



# **PERFORMANCE AUDIT REPORT**

## **Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections**

**A Report to the Legislative Post Audit Committee  
By the Legislative Division of Post Audit  
State of Kansas  
December 2003**

# ***Legislative Post Audit Committee***

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## ***Legislative Division of Post Audit***

**THE LEGISLATIVE POST** Audit Committee and its audit agency, the Legislative Division of Post Audit, are the audit arm of Kansas government. The programs and activities of State government now cost about \$9 billion a year. As legislators and administrators try increasingly to allocate tax dollars effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by Legislative Post Audit helps provide that information.

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December 12, 2003

To: Members, Legislative Post Audit Committee

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This report contains the findings, conclusions, and recommendations from our completed performance audit, *Costs Incurred For Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*.

The report also contains appendices showing detailed information about the death penalty cases in Kansas and our sample of other 1<sup>st</sup> degree murder cases, including time lines, current status and detailed cost estimates.

This report includes a recommendation for the House and Senate Judiciary Committees to seek input from the Judicial Council in considering the cost saving ideas presented in the report. It also recommends that the State Board of Indigents' Defense Services continue pursuing the resources it needs to handle all death penalty cases in Kansas.

We would be happy to discuss the findings or recommendations presented in this report with any legislative committees, individual legislators, or other State officials. These findings are supported by a wealth of data, not all of which could be included in this report because of space considerations. These data may allow us to answer additional questions about the audit findings or to further clarify the issues raised in the report.

Barbara J. Hinton  
Legislative Post Auditor



# EXECUTIVE SUMMARY

LEGISLATIVE DIVISION OF POST AUDIT

## Overview of Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections

**Kansas has had a death penalty law 3 times, but hasn't executed anyone since 1965.** *Kansas is one of 38 states that currently have the death penalty. The U.S. Supreme Court struck down the death penalty laws in 40 states, including Kansas, in 1972. After several previous attempts, the 1994 Legislature enacted a new death penalty law, which then-Governor Joan Finney allowed to become law without her signature.* ..... page 3

*Kansas doesn't have a separate "death row." The 7 inmates currently sentenced to death are housed in the maximum security prison in El Dorado, along with other prisoners who are in administrative segregation.*

**Not every murder qualifies for the death penalty.** *To seek the death penalty for a crime, several things have to occur:* ..... page 3

- *the circumstances of the crime have to fit the criteria set out in State law*
- *the prosecutor's office must file formal capital murder charges*
- *the prosecutor's office must file formal declaration to seek the death penalty within 5 days of the preliminary hearing.*

*Not all capital-eligible crimes are charged capital, and not all capital charges result in the prosecutor seeking the death penalty.*

**The U.S. Supreme Court has stated that "death is different," which leads to more review and a lengthier process for those cases in which the death penalty is sought.** *Death penalty cases are subjected to higher or "super" due process standards. These include:* ..... page 5

- *Jurors for death penalty cases have to be "death penalty qualified." This means jurors go through extensive questioning by both the prosecution and defense to make sure their beliefs about capital punishment wouldn't substantially impair or prevent their performance as jurors.*
- *There's a two-phase trial process. A jury determines the defendant's innocence or guilt in the first trial. In a second, separate trial, usually the same jury decides whether to recommend the death penalty.*
- *The jury must consider aggravating and mitigating circumstances in the sentencing phase. This can be extensive and make the sentencing phase quite lengthy.*
- *State and federal laws require an automatic review of death penalty cases by the State Supreme Court. For most other sentences, the*

*Kansas Supreme Court would have the option of deciding whether to consider an appeal.*

**Costs for death penalty cases are incurred at both the State and local levels.** *The State Board of Indigents' Defense Services usually bears the cost of defending capital murder cases. Prosecution costs will be borne by either the counties or the State, depending on who assumes the responsibility for the case. In jurisdictions where local prosecutors don't have staff with the expertise to prosecute a death penalty case, the Kansas Attorney General's Office is called in.* ..... page 8

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### **Question 1: How Does the Cost of Death Penalty Cases in Kansas Compare With the Costs of Cases Involving Non-Death Sentences?**

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*Actual cost figures for death penalty and non-death penalty cases in Kansas don't exist. Some information presented here is based on estimates because judges, attorneys, court staff, and local law enforcement officers don't keep case-by-case time records and projections. Other costs had to be projected because most death penalty cases in Kansas are in the early stages of the process, and there's no way to know how many appeals these cases will have.* ..... page 10

**During this audit, we obtained and compared estimated cost information for 22 cases.** *This included:* ..... page 10

- *7 cases where the death penalty was sought and given*
- *7 cases where the death penalty was sought and not given*
- *8 first degree murder cases where the death penalty was not sought*

*All 22 cases had gone to trial and resulted in a conviction.*

**Cases in which the death penalty was sought and imposed could cost about 70% more than cases in which the death penalty wasn't sought.** *The estimated median cost of a case in which the death sentence was given was \$1.2 million, compared to the same estimated costs for a non-death penalty case of about \$740,000.* ..... page 11

*The State will bear about 85% of the total estimated and projected costs for the 14 cases in which the death penalty was sought.*

**Death penalty cases tend to have higher costs at the trial and appeal stages.** *The median trial cost for cases in which the death penalty was imposed was more than \$500,000, compared to about \$33,000 for the median non-death penalty cases we reviewed. At just over \$400,000, the projected appeal-related costs for the death penalty cases in our sample was more than 20 times the projected cost for cases in which the death penalty wasn't sought. Numerous factors can make death penalty cases more expensive, such as lengthier proceedings, more experts, and more issues to litigate.* ..... page 13

## **Question 2: Are There Steps Kansas Could Take To Reduce Overall Costs in a Capital Punishment Case?**

**Much of the process is mandated by the U.S. Supreme Court.** As ..... page 20  
*such, basic core processes related to the trial, sentencing, and other aspects of death penalty cases were essentially the same between Kansas and the comparison states of Florida, Texas, and North Carolina.*

**Some aspects of the way Kansas has implemented the death penalty actually save money.** ..... page 20  
*Areas where Kansas was different from one or more of the other states are summarized below:*

- *Kansas doesn't require a grand jury indictment*
- *Kansas generally doesn't sequester juries*
- *The Kansas Supreme Court doesn't conduct proportionality reviews (comparing the death sentence in the case before them to the sentences given in other cases involving similar crimes)*

**Certain changes to Kansas law potentially could reduce costs associated with the death penalty.** ..... page 21  
*Having a true life sentence without the possibility of parole could reduce costs in 2 ways. First, prosecutors might not be inclined to seek the death penalty in as many cases if they know a conviction will result in the defendant being locked away forever. Second, juries might be more likely to impose a life sentence rather than death, which could reduce appeal costs. Also, deleting statutory provisions that authorize the Supreme Court to look for trial errors beyond those raised on appeal could further reduce costs.*

**Implementing cost control measures used in other states or suggested by local officials also could reduce costs.** ..... page 24  
*These include:*

- *Some sort of screening mechanism could be used to determine which cases merit seeking the death penalty, such as having all cases screened by the Attorney General.*
- *Having State-employed specialists, such as psychological and forensic experts, also could help control some costs by avoiding the need to contract with private-sector specialists.*
- *Other states have implemented limits on fees paid to contracted attorneys, but Kansas officials have conflicting guidance in this area. The Kansas Attorney General recently issued an opinion stating that the Board of Indigents' Defense can consider State resources in adopting regulations for defense of indigent clients. Yet, recent American Bar Association guidelines clearly state that payment limits are improper in death penalty cases.*

**Ensuring the Board of Indigents' Defense Services can handle most death penalty cases could save costs.** ..... page 27  
*The Death Penalty Defense Unit within the Board of Indigents' Defense Services was established to provide representation to indigent defendants charged with capital crimes. However, sometimes the Death Penalty Defense Unit can't provide the defense services because of conflicts of interest or excessive caseloads.*

When the Board contracts with private counsel, the cost is usually \$100 per hour. A rough estimate of an hourly rate for in-house Death Penalty Defense Unit counsel is about \$32 per hour (based on an average attorney salary of \$55,000 plus fringe benefits, but not including overhead or support staff). The Board currently is pursuing the idea of setting up a conflicts office in Wichita to help avoid the need to contract with private attorneys.

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This audit was conducted by Chris Clarke, Carol Porter, and Ivan Williams. Leo Hafner was the audit manager. If you need any additional information about the audit's findings, please contact Ms. Clarke at the Division's offices. Our address is: Legislative Division of Post Audit, 800 SW Jackson Street, Suite 1200, Topeka, Kansas 66612. You also may call us at (785) 296-3792, or contact us via the Internet at LPA@lpa.state.ks.us.

# **Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections**

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The Kansas Governmental Operations Accountability Law (K-GOAL) requires Legislative Post Audit to conduct a performance audit of specified State agencies each year. K-GOAL audits can help determine the necessity, propriety, and legality of the operations we review and evaluate, and can identify inefficient or ineffective operations. Through this process, the Legislature can, in the words of the Act, “retain and maintain appropriate and effective governmental operations, remediate defective governmental operations, and terminate inappropriate or obsolete governmental operations.” The Legislative Post Audit Committee chose to focus this K-GOAL audit on costs incurred for death penalty cases.

Since 1994, when the death penalty was re-instituted in Kansas, fewer than 20 death penalty cases have been tried in Kansas. The State Board of Indigents’ Defense Services has spent about \$4.7 million on defense costs alone for these capital punishment cases. Nearly \$2 million was spent on just 3 cases.

In addition to defense costs, State and local agencies bear the costs of investigating and prosecuting such cases, and the court system bears the cost of adjudicating them. Further, the Department of Corrections incurs costs for incarcerating and executing individuals sentenced under the death penalty.

Legislators have expressed an interest in knowing what a capital punishment case costs both the State and local units of government, and whether there are less costly ways to pursue it, or whether alternative sentences could be imposed for less cost. This audit answers the following questions:

- 1. What are the total State and local costs of cases involving the death penalty?**
- 2. Are there steps Kansas could take to reduce overall costs in capital punishment cases?**
- 3. Are alternative sentences to the death penalty less costly to governmental entities?**

To answer these questions, we first reviewed literature and studies related to the cost of death penalty cases, and talked to judges, attorneys, and others familiar with these cases to help ensure we captured all costs that were relevant and likely to be significant. We then developed a data collection document and asked local law enforcement officials, local courts and prosecutors, State courts, the Kansas Attorney General’s Office, the Kansas Bureau of Investigation, the Board of Indigents’ Defense Services, Legal Services for Prisoners, and the Department of Corrections to provide information about the costs they incurred for all cases that have been tried seeking the death penalty.

For comparison purposes, we asked those entities to provide the same types of cost information for a sample of 1<sup>st</sup> degree murder cases that weren’t tried as death

penalty cases, but the defendant received a long prison sentence. Because none of the death penalty cases in Kansas have gone through the entire appeals process and because there haven't yet been any executions, we had to develop methods for estimating those costs. We didn't attempt to capture and apportion overhead costs, such as building costs and utilities, to the individual cases in our sample because of the limited time available for this audit, the difficulty in identifying such costs, and the fact that these costs are likely to be relatively small in relation to other costs. Facility overhead costs are factored into estimated and projected incarceration costs.

We also contacted several other states and officials from the federal government to gather information about their respective death penalty procedures and sentencing options. We compared that information to the procedures outlined in Kansas statutes to identify potential ways to streamline the process for death penalty cases.

In conducting this audit we followed all applicable government auditing standards. However, a number of cautions need to be noted.

1. Most agencies and individuals involved don't have records of time spent on particular cases, so the vast majority of figures reported are estimates.
2. Except for some records maintained by the Board of Indigents' Defense Services and the Kansas Bureau of Investigation, generally there was nothing we could look at to verify the accuracy of any of the data assembled for this report. It was all self-reported by the agencies and individuals involved in the cases.
3. The number of death penalty cases available to be studied in Kansas (14) generally is too small to draw reliable conclusions about average costs. With such a small group, 1 or 2 very costly cases can significantly affect averages.
4. None of the death penalty cases has gone through the execution stage, and only 2 have been through even the 1<sup>st</sup> appeal stage. Thus, we had to use cost estimates developed by other state studies for certain portions of the death penalty process in Kansas. Further, for direct appeals to the Kansas Supreme Court, we had to apply average costs for 2 Kansas cases that have gone through this process to other cases which hadn't progressed as far. Actual expenses for these phases of the trials and appeals could be significantly higher or lower than the estimates we had to apply.
5. We can't tell how far the estimated individual case costs and projected future costs shown in this report may vary from the true costs that ultimately will be incurred.

For reporting purposes, we've combined questions 1 and 3 from the original scope statement approved by the Legislative Post Audit Committee (see Appendix A) into a single question. Our findings begin on page 10, following an overview of the death penalty in Kansas.

### ***Kansas Has Had a Death Penalty Law 3 Times, But Hasn't Executed Anyone Since 1965***

Kansas is one of 38 states that currently has the death penalty. Its first death penalty law was adopted at statehood and abolished in 1907, then re-enacted in 1935. Between 1935 and 1965, 14 people were executed by hanging. The last executions took place in 1965.

In 1972 in *Furman v. Georgia*, the U.S. Supreme Court struck down the death penalty, stating that the conditions under which it was being carried out at the time amounted to cruel and unusual punishment. The Justices disagreed on how, or even if, the death penalty could be carried out fairly and humanely. That case voided death penalty laws in 40 states, including Kansas, and changed the sentences of 629 people on death rows to life in prison.

In its 1976 *Gregg v. Georgia* ruling, the U.S. Supreme Court ruled the death penalty itself was not unconstitutional and allowed states to reinstate capital punishment if they followed certain procedural reforms, including a 2-phase trial and automatic appeals.

After several previous attempts to re-enact a death penalty, the 1994 Kansas Legislature enacted a new death penalty law which then-Governor Joan Finney allowed to become law without her signature. No one has been executed under the current law, but the Department of Corrections currently is housing 7 inmates who have been sentenced to death.

Kansas doesn't have a separate "death row." Inmates sentenced to death are housed in the maximum security prison in El Dorado with other prisoners who are in administrative segregation. Administrative segregation means they are separated from the general prison population and allowed out of their cells one at a time for one hour per day.

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### ***Not Every Murder Qualifies for the Death Penalty***

To seek the death penalty for a crime, several things have to occur:

- the circumstances of the crime have to fit the criteria set out in State law, as shown in our "Death Penalty at a Glance" box.
- the prosecutor's office must file formal capital murder charges. The prosecutor doesn't have to file capital charges for every crime that fits the criteria outlined in the statute.
- if the prosecutor is going to seek the death penalty, a formal declaration to that effect has to be filed within 5 days of the defendant's arraignment on capital charges.

