

House Corrections and Juvenile Justice Committee
February 19, 2019

House Bill 2282

Testimony of Meryl Carver-Allmond
Proponent

Dear Chairman Jennings and Members of the Committee:

I am a public defender who handles direct appeals of death penalty cases in the Kansas appellate courts.

Twenty-five years ago, in 1994, the Kansas legislature reinstated the death penalty in Kansas. Since then, this State has spent millions of dollars attempting to litigate a capital case to an execution. The State has not been able to successfully do so, and is unlikely to be able to successfully do so in the near future for reasons I will set out below. With no end in sight and many other worthy places to put our Kansas tax dollars, I urge you that it's time to cut our losses and repeal the Kansas death penalty.

As background information, each capital case typically goes through four major stages of appeal once a death sentence is rendered at the end of a trial¹:

1. Direct appeal
2. State habeas
3. Federal habeas
4. End-stage litigation (often involving issues like method of execution, clemency, etc.)

Within each stage there are multiple levels of intermediate review. For example, the first two stages involve,

1. Direct appeal
 - a. Mandatory review by the Kansas Supreme Court
 - b. Petition for writ of certiorari to and possible review by the United States Supreme Court
2. State habeas
 - a. Review by a Kansas district court
 - b. Review by the Kansas Court of Appeals

¹ Based on my experience as an appellate attorney, I will not focus on the increased resources involved in a capital trial, except to say that they are similarly extensive.

- c. Petition for review to and possible review by the Kansas Supreme Court
- d. Petition for writ of certiorari to and possible review by the United States Supreme Court

After 25 years, some of the earliest Kansas capital cases are just now beginning to get to the first (district court) level of the second (state habeas) stage of review.² But, with this new stage of review comes new obstacles, all of which will add more time—and therefore more cost—to this already long, expensive process.

- State habeas involves an entirely new set of defense attorneys reinvestigating and reviewing each capital case. The documents alone are tens of thousands of pages to organize and review, even without considering the difficulties and expense of tracking down long-lost witnesses or jurors, or hiring new experts to review old test results and perform new testing.
- Defense attorneys who have already worked on a given case at either the trial or direct appeal stage are prohibited from participating in the habeas review. As such, new attorneys must be hired or contracted. These new attorneys must be qualified to do capital work, and they must maintain that qualification with ongoing training.
- Prosecutors, court staff, and judges will also be required to refamiliarize themselves with these voluminous capital cases. While there is no ethical reason a prosecutor or judge cannot perform habeas work on a case they've already worked on at trial or direct appeal, because of the time that has passed, many of the original prosecutors and judges have moved to other jobs, retired, or even died, and are therefore unavailable to continue their previous work. Thus, the prosecutors and judges must also largely start from the beginning.
- Because no Kansas case has yet been litigated through state habeas, attorneys and district courts (and eventually appellate courts) are going to be asked to apply and interpret untested law. Because these laws have not been applied in capital cases before, there will likely be mistakes, remands, and do-overs, just as we've experienced with the direct appeal process.
- As with the direct appeal process, it is also likely that the legislature will be required to spend time and money to amend laws that do not pass constitutional muster or are otherwise unworkable.

² Cases currently at state habeas stage include *Kleypas*, *Gleason*, *Robinson*, and *Cheever*. All other Kansas capital cases are either still on direct appeal or have not been tried yet.

- Lastly, obviously, if state habeas review uncovers substantive, prejudicial mistakes that occurred in a capital trial or direct appeal, any case with such an error would be required to start the entire process, or part of the process, over.

And these are just potential problems with where we are right now.

It's beyond the scope of my experience to attempt to inform this committee about how federal and late-stage litigation might work out, but I would like to address two obvious issues I see based on recent cases and news from other states.

First, just this term, the United States Supreme Court is considering the case of an Alabama death row inmate whose physical and mental health, after spending 30 years on death row, has declined to such a degree that he can no longer understand why he is to be executed.³ In Kansas, 4 of our 10 death row inmates are already over the age of 50, and another older inmate died in prison in 2016.⁴ Given our aging death row population, it seems likely that similar challenges will occur in Kansas if we continue on our present course.

Second, as has been noted in the media, states using lethal injection, as Kansas purports it will do, are having increasing difficulties in legally obtaining execution drugs.⁵ It seems fair to assume that, should we ever get through the maze of the earlier stages of litigation, Kansas would have similar problems. It makes little sense to spend the resources necessary to get a capital case to that point with such uncertainty.

In conclusion, Kansas has spent 25 years attempting to litigate a death sentence to execution. While we are somewhat closer than when we started, in the larger scheme of the time and money that has already been spent, obstacles still in the way, and overarching issues that make it uncertain that a death sentence will ever be carried out, those 25 years have been a waste of our time and other valuable resources. As such, I urge you to cut our losses, and recommend that the Kansas death penalty be repealed.

Sincerely,
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³ See *Madison v. Alabama*, briefs and docket available at <https://www.supremecourt.gov/docket/docketfiles/html/public/17-7505.html>.

⁴ See Kansas Department of Corrections, "Capital Punishment Information", available at <https://www.doc.ks.gov/newsroom/capital>.

⁵ See, e.g., "Drug companies don't want to be involved in executions, so they're suing to keep their drugs out", *Washington Post*, August 13, 2018, available at <https://wapo.st/2Oy9CQ7>.