Kansas.

We know, for example, that capital punishment does not deter heinous capital crimes. We can now look at the lack of correlation between such crimes and the death penalty laws and practices of other states to establish that conclusion. Such data analysis also demonstrates the unintended links between race or ethnicity and application of death sentences in our society. We cannot pretend that Kansas would be immune from such disturbing patterns. Moral misgivings have grown as we gain a better understanding of these relationships.

My brief comments focus on three additional concerns: (1) We have now learned, beyond reasonable doubt, that imperfections in our criminal justice process would eventually result in execution of innocent individuals; (2) Unavoidable delays attached to death penalty prosecution and review procedures prolong suffering rather than bringing closure for friends and relatives of murder victims; and (3) Costs of maintaining inmates on death row add to the burdens faced by the Kansas Department of Corrections as it struggles to maintain minimum standards.

Our lengthy and deliberate criminal justice process may be seen by some as a source for confidence that, prior to imposing capital punishment, we will correct possible errors, and we will not execute the innocent. Experience and study demonstrate the opposite. We know this because of all we have learned when DNA evidence leads to over-turned convictions. We have seen it happen in Kansas. Rather than establishing elimination of error, however, those reversals demonstrate the persistence of erroneous prosecutions within our criminal justice system. Experts at the KBI lab here in Topeka would provide a more complete picture of the number of pretrial investigations in which authorities believe they have captured a criminal only to discover the innocence of the person they intended to prosecute. Unfortunately, capital murder cases often will not be built around the type of DNA evidence that has so clearly demonstrated actual innocence of some convicted defendants.

In contrast to the relative certainty derived from DNA evidence, we have also learned that eye-witness testimony, in particular an observer's identification when faced with a line-up of strangers, may often produce error even though viewed as persuasive by jurors. A combination

¹ Views expressed in this testimony are personal, and my position as a professor of law at Washburn University is noted solely for purposes identification.

of high emotions surrounding murder prosecutions and the persistence of a well-meaning district attorney contribute to the likelihood of mistake. Tragically, convictions based upon such evidence often cannot be reversed even through the most rigorous appeal process.

In other words, reversals brought about by the advent of DNA evidence demonstrate beyond any doubt that we make mistakes. The lack of such incontrovertible evidence in many capital murder cases, accompanied by reliance on evidence that appears persuasive but we know to be often inaccurate, demonstrates that innocent persons will almost certainly be executed. Anyone who votes to maintain the death penalty at this stage, based on current evidence, must do so knowing that an innocent person may be put to death as a result.

When saying this, we should acknowledge that, judges and lawyers normally try their best to correct errors through an extended review process. Those efforts should be applauded. The resulting delays, however, constitute further evidence of systemic failure. Within this context, think in particular about the burden of delay borne by friends and relatives of murder victims. Members of this Committee all know that not a single person has been executed in Kansas in more than 50 years. As a result, we cannot place a number on the “average length of delay” between conviction and execution in this state. Even in states with more experience and a determination to “fast track” execution, however, decades of delay commonly occur.

When Kansas restored the death penalty, this inevitable length of delay could not have been fully understood. At that time, it may have been reasonable to think that imposition of death would bring a relatively quick and final resolution, thereby relieving some of the trauma brought about by murder. We now know better. Rather than a timely sense of relief, those closest to the murder victims suffer extended pain and suffering.

An additional factor that members of this Committee on Corrections should keep in mind is that the state bears the enormous financial costs of prosecuting, defending and housing capital murder defendants. Based on prior experience, I tend to view those costs within a broader context. More than 40 years ago, Federal District Court Judge Richard Rogers appointed me to represent inmates challenging conditions in Kansas prisons. Resulting litigation lasted for 19 years, and orders from Judge Rogers led, among other things, to building the El Dorado prison as well as the Larned mental health treatment facility. Through that experience, I learned firsthand about the enormous costs associated with imprisonment, especially when the state attempts to avoid those costs by letting conditions deteriorate over time.

Now more than at any other time since the conclusion of that litigation we face the risk of replicating that experience. Members of this Committee are uniquely situated to appreciate the link between maintaining capital punishment, along with all of the costs entailed, and the broad challenges faced by the Kansas Department of Corrections. Costs of housing and maintaining death row inmates exceed average costs of imprisonment. I know that Secretary Werholtz, who lived through much of the prior litigation that I was a part of, has provided you with a picture of the challenges he faces. As the state confronts years of neglect within the criminal justice system more generally, I urge you to view repeal of capital punishment as one of many steps that could be taken to address those problems.