## Death Penalty at a Glance

**Date Death Penalty Re-enacted in Kansas - July 1, 1994**

### Crimes Eligible for the Death Penalty in Kansas -

Capital Murder—intentional and premeditated killing of a person with one or more of the following qualifying circumstances:

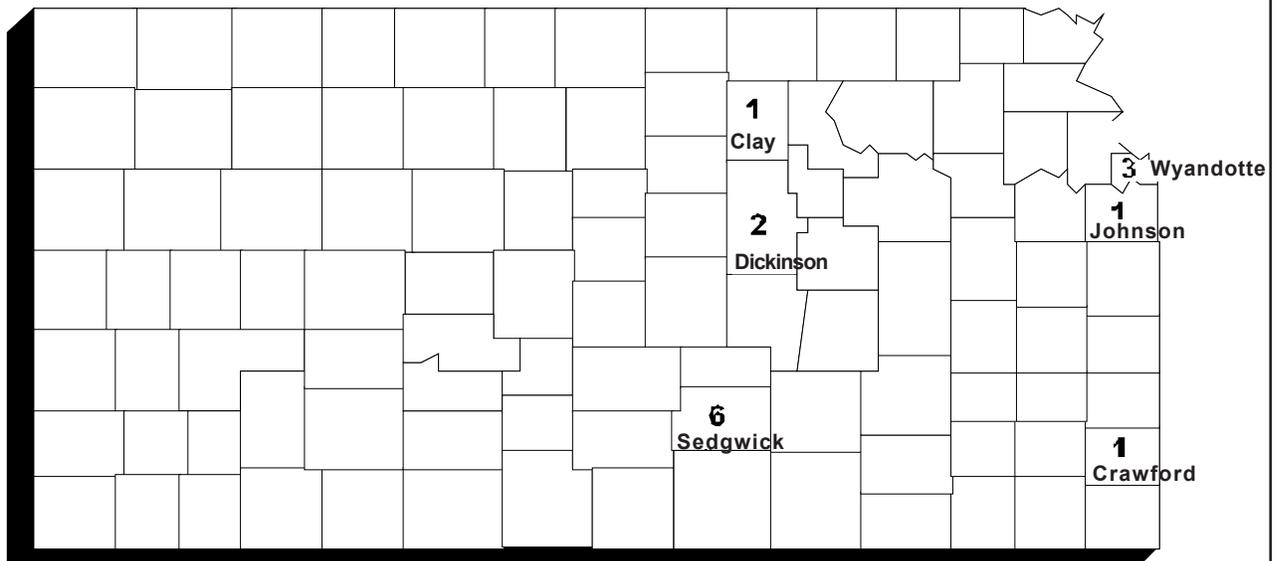
- Kidnaping or aggravated kidnaping for ransom
- Contract murder
- Murder committed by an inmate in a correctional facility
- Murder of a rape or sodomy victim
- Murder of a law enforcement officer
- Murders of more than one person during the same act
- Murder of a child under 14 with the intent to kidnap or commit sex offenses

Execution of defendants who are juveniles, insane, or mentally retarded is prohibited.

### Kansas Capital Murder Cases as of June 30, 2003

Cases since 1994 that potentially fit the statutory criteria for seeking the death penalty	79
Cases Tried Seeking the Death Penalty	14
Defendant Convicted and Death Penalty Imposed	7
Defendant Convicted and Prison Sentence Imposed	7
Defendant Acquitted	0
Executions to date	0

### Location of Death Penalty Cases in Kansas



***The U.S. Supreme Court Has Stated That “Death Is Different,” Which Leads To More Review and a Lengthier Process for Those Cases in Which the Death Penalty Is Sought***

Since its 1976 ruling that allowed the death penalty to be reinstated, the Court has developed a vast framework of federal constitutional rules that govern the trial, sentencing, and direct appeal of capital cases. The Supreme Court has said “death is different,” both because of its severity and its finality. Therefore, these cases are subjected to higher or “super” due process standards. When Kansas re-enacted the death penalty in 1994, the Legislature incorporated many of the Supreme Court’s rulings into Kansas law. Items that make death penalty cases different are discussed below:

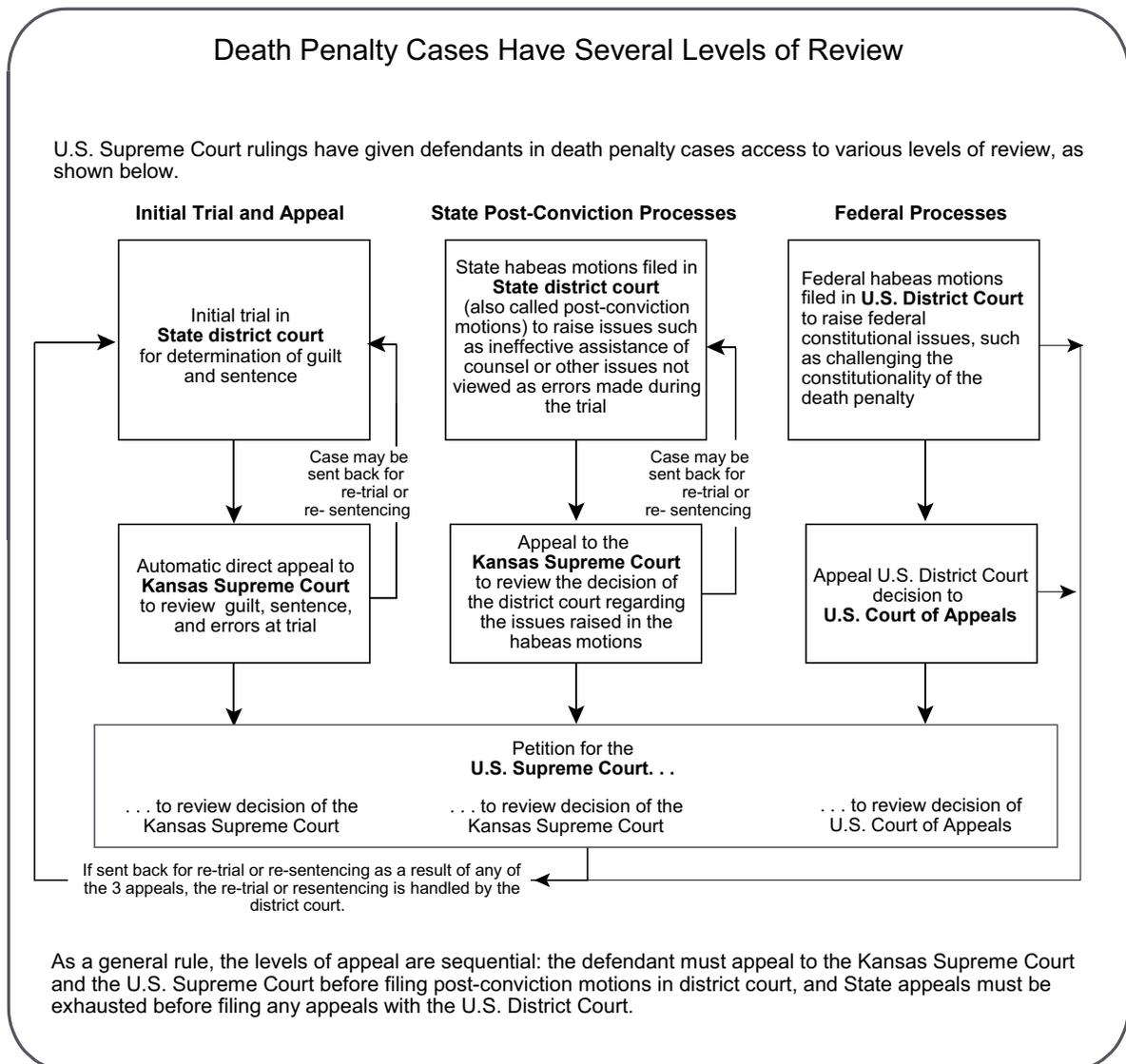
- **Jurors for death penalty cases have to be “death penalty qualified.”** This means jurors go through extensive questioning by both the prosecution and defense to make sure their beliefs about capital punishment wouldn’t substantially impair or prevent their performance as jurors. As a result, more potential jurors are called because of the likelihood that many will be excused during questioning. Because of the extensive questioning, it also takes longer to choose a jury.
- **There’s a two-phase trial process.** This process is often referred to as a bifurcated trial. In the first trial, a jury determines the defendant’s innocence or guilt. In a second, separate sentencing trial, usually the same jury decides whether to recommend the death penalty.
- **The jury must consider aggravating and mitigating circumstances in the sentencing phase.** Under Kansas law, jurors have to consider a number of aggravating and mitigating circumstances in deciding whether to recommend the death penalty, as shown in *Table OV-1*.

<b>Table OV-1 Aggravating and Mitigating Factors Considered by the Jury</b>	
<b>Aggravating circumstances are defined as:</b>	<b>Mitigating circumstances are defined as:</b>
<ul style="list-style-type: none"> <li>● the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another</li> </ul>	<ul style="list-style-type: none"> <li>● the defendant has no significant history of prior criminal activity</li> </ul>
<ul style="list-style-type: none"> <li>● the defendant knowingly or purposely killed or created a great risk of death to more than one person</li> </ul>	<ul style="list-style-type: none"> <li>● the crime was committed under the influence of extreme mental or emotional disturbances</li> </ul>
<ul style="list-style-type: none"> <li>● the defendant committed the crime for the defendant’s self or another for the purpose of receiving money or any other thing of monetary value</li> </ul>	<ul style="list-style-type: none"> <li>● the victim was a participant in, or consented to, the defendant’s conduct</li> </ul>
<ul style="list-style-type: none"> <li>● the defendant authorized or employed another person to commit the crime</li> </ul>	<ul style="list-style-type: none"> <li>● the defendant was an accomplice, with minor participation in the crime which was committed by another person</li> </ul>
<ul style="list-style-type: none"> <li>● the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution</li> </ul>	<ul style="list-style-type: none"> <li>● the defendant acted under extreme distress or under the substantial domination of another person</li> </ul>
<ul style="list-style-type: none"> <li>● the defendant committed the crime in an especially heinous, atrocious, or cruel manner</li> </ul>	<ul style="list-style-type: none"> <li>● the capacity of the defendant to appreciate the criminality of the conduct was substantially impaired</li> </ul>
<ul style="list-style-type: none"> <li>● the defendant committed the crime while serving a sentence of imprisonment for conviction of a felony</li> </ul>	<ul style="list-style-type: none"> <li>● the age of the defendant at the time of the crime</li> </ul>
<ul style="list-style-type: none"> <li>● the victim was killed because of the victim’s performance or prospective performance as a witness in a criminal proceeding</li> </ul>	<ul style="list-style-type: none"> <li>● at the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim</li> </ul>

Witnesses and evidence may be presented by both sides on these factors, which can make the sentencing phase of the trial fairly lengthy. Jurors must weigh these circumstances, and can recommend the death penalty only if they unanimously decide—beyond a reasonable doubt—that the aggravating circumstances outweigh the mitigating circumstances.

If the jury can't reach a unanimous determination that death is the appropriate sentence, the judge then determines whether the defendant gets life with parole eligibility in 25 years or 50 years—again based on a weighing of aggravating and mitigating circumstances. If the jury unanimously concludes that death is the appropriate sentence, the trial judge may, but is not required to, impose a death sentence.

- **State and federal laws require an automatic review of death penalty cases by the State Supreme Court.** Currently, this requirement also applies to defendants sentenced to a Hard 50 sentence (a life sentence with parole eligibility after 50 years). For all other sentences, the Kansas Supreme Court would have the option of deciding whether to consider any appeal.



In cases where the defendant is sentenced to death, the Kansas Supreme Court must not only review specific issues raised on appeal by the defendant's attorney, but by statute is also "authorized to notice unassigned errors appearing of record if the ends of justice would be served." The justices have interpreted this to mean that, not only do they need to review the issues raised by the parties, but they also are required to "scour the record" for any other potential errors that may have been made during the guilt or sentencing phases of the trial. This extra review is unique to Kansas.

In addition to the automatic appeal to the Kansas Supreme Court, defendants sentenced to death have multiple avenues of appeal, which are summarized in the box to the left.

While these levels of review also are available to non-capital defendants, defendants sentenced to death are more often granted permission to use them.

According to the literature, because of these "super" due process requirements, appeals and collateral proceedings are more likely to be successful in capital cases, which result in more reversals and remands (sending the case back to re-do all or part of it), and multiple trips through the system. Lower courts have to rehear the case until all options are exhausted.

According to the national average, it takes about 11 years from the time a death penalty sentence is given until the actual execution. The profile box below describes a defendant from Florida whose death sentence was overturned after 20 appeals. Timelines for each of the defendants sentenced to death in Kansas and their status at the time of this report can be found in Appendix F.

#### **20 Appeals Finally Lead to a Reduced Sentence**

One defendant was sentenced to death in Florida in 1975, and his case was affirmed by the Florida Supreme Court. In 1976, the U.S. Supreme Court heard his case and upheld the death penalty process in Florida. Over the course of the next 14 years, this defendant's case was reviewed (or refused to be reviewed) as follows:

<b>Court</b>	<b># of times appealed</b>
Florida Circuit Court	4
Florida Supreme Court	5
U.S. District Court	3
11 <sup>th</sup> Circuit Court of Appeals	3
U.S. Supreme Court	5

Twice, the Florida Supreme Court called the defendant's appeals "legally frivolous" and dismissed them. On his last appeal, however, the Florida Supreme Court reduced his sentence to 25 years without parole.

**Costs for Death Penalty Cases Are Incurred At Both the State and Local Levels**

The decision to pursue the death penalty in any case is up to the local prosecutor's discretion (unless that person delegates the decision to the State Attorney General). However, the costs associated with prosecuting a death penalty case are incurred at both the State and local level. *Table OV-2* summarizes some of the more common costs for different phases.

<b>Table OV-2 Examples of Common Costs Incurred in Death Penalty Cases</b>		
<b>Examples of Common Costs</b>	<b>State Involvement</b>	<b>Local Involvement</b>
<b>Investigations Costs</b> <ul style="list-style-type: none"> <li>● Securing the crime scene</li> <li>● Gathering evidence</li> <li>● Conducting lab tests on evidence</li> <li>● Interviewing witnesses</li> <li>● Cleaning up the crime scene</li> </ul>	Kansas Bureau of Investigation	Police/Sheriff
<b>Confinement Costs Through the Trial</b>	none	Local jail
<b>Prosecution Costs</b> <ul style="list-style-type: none"> <li>● Salaries of prosecuting attorneys</li> <li>● Prosecution witness fees</li> <li>● Travel costs to interview witnesses, take depositions, etc.</li> <li>● Experts and other services</li> </ul>	Kansas Attorney General	County/District Attorney
<b>Defense Costs</b> <ul style="list-style-type: none"> <li>● Salaries of Board of Indigents' Defense Service attorneys</li> <li>● Costs of any contracted attorneys</li> <li>● Expert witness fees</li> <li>● Travel costs to interview witnesses, take depositions, etc.</li> </ul>	Board of Indigents' Defense Services	none
<b>Court Personnel Costs</b> <ul style="list-style-type: none"> <li>● Judge's time for trial, motions, research</li> <li>● Salary costs for bailiff, court reporter, etc.</li> <li>● Support staff costs for clerks, etc.</li> </ul>	Judges and court staff (most paid by the State)	Bailiff and security staff (paid by the counties)
<b>Jury Costs</b> <ul style="list-style-type: none"> <li>● Notification of jurors</li> <li>● Printing, administration, and analysis of juror questionnaires</li> <li>● Per diem paid for serving on jury</li> <li>● Housing and meals if sequestered</li> </ul>	none	Paid by county
<b>Incarceration After Sentencing</b>	Department of Corrections	none
<b>Appeal to Supreme Court</b>	Supreme Court Staff, Attorney General, Board of Indigents' Defense Services	none
<b>Additional Appeals</b>	Attorney General, Board of Indigents' Defense Services, Supreme Court Staff	none
<b>Execution</b> <ul style="list-style-type: none"> <li>● Salary cost for executioner and staff</li> <li>● Special security costs at the institution</li> <li>● Perimeter security</li> </ul>	Department of Corrections	Local police/sheriff for security
Source: LPA survey of the parties involved in these cases.		

**The State Board of Indigents' Defense Services usually bears the cost of defending capital murder cases.** People accused of capital murder usually don't have the resources to hire their own defense attorneys. In those cases, the Board provides defense counsel. To carry out its mission of providing, supervising, and coordinating constitutionally and statutorily required counsel and related services, the Board oversees a Statewide system of public defender offices and assigned counsel.

In response to the death penalty's re-enactment in 1994, the Board established what has come to be known as the Death Penalty Defense Unit. These attorneys represent people charged with capital murder at the trial level. The Board also has capital appellate defenders to represent them at the appeal levels. *Table OV-3* shows the Board's staff breakdown:

<b>Table OV-3</b> <b>Board of Indigents' Defense Services</b> <b>FTE Positions by Program</b> <b>(Approved FY 03)</b>	
Administrative Services	11
Appellate Defender Office	29
Trial Level Public Defender Offices	111
Death Penalty Defense Unit	15
<b>Total</b>	<b>166</b>

The Board has had to contract with private counsel in several death penalty cases because of conflicts of interest. For example, one death penalty case involved 2 defendants who jointly committed the crimes. The Death Penalty Defense Unit represented one defendant, but because there was a chance he would testify against the other, the Unit was prohibited from representing the second defendant. Question 2, beginning on page 20, has more detail about this case and the most expensive death penalty case to date, which involved the Board contracting with private attorneys.

**Prosecution costs will be borne by either the counties or the State, depending on who assumes responsibility for the case.** In jurisdictions where local prosecutors don't have staff with the expertise to prosecute a death penalty case, the Kansas Attorney General's Office is called in.

The Attorney General's Criminal Litigation Division advises and assists county and district attorneys and local law enforcement officials in investigating and prosecuting criminal cases. In many instances, attorneys in the Criminal Litigation Division handle the direct prosecution of cases at the request of local prosecutors throughout the State.

## Question 1: How Does the Cost of Death Penalty Cases in Kansas Compare With The Cost of Cases Involving Non-Death Sentences?

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Actual cost figures for death penalty and non-death penalty cases in Kansas don't exist. Based on cost estimates we were able to gather, it appears the median death penalty case tried to-date would cost an estimated \$1.2 million through execution, or about 70% more than the estimated cost of the median non-death penalty case through the end of incarceration. Most of those costs will be borne by the State. Trial and appeal costs account for the largest cost differences between the death-penalty and non-death-penalty cases. Trial costs differ because of lengthier and more complicated trials. Appeal costs are higher because more appeals are likely, given that the defendant's life is at stake. These and other findings are discussed in the sections that follow.

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### *During This Audit, We Obtained and Compared Estimated Cost Information for 22 Cases*

Our comparisons focused on 3 types of cases filed since the death penalty was re-enacted in 1994. We chose only cases that had been through a full trial and sentencing procedure. Our sample is described below.

- **7 cases where the death penalty was sought and given.** This group includes all the cases where the defendant was convicted at trial and received a death sentence.
- **7 cases where the death penalty was sought but not given.** This group includes all the cases where the defendant was convicted at trial but did not receive a death sentence.
- **8 cases where the death penalty was not sought.** These were 1<sup>st</sup> degree murder cases in which the defendant was convicted at trial and received a long prison sentence. We used these cases for comparison purposes because the crimes would have been similar to the cases in which the death penalty was sought, but these cases went through the regular trial process, rather than the death penalty process.

As described in the Introduction and in Appendix B, it's important for the reader to be aware that the information and cost estimates we were able to gather or develop for death penalty cases have numerous limitations. For example:

- judges, attorneys, court staff, and local law enforcement officers don't keep case-specific time records. We had to rely on their memories and best estimates of how much time they spent on these cases, many of which occurred several years ago.
- most death penalty cases in Kansas still are at the early stages of the appeal cycle, and it's difficult to reliably predict how many appeals these cases may have, or what those appeals will cost. As mentioned in the profile on page 7, some cases can go through as many as 20 appeals.

We had to rely on some relatively sparse data from other states to estimate the number and costs of future appeals.

- The number of death penalty cases in Kansas is small, and 1 or 2 expensive or inexpensive cases could significantly affect average estimated costs. Because it is not affected by extreme values, throughout this report we present information based on the median for each group of cases.
- The Kansas Supreme Court did not provide estimates for the time the justices spent on the 2 death cases that have had their direct appeal to the Supreme Court, and on other cases they have heard. The Office of Judicial Administration declined to provide information about how long the justices spent on these cases because of “concern about invading the justices’ decision-making process.” Of the entities we surveyed in this audit, they were the only ones who didn’t estimate their time. As a result, we had to rely on sparse comparative data from North Carolina to estimate this.

As a result of these limitations, the figures we present in this report should be viewed only as *estimates of total costs*, not as actual cost figures. Actual experiences in each of these cases could vary significantly from the estimates we received or developed. Also, many officials who worked on these cases worked uncompensated overtime hours. Because these hours aren’t paid, we didn’t assign a value to this time.

***Cases in Which the Death Penalty Was Sought and Imposed Could Cost About 70% More Than Cases in Which the Death Penalty Wasn’t Sought***

Table I-1 shows the total costs for the 22 cases in our sample, as well as information about the most- and least-expensive cases and the median cost for a case, by type of case. These figures include estimates of all State and local costs incurred to-date, as well as projected costs for things that haven’t yet occurred—such as appeals, incarceration, and executions.

Detailed information about our processes for estimating and gathering costs can be found in Appendix B. Detailed cost estimates for all 22 cases included in this audit can be found in Appendix D.

	<b>Death Sentence (7 cases)</b>	<b>Death Penalty Sought - Sentenced To Prison (7 cases)</b>	<b>Death Penalty Not Sought (8 cases)</b>
<b>Total Costs for Group</b>	<b>\$10.6 million</b>	<b>\$6.3 million</b>	<b>\$6.3 million</b>
<b>Most-Expensive Case</b>	\$2.4 million	\$1.1 million	\$1.0 million
<b>Least-Expensive Case</b>	\$1.1 million	\$0.7 million	\$0.6 million
<b>Median Cost for a Case</b>	\$1.2 million	\$0.9 million	\$0.7 million
Source: LPA survey of the parties involved in each type of case, and calculated projections.			

Several interesting points from the table on the previous page:

- **the estimated median cost of a case in which the death sentence was given was about 70% more than the median cost of a non-death penalty murder case.** That figure was \$1.2 million compared to about \$740,000.
- **there was a lot of variability for the 7 cases in which the death sentence was given.** Their estimated costs ranged from \$2.4 million (State v. Robinson) to \$1.1 million (State v. Scott).
- **death penalty cases weren't always more expensive than non-death penalty cases.** As the table shows, the most expensive non-death penalty case in our sample was estimated to cost \$1.0 million, compared with about \$700,000 for the least expensive case where the death penalty was sought but not given. Overall, 5 non-death penalty cases in our sample had estimated costs higher than \$700,000, in large part because the defendants were young and received long prison sentences, thereby increasing their projected incarceration costs.

**The State bears most of the costs of death penalty cases.** *Table I-2* summarizes total estimated costs for all 14 cases in which death penalty trials have been held in Kansas. The table breaks those costs down into 4 primary phases, and by the entity that bore the cost.

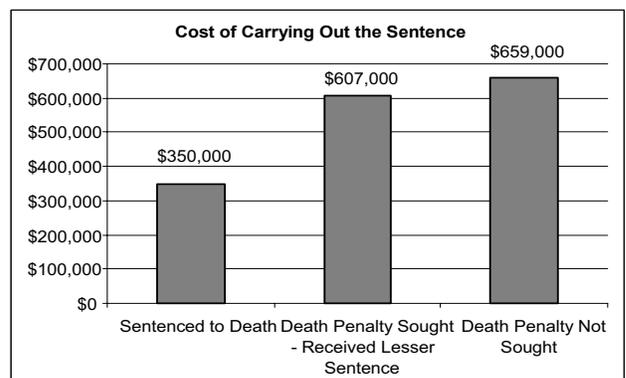
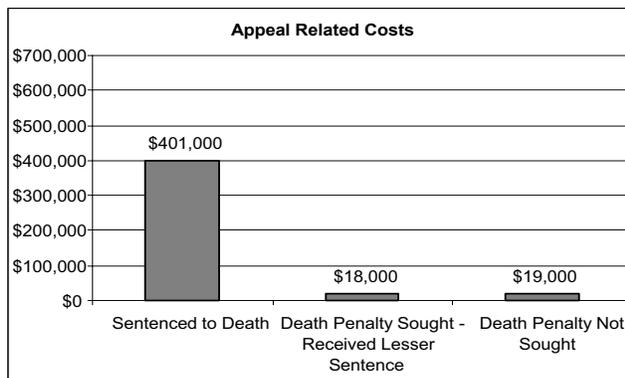
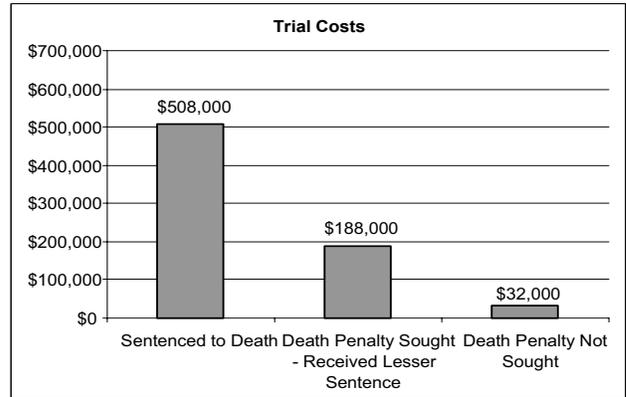
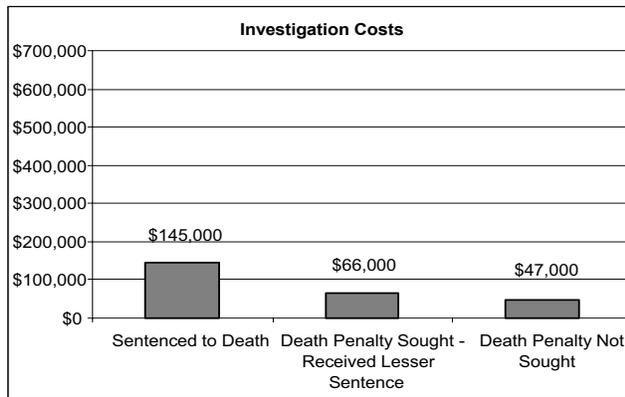
<b>Table I-2 Estimated and Projected Costs for 14 Cases in Which the Death Penalty Was Sought</b>			
<b>Cost Category</b>	<b>State</b>	<b>Local</b>	<b>Total</b>
Investigation	\$281,320	\$1,581,770	\$1,863,090
Trial			
Prosecution	\$191,314	\$558,804	\$750,118
Defense	\$3,959,044	\$0	\$3,959,044
District Courts	\$440,725	\$226,136	\$666,861
Appeal Related	\$3,115,568	\$99,667	\$3,215,235
Incarceration/ Execution	\$6,479,930	\$32,627	\$6,512,557
<b>Total</b>	<b>\$14,467,901</b>	<b>\$2,499,004</b>	<b>\$16,966,905</b>
<b>% of Total</b>	<b>85%</b>	<b>15%</b>	<b>100%</b>
Source: LPA survey of the parties involved in each type of case, and calculated projections.			

The table shows that the State will bear about 85% of the total estimated and projected costs for these cases. Local governments tend to bear the majority of the costs for investigating and prosecuting these cases, whereas the State bears most of the defense, appeal, and incarceration costs.

***Death Penalty Cases Tend To Have Higher Costs at the Trial and Appeal Stages***

Chart I-1 shows the median estimated and projected costs for 4 phases—investigation, trial, appeals, and incarceration and/or execution—for each of the 3 types of cases included in this audit.

**Chart I-1  
Median Estimated Case Costs By Phase**



Source: LPA survey of the parties involved in each case, and calculated projections.

As the chart on the previous page shows, death penalty cases are estimated to be much more costly during the trial and appeals phases, while non-death penalty cases are more costly in the incarceration and/or execution phase. That's because non-death-penalty cases result in long prison terms, whereas in death-penalty cases, we projected that each accused eventually would be executed.

The following sections discuss some of the factors that studies have suggested result in higher costs for death penalty cases, or that make death penalty cases unique, and what we found when we looked at our sample of cases in Kansas.

### ***Factors that can impact investigation costs***

This includes work conducted by the local police, county sheriff, or the KBI for investigating the crime scene, interviewing witnesses/leads, doing forensic lab work, and housing the defendant in jail. The factors involved are summarized in *Table I-3*.

<b>Table I-3 Factors That May Make Death Penalty Cases Unique or More Expensive: Investigation Phase</b>	
Factors That Can Increase Costs	What We Saw in Kansas:
<p><b>More extensive investigations requiring more hours, and more forensic testing.</b> The hypothesis is that there will be more intensive investigation with more hours worked and more lab/forensic testing in cases involving the death penalty.</p>	<p>Reported costs for local police/sheriff and KBI generally were higher for the death penalty cases. It should be noted that cases where prosecutors seek the death penalty are usually the worst-of-the-worst crimes. However, the second highest investigation cost case was a non-death penalty case. This highlights the fact that additional investigation and forensic costs may be due to the nature or location of the crime, not to the fact that the defendant was facing the death penalty.</p>
<p>Source: National Center for State Courts Research Model for Determining Death Penalty Costs, and LPA survey of the parties involved in each type of case.</p>	

### ***Factors that can impact trial costs***

This phase includes prosecution, defense, and court costs. Costs are based on attorney and judge time for pre-trial and trial proceedings. These costs also include expert witness expenses, juror costs, travel costs, costs of other court staff and other prosecution and defense staff, and fees for copying documents, etc. The factors involved are summarized in *Table I-4* to the right.

**Table I-4  
Factors That May Make Death Penalty Cases Unique or More Expensive:  
Trial and Pre-Trial Phases**

Factors that Can Increase Costs	What We Saw in Kansas:
<b>The number of defense and prosecuting attorneys assigned.</b> Because of the complexity and number of motions and issues in death penalty cases, 2 attorneys typically are assigned for the defense and the prosecution.	8 different attorneys have been involved in the trial and appellate defense of Gary Kleypas.
<b>Motion filings and hearings.</b> More issues are raised in motion filings and may be raised in separate motions in order to be thorough.	Although we don't have precise data on all cases, more than 200 motions were filed in the Kleypas case. This reportedly required the judge to hold motion hearings on evenings and weekends.
<b>Change of venue surveys and travel costs.</b> When pre-trial publicity could prejudice potential jurors, the defense may file a motion to have the judge move the trial to another city. Before a decision is made, a change of venue survey may be conducted to assess the level of bias among potential jurors. That can cost as much as \$30,000. When the trial is moved to another city, travel costs will also be incurred for the judge, court staff, and attorneys of the originating county.	Change of venue survey costs were reported for 9 of the 14 death penalty cases and none of the 8 non-death penalty cases we reviewed. These costs ranged between \$6,150 and \$39,915 per case.
<b>Jury selection.</b> Jurors go through extensive questioning by both the prosecution and defense.	Death penalty cases we reviewed averaged 230 jurors at the start of jury selection compared to 89 jurors at the same point in non-death penalty cases. There were 600 potential jurors at the start of jury selection in the Robinson case.
<b>Length of the trial, interrogations, and deliberations.</b> Because capital cases include more than one crime, and sometimes more than one defendant, there often are more witnesses to question. And, because the defendant could be put to death, more care is taken in questioning and jury deliberations.	Death penalty cases we reviewed averaged 28 days from the start of jury selection to the end of the trial, compared with 9 days in non-death penalty cases.
<b>Expert witnesses.</b> DNA and forensic testing are typical, and may be used by the defense or prosecution.	Defense expert witness costs were reported for 11 of the 14 death penalty cases we reviewed and 3 of the 8 non-death penalty cases. These costs ranged between \$400 and \$38,540 per case.
<b>Separate sentencing trial.</b> Only in capital cases where the defendant has been found guilty is a separate trial conducted to determine whether the defendant should be put to death. That decision is based on weighing aggravating and mitigating factors.	On average the separate sentencing trial added an average of 6 days to the length of Death Penalty trials for the cases we reviewed.
<b>Extensive investigations for mitigating evidence.</b> If the defendant is found guilty and there is a second sentencing trial, the defense is allowed to put on <u>any</u> evidence about the defendant's background to convince the jury the defendant should not be put to death. This information is derived from an extensive investigation conducted by the defense. Because the U.S. Supreme Court has ruled a state may not restrict the type or amount of evidence presented as mitigating circumstances, this process involves additional costs for investigations, expert witnesses, and court time.	Contract mitigation specialist costs were reported for 5 of the 14 death penalty cases and none of the 8 non-death penalty cases we reviewed. These costs ranged between \$4,000 and \$52,261 per case.
<b>Psychiatric and medical evaluations.</b> Evaluations are conducted to determine the defendant's sanity and to determine if any medical reasons exist that may explain the criminal behavior.	Defense psychiatric costs were reported for all 14 death penalty cases and 2 of the 8 non-death penalty cases we reviewed. These costs ranged between \$910 and \$71,540 per case.

Source: National Center for State Courts Research Model for Determining Death Penalty Costs, Death Penalty Information Center, and LPA survey of the parties involved in each type of case.

***Kansas' First Capital Case Since 1994  
Is Remanded for Re-Sentencing***

Gary Kleypas was convicted of capital murder, attempted rape, and aggravated burglary in connection with the 1996 death of Carrie Williams, a fellow Pittsburg State University student. The trial had a change of venue from Crawford County to Wyandotte County. Kleypas was sentenced to death on March 11, 1998. Jurors had found that all 3 aggravating circumstances that prosecutors said could warrant the death penalty applied in this case - a previous conviction for a felony with great bodily harm; the crime was committed to avoid arrest or prosecution; and the crime was committed in an atrocious or cruel manner.

On direct appeal, the Kansas Supreme Court affirmed the capital murder conviction of Kleypas, but vacated his death sentence and remanded the case back to Crawford County for re-sentencing before a newly empaneled jury. The Court upheld the constitutionality of the Kansas death penalty statute, but ruled that the law prescribing how a jury is to weigh aggravating and mitigating circumstances in arriving at its sentence violated the Eighth Amendment as applied in this case.

The Court held it was improper for the jury to be instructed as the statute requires, that if aggravating circumstances were found but "not outweighed by any mitigating circumstances, the defendant shall be sentenced to death." This has the effect of requiring the death penalty even when the aggravating and mitigating circumstances are found by the jury to be in equal balance. Thus, the majority held, the so-called "weighing equation" which in essence allows a "tie" to go to the state violates the federal constitutional prohibitions against cruel and unusual punishment and the guarantee of due process. The Court ruled that "fundamental fairness" requires that a tie goes to the defendant when life or death is at issue. In reaching its decision, the Court reasoned that the Kansas Legislature intended to enact a constitutional death penalty scheme and concluded that the statute is not void on its face, but only in its application.

Kleypas must now be re-sentenced by a newly impaneled jury that will be instructed that a defendant must be sentenced to death if the aggravating circumstances found to exist outweigh the mitigating circumstances, as opposed to an instruction that the death penalty be imposed if the mitigating circumstances don't outweigh the aggravating circumstances. The first trial cost the State about \$836,000. Crawford County officials estimate that it will cost the county around \$140,000 to conduct the re-sentencing trial, which includes transporting Kleypas to and from court every day, and providing security in and around the courtroom. It is anticipated that the re-sentencing will begin in Spring 2004.

According to Supreme Court staff, the next 3 cases that will come before the Court on direct review have the same erroneous jury instruction that the Kleypas case did. If the Supreme Court holds to its prior ruling in Kleypas, it's very likely that the next 3 cases all will be sent back as well, at least for re-sentencing.

### ***Factors that can impact appeal costs***

This phase includes prosecution, defense, the Kansas Supreme Court, and the State’s district courts. Costs included are related to the time spent by attorneys, judges, and justices, as well as support staff. We also calculated projections for any re-trials or re-sentencing proceedings, and for future State or federal post-conviction proceedings, such as writs of habeas corpus and requests for review by the U.S. Supreme Court. The factors involved are summarized in *Table I-5*. The profile box on page 16 details the re-sentencing process for Kansas’ first death penalty case.

<b>Table I-5 Factors That May Make Death Penalty Cases Unique or More Expensive: Appeals Phase</b>	
<b>Factors that Can Increase Costs</b>	<b>What We Saw in Kansas:</b>
<p><b>More appealable issues from guilt and sentencing trials.</b> Because more issues are objected to at trial and a separate sentencing trial is held, more issues can be raised on appeal.</p>	<p>In his direct appeal, Mr. Kleypas filed a 3-volume brief totaling almost 600 pages and raising 51 issues. The normal page limit on briefs is usually 50 pages.</p>
<p><b>Cases being reversed or remanded back to the trial court for retrial or re-sentencing.</b> On average, 68% of death sentences are reversed on appeal and have to be retried, re-sentenced, or both. Additional errors made during the retrial can produce further appealable issues.</p>	<p>To date, one death penalty defendant has had his case completely reviewed by the Kansas Supreme Court, and the Court sent the case back to district court for re-sentencing. This means the original district court will have to select another “death qualified” jury, and the parties again will present aggravating and mitigating evidence.</p> <p>Another death penalty case was heard before the Supreme Court on direct appeal in September, but the Court has yet to issue its opinion. This case and 3 others have the same issue that caused the Supreme Court to remand Kleypas back for re-sentencing.</p>
<p>Source: National Center for State Courts Research Model for Determining Death Penalty Costs, Death Penalty Information Center, and LPA survey of the parties involved in each type of case.</p>	

### ***Factors that can impact incarceration/execution costs***

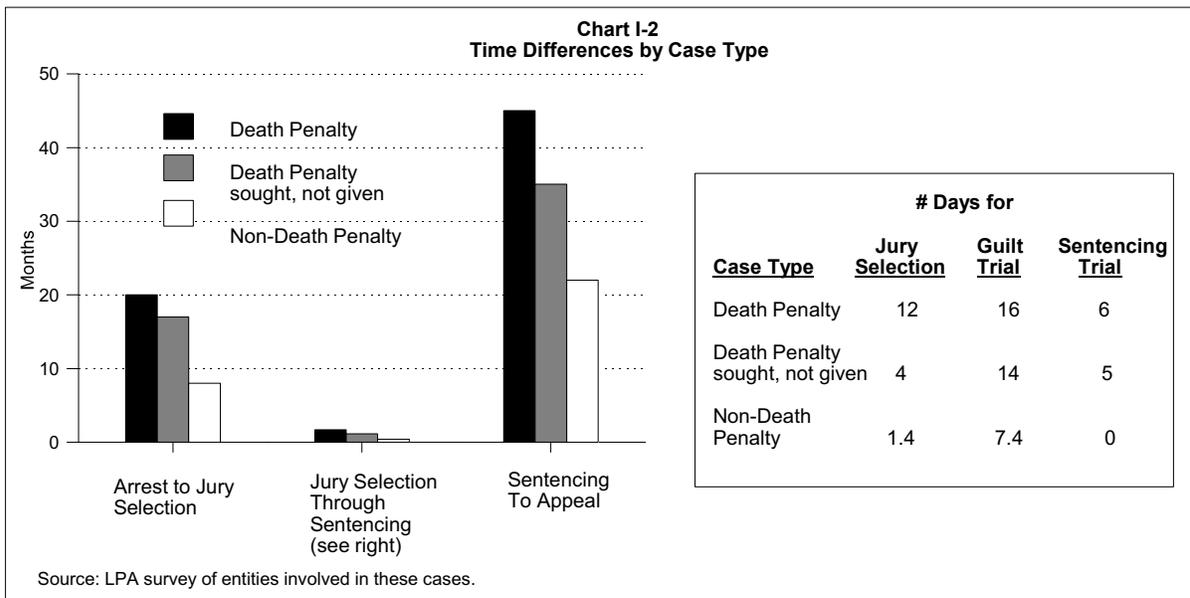
This phase includes the Kansas Department of Corrections and local law enforcement. The costs include incarceration costs for all defendants— those sentenced to death up until the time of execution, and other defendants for the duration of their sentences, or until they reach the age of average life expectancy. Costs also include actual execution costs and site security. The factors involved are summarized in *Table I-6*.

**Table I-6  
Factors That May Make Death Penalty Cases Unique:  
Incarceration / Execution Phases**

Factors that Can Increase Costs	What We Saw in Kansas:
<b>Sentence not carried out for an average of 11 years.</b> Defendants sentenced to death incur incarceration costs during the time they are incarcerated.	None of the Kansas cases involving the death penalty have been through all the avenues of appeal available to the defendants. Mr. Kleypas (the first death penalty case) was originally sentenced to death in 1998, but in December 2001 his case was remanded for re-sentencing. If he is re-sentenced to death in Spring 2004, we projected the execution would happen in 2015, 11 years after the latest sentence was imposed.
<b>Less than 10% of executions are carried out.</b> The Death Penalty Information Center states, most defendants sentenced to death incur all of the trial and appeals costs, yet end up spending the rest of their lives in prison instead of being executed.	Unknown at this point; no death penalty cases have been through the entire process.
<b>More requests for clemency.</b> All defendants sentenced to death likely apply for clemency when the execution appears imminent, while defendants sentenced to life in prison may not file for clemency.	Unknown at this point; no death penalty cases have been through the entire process.
<b>Execution costs.</b> In Kansas, these costs will include transporting the inmate from El Dorado to the Lansing Correctional Facility, security around the prison in Lansing, and the personnel to carry out the execution.	Unknown at this point; no death penalty cases have been through the entire process.

Source: National Center for State Courts Research Model for Determining Death Penalty Costs, Death Penalty Information Center, and LPA survey of the parties involved in each type of case.

In addition, the “super due process” required for death penalty cases means that, in general, those cases are going to take longer to resolve. *Chart I-2* provides some general information about differences in trial and appeal times for our sample of cases. More detailed time lines for both the death penalty and non-death penalty cases in our sample can be found in Appendix F.



**Officials We Spoke With and Literature Suggest  
Both Costs and Benefits  
Which We Couldn't Quantify in This Audit**

During this audit, we spoke with a number of knowledgeable officials and reviewed literature related to death penalty costs and systems. From these sources, we learned a number of costs and benefits that may exist as a result of having a death penalty, but that are hard to quantify. Some of those mentioned were:

**Examples of costs:**

- Creates a sense of brutality in society by sanctioning the taking of a life
- Cost to the system - other cases being neglected because of resources being shifted to capital cases
- Possible execution of innocent persons

**Examples of benefits:**

- A sense of justice
- Cost savings from trials avoided because the possibility of a death sentence caused a defendant to plead guilty to a lesser charge
- Cost savings from crimes that aren't committed because of a deterrent effect of the death penalty

This audit was not designed to quantify these types of costs or benefits or to render an opinion on whether the costs or benefits from having a death penalty outweighed the other. This audit simply looks at how the direct costs of the various phases of death penalty cases compare with those same types of costs for non-death penalty cases.

## Question 2: Are There Steps Kansas Could Take To Reduce Overall Costs in Capital Punishment Cases?

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The basic core processes followed by other states we looked at and the federal government are essentially the same as in Kansas. That's because requirements for things like death-penalty-qualified juries, bifurcated trials, and automatic reviews by state supreme courts are either imposed by law or required by the U.S. Supreme Court. Kansas already may be reducing costs in the cases it has pursued by not using certain non-required processes such as grand juries, or the sequestering of jurors during trial. Changes to State law, such as offering a true life sentence with no possibility for parole, possibly could reduce overall costs in Kansas. Having State-employed specialists also could help control some costs. These and other ideas are discussed in the sections that follow.

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### *Much of the Process Is Mandated By the U.S. Supreme Court*

In this audit, we compared the process Kansas follows for pursuing the death penalty with processes in Florida, Texas, North Carolina, and the federal government. We chose Florida and Texas because those states have had numerous death penalty trials and executions. North Carolina was selected because one of the most frequently cited studies of death penalty costs came from that state. We also spoke with Kansas officials who have been involved in the prosecution and defense of death penalty cases to solicit ideas for making the process less costly.

In comparing the basic core processes related to the trial, sentencing, and other aspects of death penalty cases, we found them to be basically the same. That's because most of the process has been prescribed by the U.S. Supreme Court. Areas we noted that were different are discussed in the sections that follow.

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### *Some Aspects of the Way Kansas Has Implemented the Death Penalty Actually Save Money*

These items are explained below.

- *Kansas doesn't require a grand jury indictment*—Grand juries are panels of citizens assembled to listen to the evidence to decide whether someone should be charged with a crime. Grand juries are required in the federal system and in a number of other states in order to bring indictments in death penalty cases. In Kansas, prosecutors have the option of convening a grand jury, but haven't yet done so.
- *Kansas generally doesn't sequester juries during trials*—Sometimes in sensitive or high-profile cases jurors aren't allowed to go home during the trial to avoid the possibility they'll be prejudiced by news

reports about the case or by people they may talk to. When juries are sequestered, the government has to pick up the cost of feeding and housing them. Although Kansas judges have the authority to order jurors sequestered during the trial or deliberations, our data showed juries have been sequestered in only one death penalty case, and then only during deliberations.

- *The Kansas Supreme Court doesn't conduct proportionality reviews—* These reviews involve the states' Supreme Court justices comparing the death sentence in the case before them to the sentences given in other cases involving similar crimes, to make certain the death sentence isn't excessive. Of the 38 states that currently have the death penalty, 21 states authorize the state Supreme Court to compare sentences. Kansas doesn't.

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***Certain Changes to Kansas Law Could Potentially Reduce Costs Associated With the Death Penalty***

We identified several actions requiring statutory changes that potentially could help contain the costs related to the death penalty—having a true life sentence without the possibility of parole, and removing or clarifying a statutory provision that makes the Supreme Court responsible for “extra” review. Each is described below:

**Having a true life sentence without the possibility of parole could potentially reduce costs in 2 ways.** Current Kansas law sets the punishment for those convicted of capital murder at either death, or prison with eligibility for parole set at either 25 or 50 years.

The literature we reviewed suggests that prosecutors and juries are most concerned about ensuring that those who commit capital murder can no longer be a threat to the public safety. Having the option of imposing life in prison without parole could reduce costs in 2 ways.

- *Prosecutors might not be inclined to seek the death penalty in as many cases if they know a conviction will result in the defendant being locked away forever.* That means all the costs associated with the bifurcated trial, screening jurors for biases related to the death penalty, automatic appeals to the State Supreme Court, and other associated costs could be avoided.
- *Jurors might be more likely to impose a life sentence rather than death, which could reduce appeal costs.* Even though Kansas' law provides for long-term incarceration if the death penalty isn't imposed, the literature suggests that if jurors think there's even a possibility the offender will be released from prison, they are more likely to impose the death penalty than a prison sentence. That's because jurors don't want some defendants to be released no matter what their age may be at the time of release. Our review also showed that defendants with non-death sentences have fewer issues on appeal, which would save appellate costs.

Opponents of life without parole say a “Hard 50” sentence is basically a life sentence because most offenders won’t be eligible for parole until after they have died in prison. However, of the 38 states that have the death penalty, 35 also offer a life without parole option. Of the 12 states that don’t have the death penalty, 11 have life without parole as the mandatory sentence for 1<sup>st</sup> degree murder, and 1 allows the judge to set the number of years.

**Deleting statutory provisions that authorize the Supreme Court to look for trial errors beyond those raised on appeal could further reduce appeal costs.** State law (K.S.A. 21-4627) says:

“The supreme court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.” (underscoring added)

The Supreme Court’s research attorney told us this provision requires him to review the entire record for trial errors that may have occurred, whether or not those issues were raised in the appeal briefs filed by the defense attorneys. Court records in death penalty cases can be very voluminous. For example, in the Kleypas appeal the record consisted of more than 10,000 pages of documents, which the Supreme Court’s research attorney had to review and digest for the Court. In all, he estimated he spent about 2,500 hours preparing that case for the Court to review. We can’t say how much time this statutory provision added, but it’s likely to be significant.

Clearly, this provision provides a safeguard to help ensure that errors aren’t overlooked that could result in an innocent person being convicted. But neither the federal government nor any of the other 3 states we reviewed had such a provision.

**Because Kansas already imposes the death penalty for fewer crimes than other states we looked at, we didn’t see opportunity for savings there.** In Kansas, the death penalty can be sought only in cases of pre-meditated intentional killing of another person in which at least 1 of 7 qualifying circumstances also is present.

As noted earlier, about 80 crimes committed in Kansas since July 1994 have involved one or more of these qualifying factors. Only 53 of those cases were actually charged with capital murder. *Table II-1* shows summarized information for those cases.

Table II-1 Types of Capital Crimes Charged From 1994 To Date	
Aggravating factors that make murders eligible for the death penalty under Kansas law	Number of cases charged under this factor
Kidnaping or Aggravated Kidnaping for Ransom	1
Contracted Murder	3
Murder Committed by an Inmate at a Correctional Facility	0
Murder of a Rape or Sodomy Victim	14
Murder of a Law Enforcement Officer	3
Murder of More Than One Person During the Same Act	36
Murder of a Child Under 14 With the Intent to Kidnap or Commit Sex Offenses	0
<b>Total</b>	57(a)
<i>(a) Note: Totals add to more than 53 cases because some crimes qualified under more than one factor</i>	
Source: State Board of Indigents' Defense Services	

As the table shows, the death-penalty-eligible crimes that have occurred most frequently in Kansas were multiple murders and murders involving rape or sodomy.

In theory, further reducing the categories of murder that qualify for the death penalty could save costs, but Kansas already is fairly restrictive in the types of crimes that qualify for the death penalty. Compared to Florida, Texas, and North Carolina, Kansas has the most limited group of crimes in which the death penalty could be sought. *Table II-2* shows some examples of additional crimes that qualify for the death penalty in those 3 other states.

Table II-2 Examples of Additional Capital Crimes In Several Other States			
Number of Additional Crimes Eligible for the Death Penalty	Texas - 6	North Carolina - 16	Florida - 21
<b>Examples:</b>			
murder committed during a robbery	✓	✓	✓
murder committed as a result of arson	✓	✓	✓
murder committed during a burglary	✓	✓	✓
murder while escaping from custody	✓	✓	✓
murder committed during an aircraft hijacking		✓	✓
murder during a terrorist act		✓	✓
murder by discharging explosives		✓	✓
murder during a carjacking			✓
murder associated with stalking			✓
murder involving the abuse of children, elderly, or disabled persons			✓
Source: LPA survey of other states			

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***Implementing Cost Control Measures Used in Other States or Suggested by Local Officials Also Could Reduce Costs***

These measures—including screening cases for “merit” and having State-employed specialists—are described below.

**Some sort of screening mechanism could be used to determine which cases merit seeking the death penalty.** In Kansas, local prosecutors have sole discretion in deciding whether to seek the death penalty. The only exception occurs when a local prosecutor asks the Attorney General’s Office to take over a case, such as when there’s a lack of resources or expertise. In those cases, the Attorney General makes the decision.

A review process established at the federal level requires cases to be evaluated by a review committee that meets with the attorneys, and gives the defense the opportunity to present any arguments against seeking the death penalty. The committee then makes a recommendation to the U.S. Attorney General, who makes the final decision.

The arguments Kansas attorneys, judges, and others offered for and against implementing this type of screening process in Kansas are summarized below.

**Arguments in favor of such a review**

- It keeps decisions to seek the death penalty from being based on local politics
- It promotes consistency and fairness across the State
- It eliminates making the decision based on economics (whether the county can afford it)

**Arguments against such a review**

- Local prosecutors are already using some sort of internal review process
- It wouldn’t reduce the number of cases or save costs
- It wouldn’t streamline the process

Having this type of screening process would reduce costs only if it resulted in fewer cases being tried seeking the death penalty. Otherwise the review process itself would be an additional cost to State or local government.

**Having State-employed specialists also could help control some costs.**

Some people we talked with during this audit either suggested hiring—or have hired—specialists to provide a more efficient process and help reduce costs.

- *Oklahoma has state-salaried psychological and forensic experts within their indigent defense unit.* These employees’ salaries cost the state less than contracting out for experts on a case-by-case basis to perform psychological or DNA tests and to testify at trial.
- *A panel of specially trained judges could be used for death penalty cases.* The expertise they would acquire possibly could lead to more efficient trials and cut down on the number of errors made during trial, resulting in fewer

issues on appeal and fewer reversals. Alternatively, some states (like Florida) require judges to obtain at least some specific training before they are allowed to sit on the bench for a death penalty case.

- *A panel of law clerks with death penalty expertise could be hired to travel to counties and assist judges who don't have much experience or training with death penalty cases. The experience these clerks would have with the various legal rulings could assist judges in these cases.*

**Some other states have employed spending caps or limits on rates paid to contracted attorneys or experts in death penalty cases, but those types of limits appear to be contrary to American Bar Association standards.** *Table II-3* shows how Kansas compares with several other states in terms of the limits placed on contracted attorneys or expert witnesses fees.

<b>Table II-3 Capital Case Defense Contracted Attorney and Expert Fees</b>				
	Contracted Attorneys		Contracted Experts	
	Limits on Hours	Limits on Rates	Limits on Hours	Limits on Rates
<b>Kansas</b>	<b>None</b>	<b>None. Kansas normally pays \$100/hour.</b>	<b>None</b>	<b>None</b>
Florida	None	Currently the only limit is \$5,000 for post-conviction appeals. Florida is looking into other limits.	None	None
Texas	None	\$60/hour in court and \$40/hour out of court until death penalty notice is filed. After that, \$60/hour out of court and \$500/day in court.	None	None
North Carolina	None	\$85/hour	None	None
Oklahoma	None	By statute, \$20,000 per case for lead counsel and \$5,000 per case for co-counsel. May request more at \$80/hour for lead counsel and \$60/hour for co-counsel. Appeals are not to exceed \$15,000.	None	None, but Oklahoma has in-house forensic and psychiatric experts.
Missouri	None	\$12,000 per attorney up to 2 attorneys, and can request more if case becomes extended. Appeals are limited to \$75,000 per case.	None	None
Colorado	None	\$65/hour	None	By Supreme Court directive, limited to \$150/hour.
Nebraska	None	None	None	None

Source: LPA survey of other states.

As the table shows, Kansas' \$100/hour rate for contract attorneys in death penalty cases is somewhat higher than the \$60 to \$85 per hour rates several of the other states pay. In addition, some states have placed a cap on the total amount of attorney fees they will pay. Currently Kansas has no such statutory cap, and officials at the Board of Indigents' Defense Services pointed to some conflicting guidance in this area as discussed on the following page.

- *State law says the Board of Indigents' Defense should not interfere with defense counsel in carrying out their professional duties.* K.S.A. 22-4520 states, "the State Board of Indigents' Defense Service shall not make any decision regarding the handling of any case nor interfere with the appointed counsel, contract counsel or public defender, or any member of the staff thereof, in carrying out their professional duties."
- *Recent American Bar Association guidelines say that payment limits are improper in death penalty cases.* The February 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases state that "Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases." Those standards were referenced in a recent U.S. Supreme Court case *Wiggins v. Smith, Warden et al* as being guides for determining what is reasonable.
- *A 2003 Attorney General's Opinion concluded that State law does allow State resources to be considered in determining compensation for appointed counsel or for investigative and other expert services.* In summary, that opinion said "The determination regarding whether expert services are necessary to an adequate defense is a matter left to the sound discretion of the trial court. However, the amount of money that may be expended for such services from State funds is subject to compliance with the Board of Indigents' Defense Services' regulations expressing standards and guidelines for compensation of appointed counsel and investigative, expert and other services within the limits of appropriations."

Staff from the Board of Indigents' Defense Services told us that over the years they have looked to the previously mentioned statute for guidance. They told us they interpreted the non-interference language in the statute as calling for them to be pretty much "hands off," and to let the attorneys handle the case as they saw fit. Nonetheless, they told us they recognized their duty to provide counsel for indigent defendants in the most efficient and economical manner possible. Officials told us they attempt to bargain for lower-cost experts, deny some expert service requests, and review expenses and time sheets submitted by contract attorneys.

We saw denials of hours contracted attorneys claimed for lunches and staff meetings, and the like. We also saw evidence of extensive correspondence back and forth between the contract attorneys and Board staff negotiating expert services and fees. However, until just recently, contracts with private attorneys were written in an open-ended way (with no limit on hours worked), and as long as the attorneys submitted itemized time records, they were paid.

Board officials also told us the Attorney General Opinion seems to indicate they can consider State resources in adopting regulations for the defense of indigent clients. Board regulations currently require any claim for expert services which exceeds \$300 to have prior approval from the Board's executive director. Expert witnesses can be called in by either side to help prove the defendant's guilt or innocence. Examples of expert witnesses include DNA experts, psychologists, blood spatter experts, and the like. While the regulations have some dollar limits specified for expert services, the regulations specify that the director can approve additional amounts.

In addition, Board regulations restrict amounts paid to attorneys who are assigned or appointed by a judge in non-capital felony cases to \$50 an hour. However, those limits don't apply to contracted attorneys for capital cases hired by the Board when the Death Penalty Unit's workload is too heavy, or when there is a conflict that prevents them from taking a case. The regulation relating to contract counsel states that compensation shall be at the rate established and set forth in the contract between the attorney and the Board (currently \$100/hr).

In January 2003, the Board wrote its first contract with a limit of hours for a contracted attorney. The contract states the attorney shall work 800 hours, at which point the parties will review the work remaining to be done and agree on any additional hours. Board staff indicated they will need to see how this approach plays out.

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***Ensuring the Board of Indigents' Defense Services Can Handle Most Death Penalty Cases Could Save Costs***

The Death Penalty Defense Unit within the Board of Indigents' Defense Services was established to provide representation to indigent defendants charged with capital crimes. The current staff of 5 attorneys handle death penalty cases, and occasionally handle non-death penalty cases if their caseload allows it. However, sometimes the Death Penalty Defense Unit can't provide the defense services because of conflicts of interest or excessive caseloads. When this happens, the Board of Indigents' Defense Services contracts with private attorneys to provide the representation, usually at \$100 per hour.

The Carr brothers' case in Sedgwick county presents an example of how costs can differ between in-house Death Penalty Defense Unit attorney costs and costs for contracting with private counsel. The Death Penalty Defense Unit represented one of the brothers, but because of a potential conflict of interest (one brother may testify against the other), the Unit couldn't represent the second brother. The Board contracted with a private attorney to provide representation for the second brother.

Both brothers were involved in essentially the same crimes, and were tried at the same time, in one trial proceeding. However, the defense costs for each brother came out very differently, as shown in *Table II-4*, below.

Name	Type of Counsel	Trial Costs	Direct Appeal	Total Costs	% difference
Carr, R	Contracted Out	\$597,434	\$46,398	\$643,832	48% more
Carr, J	In-House	\$427,400	\$7,443	\$434,843	

Source: LPA survey of the parties involved in each type of case.

The normal rate the Board pays contracted private counsel is \$100 per hour. This compares with a crude estimate of an hourly rate for in-house Death Penalty Defense Unit counsel at \$32 per hour (based on an average attorney salary of \$55,000 plus fringe benefits, but not including overhead or support staff). It should be noted that the contract attorney handled the majority of the litigation relating to media coverage of the trial, and the Death Penalty Defense Unit counsel had a lesser role.

Contracted attorneys also were used in the most expensive case to date—the Robinson case. This was an extraordinary case involving multiple victims over several years and several states. The Death Penalty Defense Unit originally represented Mr. Robinson, but he hired his own counsel and in effect “fired” the Death Penalty Defense Unit attorneys. Because the hired attorney wasn’t qualified to handle a death penalty case, the judge appointed 2 private attorneys to assist him. The original attorney subsequently dropped out of the case. The 2 judge-appointed attorneys entered into a contract with the Board of Indigents’ Defense for \$100 per hour to represent Mr. Robinson. Further, due to the Carr brothers’ cases consuming both Appellate Defender Teams, private counsel was contracted to defend the appeal of Mr. Robinson.

**The Board currently is pursuing the idea of setting up a conflicts office in Wichita to help avoid the need to contract with private attorneys.** This office would be staffed with death penalty trial attorneys and would be completely separate from the Topeka office. This would not only reduce the need to hire private attorneys for “conflict” cases, but also would provide additional resources for the Board to handle other death penalty cases.

**Conclusion**

Because so much of the process for prosecuting a death penalty case is required by the U.S. Supreme Court to ensure that due process is followed, there don't appear to be significant opportunities to change the process to save money. That means that other ways to economize will need to be found within the existing processes. One way to avoid some of the expense associated with death penalty cases can come from avoidance of trials or appeals. Some people have suggested that things like having a true life sentence without the possibility of parole, or having screening panels to decide which murder cases warrant seeking the death penalty, could be useful in this area. Others have suggested that having judicial specialists hear death penalty cases could reduce trial errors and associated appeal costs.

Another big area of costs is for the defense of the accused. Attempts to severely restrict what can be spent on the defense could likely be met with court challenges and result in significant retrial costs. However, there may be more economical ways to provide an adequate defense, such as ensuring that the Death Penalty Defense Unit of the Board of Indigents' Defense Services has an adequate number of trained and experienced staff, or possibly establishing a conflicts office, so that cases don't have to be farmed out to higher-cost contracted attorneys. Kansas also could potentially benefit from looking at whether cost control measures instituted in other states are resulting in significant legal challenges, and if not, incorporating those cost control measures into State regulations as appropriate.

**Recommendations**

1. To ensure that Kansas carries out the law related to the death penalty in a fair, equitable, and economical manner, the House and Senate Judiciary Committees should request the Judicial Council to review potential cost saving measures highlighted in this report, and provide recommendations as to which of those measures are most appropriate to consider in Kansas.
2. To help ensure that the Board of Indigents' Defense Services provides a fair and adequate defense at a reasonable cost to those facing the death penalty, the Board should do the following:
  - a. make sure the Death Penalty Defense Unit has a sufficient number of qualified and trained staff so that death penalty cases don't need to be contracted out because of the workloads of existing staff.
  - b. continue to look into the feasibility of establishing a conflicts office.
  - c. look at whether there are cost controls other states have implemented that won't jeopardize the defendant's right to an adequate defense or conflict with court rulings, and incorporate those measures into its regulations as appropriate.

## APPENDIX A

### Scope Statement

The Legislative Post Audit Committee approved an audit on the death penalty at its June 17, 2003 meeting. The audit was requested by Senators Hensley and Morris.

#### **Costs Incurred For Death Penalty Cases: A K-GOAL Audit of the Department of Corrections**

In Kansas, capital punishment cases that result in conviction at the trial court are subject to automatic appeal to the State Supreme Court, and may be appealed to the U.S. District Court, the U.S. Court of Appeals, and the U.S. Supreme Court. If, at any level, an appeals court remands the case back to a lower court, the appeals process can have even more steps.

The multiple levels of appeal and other factors can make death penalty cases costly. Between 1994 (when the death penalty was re-enacted in Kansas) and 2002, costs for the Board of Indigents Defense Services have increased from about \$316,000 to more than \$2 million annually. Although about 80 cases in Kansas have been eligible for the death penalty since it was re-enacted, it has actually been sought in fewer than 20 cases.

In addition to the defense expenses, costs are incurred locally to prosecute such cases, and the court system bears the cost of adjudicating them. Also, the Department of Corrections incurs costs for incarcerating and executing individuals sentenced under the death penalty. Apparently, no agency tracks court costs or prosecutorial costs related to death penalty cases, either at the State level or at the county or district-court level.

Legislators have expressed an interest in knowing what a capital punishment case costs the State of Kansas and local units of government, and whether there are less costly alternatives to the death penalty. A performance audit in this area would address the following questions:

- 1. What are the total State and local costs of the cases in which the death penalty was sought?** To answer this question, we would review relevant literature and interview officials from the Judiciary, State and local law enforcement agencies, local prosecutors' offices, and officials at the Board of Indigent's Defense Services to identify and understand what aspects of the cases are unique to death penalty cases and what aspects are common to all felony cases. We would identify all cases in which the death penalty has been sought since it was re-imposed in 1994. We would break those cases into two groups – those in which a death sentence was imposed, and those in which a death sentence wasn't imposed. For each of those cases, we would assemble a timeline for the various phases of the case, and try to gather information about the costs incurred at both the State and local level for all phases including investigation, prosecution, defense, adjudication, and incarceration. For execution costs, we would rely on estimates made by Department of Corrections staff.

*(Staff note: There haven't been any executions in Kansas since the death penalty has been re-imposed. Therefore, actual costs incurred to date will not be complete. To estimate total costs of these cases, we will need to make assumptions about the number, length, and cost of appeals and about the life-expectancy of inmates who receive life sentences rather than the death penalty.)*

- 2. Are there steps Kansas could take to reduce overall costs in capital punishment cases?** To answer this question, we would gather information about the processes for handling death penalty cases in a sample of other states (including Florida and Texas) and at the federal level. We would identify any differences between the processes they follow and the one used in Kansas. In particular, we would look for things Kansas requires that the other states or federal government don't. If it appears that some states may have more streamlined processes, we would explore the pros and cons of adopting some of the things other states might have done.
  
- 3. Are alternative sentences to the death penalty less costly to governmental entities?** To answer this question, we would select a sample of cases involving crimes eligible for the death penalty but for which the death penalty wasn't sought. We would then develop a timeline and collect costs for those cases to compare with the costs of death penalty cases determined in Question 1. In areas where the costs of these cases varied substantially from the death penalty cases, we would attempt to determine why. Also, we would look at what alternative sentences other states are using for the types of crimes currently eligible for the death penalty in Kansas. We would do additional work as needed.

**Estimated completion time: 12-14 weeks**

## APPENDIX B

### Methodology

This appendix contains detail about the methodology used in this audit to generate cost information for the sample of death penalty and non-death penalty cases to-date, and to project future costs for these sample cases.

**Purpose of the audit:** This audit was authorized to assist Kansas legislators in knowing whether death penalty cases were significantly more expensive than non-death penalty cases, and if so, by how much. It is not a study of whether it is more costly for Kansas to have the death penalty than not to have it. Such a study would have required a much broader look at, and an attempt to place a value on, all the possible positive and negative impacts that having a death penalty brings. Those would include such things as deterrent effects, effects on families of crime victims, possible cost savings from defendants pleading guilty to avoid a trial in which the death sentence could be imposed, and the like.

#### How We Selected the Cases We Reviewed:

From the Kansas Board of Indigents' Defense Services (BIDS) records, we identified cases since 1994 that have gone to trial seeking the death penalty. Of these cases, 7 resulted in a death penalty sentence, and 7 resulted in a prison sentence.

To create a comparison group similar to the Death Penalty group, we used the BIDS records to select cases in which capital murder charges could have been filed but weren't. Those cases had to meet each of the following criteria:

1. Death Penalty was not sought
2. Defendant received a jury trial
3. Defendant received one or more Hard 40 or Hard 50 sentences

This process yielded 6 cases. We selected two additional cases from the Kansas Sentencing Commission's list of individuals who had received a Hard 40/50 sentence for murder since 1997. These cases were selected based on the aforementioned criteria, the type of offense (capital murder or 1<sup>st</sup> degree murder) and the county of record – Sedgwick or Wyandotte. These counties were selected because each had multiple cases eligible for capital murder charges. In total, we selected 8 non-death penalty murder cases 7 of which were eligible for capital murder charges. We didn't search for more non-death penalty sample cases because of the audit's time constraints.

#### State and Local Agencies Whose Costs Were Included:

State	Local
Kansas Department of Corrections	Local Police and Sheriff's Offices
Kansas Bureau of Investigation	District Courts
Kansas Attorney General's Office	County and District Attorneys' Offices
State Board of Indigents' Defense Services	
Kansas Judicial Branch (Supreme Court and Office of Judicial Administration)	
Legal Services For Prisoners	

#### Types of costs we included:

**Investigation Costs:** We included direct salary and fringe benefit costs of law enforcement agencies involved in investigating the crime, jailing the defendant, and testifying at trial. We also included miscellaneous travel and out-of-pocket costs for forensic tests conducted in connection with the case.

**Prosecution Costs:** We included direct salary and fringe benefit costs of attorneys and support staff who worked on the case. We also included fees for contracted attorneys, witnesses, as well as travel, experts, and other costs incurred by the prosecution.

**Defense Costs:** We included direct salary and fringe benefit costs for attorneys and support staff employed by the Board of Indigents' Defense Services, as well as out-of-pocket costs for change of venue studies, contracted attorneys, witnesses, experts, as well as, travel, transcript fees and other costs incurred by the defense.

**Court Costs:** We included direct salary and fringe benefit costs of the judges, court clerks, bailiffs, court reporters, or any other staff directly involved in the conduct of the trial. We also included jury expenses and travel costs.

**Appeal Costs:** We included the cost of the research attorney and other court staffs' time, as well as prosecution and defense attorney time.

**Incarceration Costs:** We included local jail costs for the defendant up to the sentencing. We also included the total cost of incarceration in Department of Corrections facilities after the sentence is imposed, including a share of the overhead costs of operating the facility.

**Execution Costs:** We included such things as the cost of overtime for corrections staff on the day of execution, the cost of added security at the facility where the execution takes place, and the cost of conducting the execution and cremating the body.

#### **Historical costs we estimated:**

**Supreme Court Justices' time** - The Judicial Branch declined to provide an estimate of the amount of time justices spent on direct appeals to the Supreme Court. They said:

“As far as estimating the amount of time spent by individual Supreme Court justices and their respective staffs is concerned, we do not believe any meaningful figures could be determined. There has been a great deal of turnover in justices and staff, and as previously indicated, no contemporaneous time records were kept. Further, we have concern about invading the justices' decision-making process.”

As a result, to estimate the justices time we had to rely on data justices from North Carolina Supreme Court provided about the amount of time they spent considering appeals of death penalty cases. Those hours were reported in a study of costs of the death penalty in North Carolina, several years ago.

#### **Costs we didn't include:**

**Overhead Costs:** We generally excluded any share of prosecution, defense and courts' administrative costs, office rent, utilities, and the like, because they were very likely to be too small to significantly affect the findings, and too difficult to assemble in the time available. However, the Department of Corrections included facility overhead costs in its incarceration cost estimates and projections.

**Overtime for Salaried Staff:** Many salaried officials who worked on these cases reported uncompensated overtime hours. Because these hours aren't paid, we didn't assign a cost value to this time.

### **How We Gathered Cost Information:**

We developed surveys with questions about time spent by various types of staff and specific types of out-of-pocket costs. Surveys were tailored for District Courts, Local Prosecutors, Local Police/Sheriff, the State Attorney General's Office, the Kansas Bureau of Investigation, the Board of Indigents' Defense Services, and the State Supreme Court. We solicited specific cost information from the Department of Corrections and Legal Services for Prisoners by phone, e-mail, or fax.

To measure personnel costs we asked about time spent on each case by different personnel. We also asked for information on current average salaries and fringe benefits for each category of personnel. We asked for estimates when actual costs weren't known. To assist them in responding we provided a Case Chronology of important dates, such as the date of the crime, date of arrest, date the trial started and ended, etc. with each survey. All of the cases where the defendant was sentenced to death, and several of the others, remain open and active on appeal or retrial, so that costs continue to accumulate.

### **How We Assembled Cost Estimates for Phases That Have Already Happened:**

Because the cost of most goods, services, and wages tend to increase over time, we converted all costs to 2003 dollars.

**Staffing Costs:** We asked for current average annual salaries of employees, and applied current salary figures to time estimates reported. To calculate Kansas Supreme Court justice costs, we had to apply hours estimated by North Carolina justices for similar cases to current Kansas' justice salaries.

**Out of pocket expenses:** For expenses reported from prior years, we inflated the costs based on the Consumer Price Index.

### **How We Projected Costs for Phases That Haven't Yet Occurred:**

Historical data on the cost of direct appeals, additional appeals, incarceration, execution or retrial/re-sentencing in death penalty cases was very limited or non-existent.

To project costs we made some key assumptions:

- All individuals currently awaiting execution will continue to appeal their case until they are executed.
- Currently available historical cost estimates provide a good estimate of future costs.
- There won't be major changes in the State's death penalty statute or relevant case law that would impact the number, length or cost of appeals.
- The number and cost of appeals in Kansas will be similar to those in North Carolina. North Carolina had data on the number and cost of appeals in their state.
- Future rates of inflation will equal the historical average (1913-2003) rate of inflation.
- Future returns on long-term government bonds will approximately equal their historical (1926-1999) average rate of return.
- Inmates in the study will be incarcerated in Kansas until they are executed or the earliest of the following happens:
  - < the end of their mandatory minimum sentence
  - < they die (estimated based on their current average life expectancy)

Where possible we used historical data, including estimates, as the basis for our projections. When no Kansas data were available (i.e. number of appeals per case) or was not provided to us (i.e. Supreme Court Justice time) we used comparable data from Missouri or North Carolina. For example, we used Missouri data to project how many of our sample cases where the defendant was sentenced to death would proceed through each step. That gave us the number of projected appeals. We used North Carolina data to estimate the time spent on cases by Supreme Court justices, and to project the length and cost of appeals.

To calculate the present value of future incarceration costs we inflated the current annual cost based on the historical average rate of inflation. We converted those costs into 2003 dollars based on the estimated return they could earn if invested in long-term government bonds. The estimated return is the average return on long-term government bonds between 1926 and 1999.

### **Significant Limitations of the Study:**

- Because death penalty cases usually involve the worst-of-the-worst crimes, it's difficult to find comparison cases. We assume some differences in costs between cases can be attributed to differences in the crimes committed. Unfortunately, how much of a difference in cost should be attributed to the nature of the crime(s) involved is unknown.
- In some cases agencies reported actual amounts from invoices or other records, but most costs were based on unverifiable estimates of time spent.
- With many cases open on appeal, complete estimated cost information is only available for the trial stage. The primary cost information available is limited to estimates of costs during the trial phase.
- Our use of the CPI provided only a rough measure of the impact of inflation on the current cost of out-of-pocket expenditures.
- We don't know how accurately the agencies involved reported their costs to us. Some cases date back many years, and agency officials had to provide time and cost estimates.
- We based the cost of direct appeals, additional appeals, incarceration, and execution on projections that are naturally limited by the accuracy of our assumptions. For example:
  - < death penalty convictions may be overturned
  - < trial, appeal, and prison costs may increase slower or faster than the rate of inflation
  - < inmates may die or be executed much sooner or later than predicted
  - < non-death penalty sentenced inmates may die before the end of their minimum sentence or be denied parole after having served their minimum sentence
- Some small unidentified costs may not have been included on our surveys.
- Survey respondents may not have reported all the hours or costs they incurred.
- A prisoner can refuse to continue appealing his/her sentence or may die during the process. When or if this will happen is impossible to predict.
- If a case is remanded on appeal, and the individual is re-convicted or re-sentenced a second direct appeal could result.
- The cost of incarceration until release or execution is difficult to predict and is subject to change drastically if one or more inmates is released, dies, or is executed much sooner or later than expected.

**APPENDIX C  
Case Details**

This appendix contains detail about the 22 cases examined in this audit. The information presented includes dates of the crime, charges, age of defendant, and sentence received.

Defendant's Name	D.O.B.	County	Sought Death?	Date of Crime	Age at Time of Crime	Charges	Date Originally Sentenced	Total Length of Consecutive Sentence(s)
Kleypas, Gary	10/8/55	Crawford	Y	3/30/96	40	Capital Murder, Attempted Rape, Aggravated Burglary	3/11/98	Death
Marsh, Michael	8/12/75	Sedgwick	Y	6/17/96	20	Capital Murder, 1st Degree Murder, Aggravated Arson, Aggravated Burglary	4/16/98	Death
Scott, Gavin	3/4/78	Sedgwick	Y	9/13/96	18	Capital Murder, 1st Degree Murder, Aggravated Burglary, Criminal Possession of a Firearm, Felony Theft	8/12/99	Death
Elms, Stanley	8/19/76	Sedgwick	Y	5/4/98	21	Capital Murder, Rape, Aggravated Burglary	2/10/00	Death
Robinson, John	12/27/43	Johnson	Y	2/29/00	56	2 Counts of Capital Murder, 1st Degree Murder, Aggravated Kidnapping, Theft, Aggravated Interference with Parental Custody	1/23/03	Death
Carr, Jonathan	3/30/80	Sedgwick	Y	12/14/00	20	4 Counts Capital Murder, First Degree Murder, Attempted Murder in the 1st Degree, 5 Counts of Aggravated Kidnapping, and 32 other felonies including Rape, Criminal Sodomy and Robbery.	11/15/02	Death
Carr, Reginald	11/14/77	Sedgwick	Y	12/14/00	23	4 Counts Capital Murder, First Degree Murder, Attempted Murder in the 1st Degree, 6 Counts of Kidnapping, and 42 other felonies including Rape, Criminal Sodomy and Robbery.	11/15/02	Death
Bradford, Virgil	11/8/70	Dickinson	Y	2/17/97	26	Capital Murder, 2 Counts of 1st Degree Murder, Aggravated Burglary	2/23/99	60 Years
Verge, Robert	3/11/74	Dickinson	Y	2/17/97	22	Capital Murder, 2 Counts 1st Degree Murder, Aggravated Robbery, Aggravated Burglary, Theft	12/4/98	50 Years
Powell, Richard	12/24/70	Wyandotte	Y	2/5/98	27	Capital Murder, Criminal Possession of a Firearm	8/27/99	44.5 Years

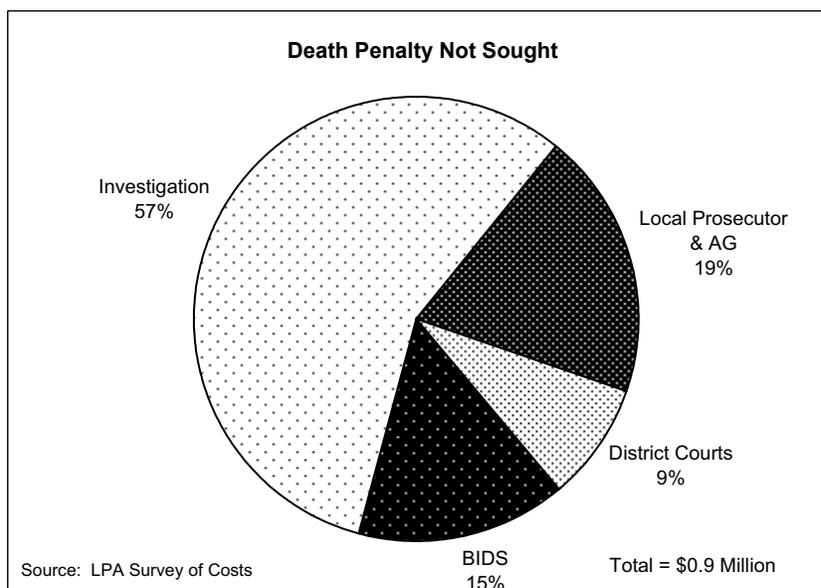
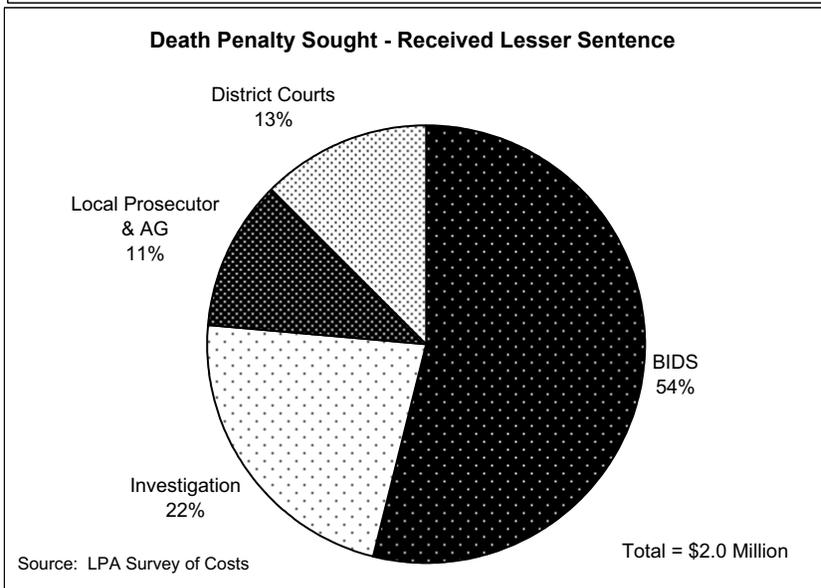
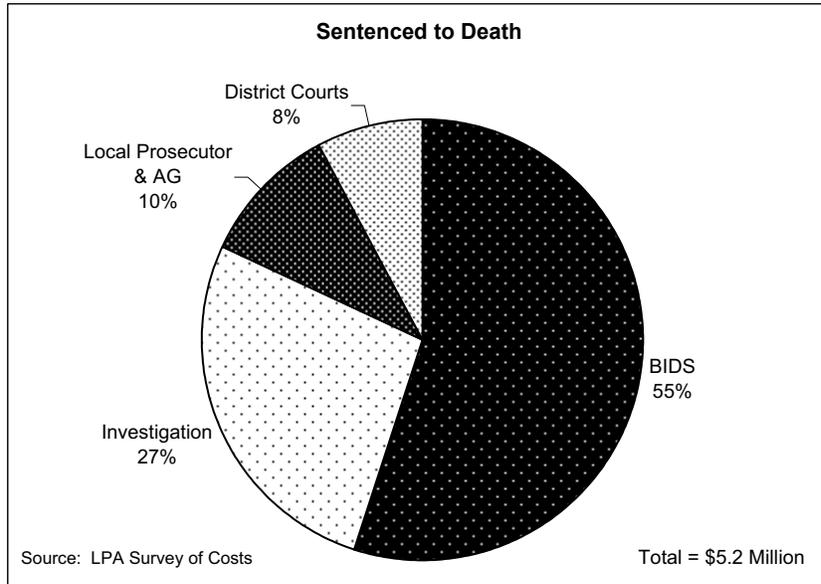
Defendant's Name	D.O.B.	County	Sought Death?	Date of Crime	Age at Time of Crime	Charges	Date Originally Sentenced	Total Length of Consecutive Sentence(s)
Martis, Gordon	4/18/76	Wyandotte	Y	5/19/99	23	Capital Murder, 2 Counts Attempted 1st Degree Murder	6/29/01	40 Years
Hebert, Jeffrey	8/31/77	Clay	Y	11/16/99	22	Capital Murder, Aggravated Battery on a Law Enforcement Officer, Criminal Use of Weapons, Inflicting Death on a Police Dog	3/13/01	59 Years
Oliver, Cornelius Trotter, Christopher	10/17/82 4/24/71	Sedgwick Wyandotte	Y Y	12/6/00 5/21/01	18 30	Capital Murder, 4 Counts of 1st Degree Murder Capital Murder, Murder in the First Degree, Aggravated Robbery	2/26/02 9/4/03	140 Years 50 Years
Barnes, Gordon	6/5/75	Sedgwick	N	4/30/95	19	1st Degree Murder & Aggravated Kidnapping	4/16/96	58 Years
Donesay, Sakone	1/28/81	Sedgwick	N	1/8/96	14	Capital Murder, Aggravated Robbery, 2 Counts Felony Theft, Felony Criminal Damage to Property, and Criminal Possession of a Firearm	9/6/96	53 Years
Wakefield, Jason	7/27/77	Sedgwick	N	9/13/96	19	2 Counts of First Degree Murder, Felony Murder, Aggravated Burglary, Felony Theft	6/19/97	80 Years
Julliano, Ramon	5/20/63	Wyandotte	N	6/11/97	34	1st Degree Murder, Criminal Solicitation to Commit 1st Degree Murder, Felony Theft & Arson	2/13/98	44 Years
Jamison, Chester	11/17/73	Sedgwick	N	10/6/97	23	2 Counts of First Degree Murder	5/28/98	80 Years
Henry, Rodney	3/18/74	Johnson	N	4/26/98	24	1st Degree Murder, Rape & Aggravated Criminal Sodomy	7/15/99	30 Years*
Douglas, Romane	7/3/79	Sedgwick	N	10/3/99	20	2 Counts of First Degree Murder, 2 Counts of Aggravated Robbery	12/1/00	113 Years
James, Tyron	7/14/81	Wyandotte	N	4/16/02	20	2 Counts of 1st Degree Murder	4/24/03	50 Years
*Originally Sentenced to 68 Years								

**APPENDIX D**  
**Cost Summary**

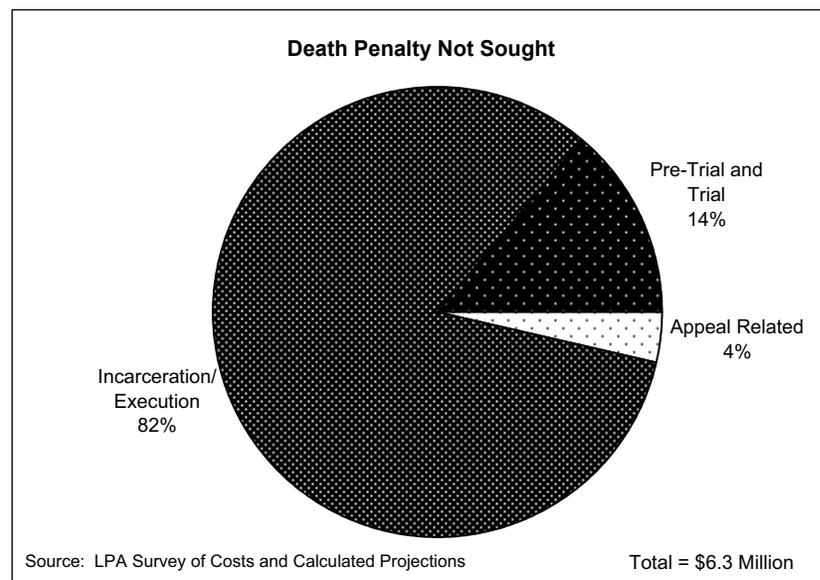
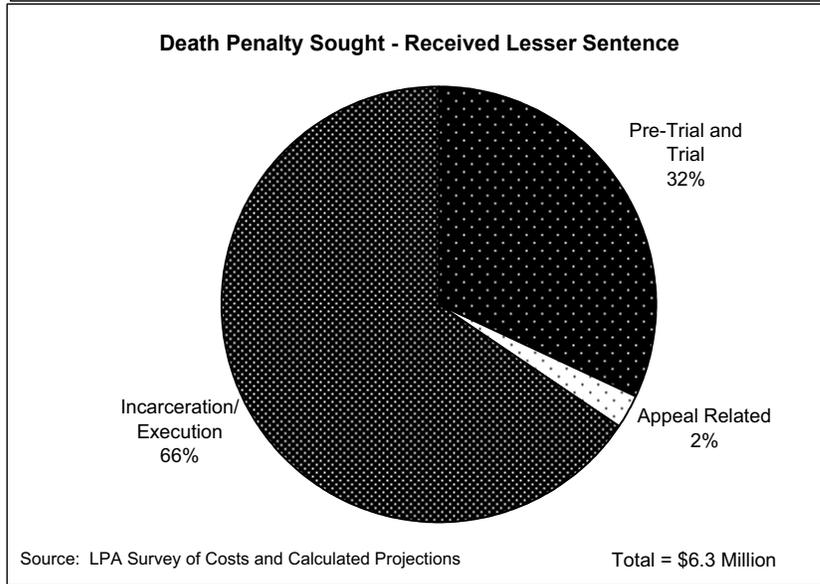
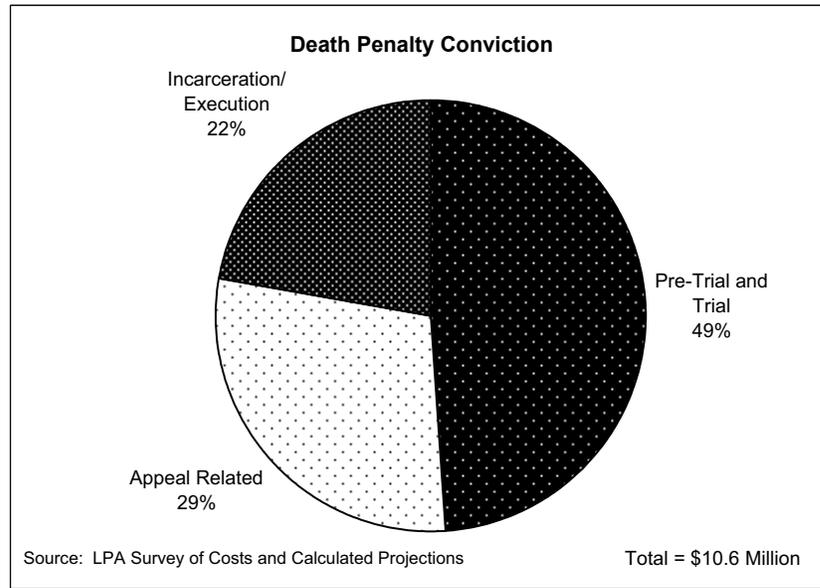
This appendix contains a table that summarizes estimated cost information for the 22 cases examined in this audit. The information presented includes estimated investigation and trial costs, and projected appeal, incarceration, execution and total costs. The pie charts on the following pages show breakdowns of costs by type of case.

Defendant's Name	County	Total Estimated Investigation and Trial Costs	Projected Direct Appeal Costs	Projected Additional Appeal Costs	Projected Incarceration/ Execution Costs	Total Estimated Case Cost
Robinson, John	Johnson	\$1,832,526	\$188,828	\$103,773	\$305,594	\$2,430,721
Kleypas, Gary	Crawford	\$836,001	\$772,611	\$103,773	\$366,865	\$2,079,250
Carr, Reginald	Sedgwick	\$853,547	\$188,828	\$103,773	\$295,191	\$1,441,339
Carr, Jonathan	Sedgwick	\$656,832	\$188,828	\$103,773	\$295,191	\$1,244,624
Marsh, Michael	Sedgwick	\$312,537	\$349,016	\$103,773	\$372,229	\$1,137,555
Elms, Stanley	Sedgwick	\$356,636	\$356,459	\$103,773	\$350,352	\$1,167,220
Scott, Gavin	Sedgwick	\$356,682	\$296,851	\$103,773	\$360,302	\$1,117,608
Death Penalty Sentence:		\$5,204,762	\$2,341,423	\$726,408	\$2,345,724	\$10,618,316
Hebert, Jeffrey	Clay	\$443,042	\$19,271	\$1,177	\$675,641	\$1,139,132
Bradford, Virgil	Dickinson	\$416,785	\$45,560	\$849	\$583,999	\$1,047,193
Verge, Robert	Dickinson	\$368,279	\$12,403	\$850	\$611,199	\$992,730
Oliver, Cornelius	Sedgwick	\$275,697	\$16,508	\$1,177	\$607,092	\$900,474
Martis, Gordon	Wyandotte	\$246,029	\$19,759	\$1,177	\$533,016	\$799,982
Trotter, Christopher	Wyandotte	\$200,456	\$16,335	\$1,177	\$528,772	\$746,740
Powell, Richard	Wyandotte	\$84,062	\$9,982	\$1,177	\$627,115	\$722,336
Death Penalty Sought - Received Lesser Sentence:		\$2,034,350	\$139,819	\$7,585	\$4,166,833	\$6,348,587
Donesay, Sakone	Sedgwick	\$189,000	\$111,562	\$3,738	\$742,961	\$1,047,261
Barnes, Gordon	Sedgwick	\$138,932	\$5,759	\$46	\$765,456	\$910,193
Wakefield, Jason	Sedgwick	\$87,801	\$9,829	\$0	\$707,154	\$804,784
Jamison, Chester	Sedgwick	\$75,239	\$22,541	\$1,235	\$677,295	\$776,310
Douglas, Romane	Sedgwick	\$83,925	\$24,487	\$1,177	\$603,390	\$712,979
Juiliano, Ramon	Wyandotte	\$43,118	\$8,263	\$1,675	\$639,986	\$693,043
Henry, Rodney	Johnson	\$207,633	\$18,363	\$1,177	\$457,836	\$685,009
James, Tyron	Wyandotte	\$52,540	\$16,335	\$1,177	\$573,052	\$643,104
Death Penalty Not Sought:		\$878,189	\$217,139	\$10,225	\$5,167,131	\$6,272,684
<b>Total - All Cases:</b>		<b>\$8,117,301</b>	<b>\$2,698,381</b>	<b>\$744,218</b>	<b>\$11,679,687</b>	<b>\$23,239,587</b>

**ESTIMATED TRIAL PHASE COSTS**



## COSTS BY PHASE



**APPENDIX E**  
**State vs. Local Costs**

This appendix contains summarized estimated cost information for the 22 cases examined in this audit. The information presented is broken down by case type, by agency or participant, and by State or Local cost. For each group, the locals have significant estimated costs, but the State bears the brunt of the estimated total costs.

<b>Comparison of State and Local Costs for Sample Cases</b>			
<b>7 - Death Penalty Conviction Cases</b>			
	<b>State</b>	<b>Local</b>	<b>Total</b>
Investigation	\$132,029	\$1,274,641	\$1,406,670
Prosecution	\$62,722	\$460,651	\$523,373
Defense	\$2,863,989	--	\$2,863,989
District Court	\$264,761	\$145,969	\$410,730
Appeal Related	\$2,968,164	\$99,667	\$3,067,831
Incarceration/Execution	\$2,313,097	\$32,627	\$2,345,724
Total	\$8,604,762	\$2,013,555	\$10,618,317

<b>7 - Death Penalty - Received Lesser Sentence</b>			
	<b>State</b>	<b>Local</b>	<b>Total</b>
Investigation	\$149,291	\$307,129	\$456,420
Prosecution	\$128,592	\$98,153	\$226,745
Defense	\$1,095,055	--	\$1,095,055
District Court	\$175,964	\$80,167	\$256,130
Appeal Related	\$147,404	--	\$147,404
Incarceration/Execution	\$4,166,833	--	\$4,166,833
Total	\$5,863,139	\$485,449	\$6,348,587

<b>8 - Non-Death Penalty Cases</b>			
	<b>State</b>	<b>Local</b>	<b>Total</b>
Investigation	\$1,392	\$498,253	\$499,645
Prosecution	\$0.00	\$169,190	\$169,190
Defense	\$133,000	--	\$133,000
District Court	\$53,611	\$22,742	\$76,353
Appeal Related	\$160,999	\$66,366	\$227,365
Incarceration/Execution	\$5,167,131	--	\$5,167,131
Total	\$5,516,133	\$756,551	\$6,272,684

Source: LPA survey of the parties involved in each type of case, and calculated projections.

## APPENDIX F

### Significant Dates and Current Status of Sample Cases

This appendix contains detail about the 22 cases examined in this audit. The information presented includes dates of the crime, trial dates, sentence date and current status as of October, 2003.

Significant Dates & Current Status of the 14 Cases in Which the State Sought the Death Penalty							
	Years Since Crime	Crime Committed	Trial Start	Trial End	Formally Sentenced	Sentence	Current Status
Kleypas	7	3/30/96	7/7/97	8/5/97	3/11/98	death	12/28/01 Supreme Court remanded. Re-sentencing pending.
Marsh	7	6/17/96	11/17/97	1/12/98	4/16/98	death	Direct appeal heard on 9/4/03. No opinion issued yet.
Scott	7	9/13/96	8/3/98	8/21/98	due to juror misconduct, the sentencing phase was redone. See next line.		
			6/14/99	6/24/99	8/12/99	death	Direct appeal pending. State hasn't filed brief yet.
Elms	5	5/4/98	11/1/99	12/2/99	2/10/00	death	Direct appeal pending. State hasn't filed brief yet.
Robinson	3	(various) 2/29/2000	9/16/02	11/2/02	1/23/03	death	Direct appeal pending.
Carr, J	3	(various) 12/14/00	9/9/02	11/15/02	11/15/02	death	Direct appeal pending.
Carr, R	3	(various) 12/14/00	9/9/02	11/15/02	11/15/02	death	Direct appeal pending.
Bradford	6	2/17/97	1/11/99	1/28/99	2/23/99		11/16/01 Supreme Court remanded for resentencing. See next line.
				na	1/9/02	Hard 40 + 238 months	No further appeals filed.
Verge	6	2/17/97	10/23/98	11/20/98	12/4/98		11/16/01 Supreme Court remanded for resentencing. See next line.
				na	1/2/02	Hard 40 + 117 months	No further appeals filed.
Powell	5	2/5/98	6/28/99	na	8/27/99	Hard 25 + 234 months	10/25/02 Supreme Court affirmed. No further action.
Martis	4	5/19/99	4/12/01	5/11/01	6/29/01	Hard 40	Direct appeal pending.
Hebert	4	11/16/99	1/10/01	2/20/01	3/13/01	Hard 50 + 110 months	Direct Appeal heard 9/9/03. No opinion issued yet.
Oliver	3	12/6/00	12/3/01	na	2/26/02	Hard 50 x 2 + Hard 40 x 2	Direct appeal pending. State has not filed brief yet.
Trotter, C	2	5/21/01	6/23/03	7/22/03	9/4/03	Hard 50	Direct appeal pending.
Significant Dates & Current Status of the 8 Sample Cases in Which the State Didn't Seek the Death Penalty							
Barnes	8	4/30/95	1/23/96	2/16/96	4/16/96	Hard 40 + 221 months	11/7/97 Supreme Court affirmed. No further action.
Donesay	7	1/8/96	8/13/96	8/20/96	9/6/96		5/29/98 remanded to trial court. See next line.
			12/7/98	12/14/98	1/6/99	Hard 40 + 158 months	3/9/01 Supreme Court affirmed. No further action.
Wakefield	7	9/13/96	4/28/97	5/6/97	6/19/97	Hard 40 x 2	4/16/99 Supreme Court affirmed. No further action.
Juliano	6	6/11/97	11/17/97	11/26/97	2/13/98	Hard 40 + 49 months	11/5/99 Supreme Court affirmed. Post conviction appeal pending.
Jamison	6	10/6/97	4/27/98	5/1/98	5/28/98	Hard 40 x 2	7/14/00 Supreme Court affirmed. No further action.
Henry	5	4/26/98	5/3/99	5/11/99	7/15/99		6/20/02 Supreme Court reversed. See next line.
				2/20/03 pled guilty	5/9/03	360 months	No further action.
Douglas	4	10/3/99	7/17/00	7/24/00	mistrial see next line.		
			10/2/00	10/10/00	12/1/00	Hard 50 x 2 + 161 months	7/12/02 Supreme Court affirmed. No further action.
James	1	4/16/02	2/24/03	2/27/03	4/24/03	Hard 50	Direct appeal pending.

## **APPENDIX G**

### **Agency Responses**

On October 31<sup>st</sup>, we provided copies of the draft report to the State Board of Indigents' Defense Services, the Kansas Attorney General, the Office of Judicial Administration, the Kansas Bureau of Investigation and the Kansas Department of Corrections. The Department of Corrections, the Office of Judicial Administration and the State Board of Indigents' Defense Services provided written responses, which are included in this Appendix. We made some minor corrections and clarifications to the draft report which didn't affect any of our findings or conclusions.

# KANSAS

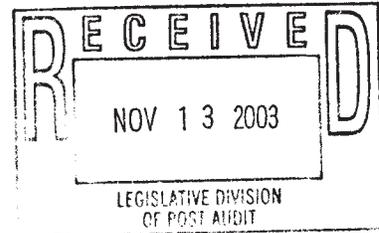
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KANSAS DEPARTMENT OF CORRECTIONS  
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Nov. 10, 2003

Ms. Barbara J. Hinton  
Legislative Post Auditor  
800 SW Jackson, Suite 1200  
Topeka, Kansas 66612-2212



Dear Ms. Hinton:

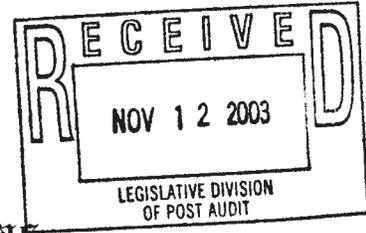
Thank you for providing us with an opportunity to review the draft copy of the report entitled: *Costs Incurred For Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*. The report gives an accurate representation of departmental processes. We do not have any additional comments to offer regarding the findings and recommendations of the report.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Werholtz".

Roger Werholtz  
Secretary of Corrections

900 SW Jackson – 4<sup>th</sup> Floor, Topeka, KS 66612-1284  
Voice 785-296-3310 Fax 785-296-0014 <http://www.dc.state.ks.us/>



## Supreme Court of Kansas

Kansas Judicial Center

301 S.W. 10th

Topeka, Kansas 66612-1507

HOWARD SCHWARTZ  
Judicial Administrator

(785) 296-4873

November 12, 2003

Barbara J. Hinton  
Legislative Division of Post Audit  
800 Southwest Jackson Street, Suite 1200  
Topeka, Kansas 66612-2212

Dear Ms. Hinton:

Thank you for the draft copy of your recently completed performance audit, *Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections*.

I would like to address statements made regarding proposed cost control measures. Page 24 of the draft report suggests that panels of specially trained judges handle death penalty cases, with the expectation that "[t]he expertise they would acquire over time would cut down on the number of errors made during trial, resulting in fewer appeals and reversals." A similar statement is made regarding law clerks at page 25.

I am somewhat concerned that these two statements could be misconstrued to reach the conclusion either that the absence of trial court error will mean fewer appeals or that trial court errors resulted in the currently existing appeals. Neither of these conclusions is true.

As noted on page 6 of the draft report, appeals in death penalty cases are appeals of right, and will exist even in the absence of trial court error. In relevant part, K.S.A. 21-4627 provides that "[a] judgment of conviction resulting in a sentence of death shall be subject to automatic review by and appeal to the supreme court of Kansas in the manner provided by the applicable statutes and rules of the supreme court governing appellate procedure." Trial court error does not necessarily form the basis for the appeals, which are automatic under K.S.A. 21-4627.

Further, as noted on page 16 of the draft report, the remand of the *Kleypas* case was not based on trial court error, but rather on the language of K.S.A. 21-4624(e), which provides in part that, if "the existence of . . . aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death." This

statutory weighing equation was found to impermissibly mandate the death penalty when the jury finds that the mitigating and aggravating circumstances are equal, and the *Kleypas* case was remanded for resentencing.

*State v. Kleypas* placed a tremendous burden upon the resources of the court system, both at the district court and the Supreme Court level. *Kleypas* involved a great deal of judicial resources as the first case to reach the Supreme Court since the death penalty was reinstated in Kansas by statute in 1994. However, it has been the experience of other jurisdictions that have had a death penalty for much longer periods than Kansas that these cases never become routine. It is not a reasonable expectation that death penalty cases will ever be easily or quickly resolved, given the nature of the cases and nature of the death penalty itself.

Thank you again for the opportunity to review and address the contents of this report.

Sincerely,

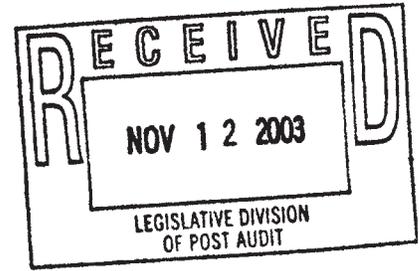
  
Howard Schwartz  
Judicial Administrator

HS:vm



**BOARD OF INDIGENTS' DEFENSE SERVICES**

**JAYHAWK WALK  
714 SW JACKSON, SUITE 200  
TOPEKA, KANSAS 66603-3714**



**(785) 296-4505**

November 12, 2003

Barbara Hinton  
Legislative Post Auditor  
800 SW Jackson, suite 1200  
Topeka, KS 66612-2212

Dear Ms. Hinton:

The State Board of Indigents' Defense Services expresses its appreciation for the hard work and for the recommendations of the audit team. Our response to the recommendations follows.

The audit recommends that the Board "make sure the Death Penalty Defense Unit has a sufficient number of qualified and trained staff so that death penalty cases don't need to be contracted out because of the workloads of existing staff." In response the Board offers that a conflict death penalty appeals office has already been established and that we have requested funds to establish a conflict death penalty trial office in Wichita. Both the appellate and trial conflicts offices will handle case overload as well as conflicts cases. This will avoid the need to hire contract attorneys in almost all instances, the only exception being the possibility of several death penalty cases being filed across the state simultaneously. In that instance, the Board has secured the training for death penalty defense of sufficient regional public defenders with extensive trial experience who would agree to have their positions upgraded and be called upon to defend death penalty cases filed in their region. Additionally, the Board has secured the training for death penalty defense of additional appellate public defenders who would have their positions upgraded and might be called upon to provide appellate death penalty defense. It should be noted that few attorneys are willing to perform death penalty defense. In all circumstances the Board provides and will continue to provide effective assistance of counsel.

The audit recommends that the Board "continue to look into the feasibility of establishing a conflicts (trial) office." In response the Board offers that it requested funds to establish a conflicts trial office in its budget submitted September 15, 2003. If the necessary funds are appropriated, a fully staffed conflicts trial office including attorneys, a mitigator and an investigator as well as paralegal staff will be established in Wichita.

The final recommendation is that the Board should “look at whether there are cost controls other states have implemented that won’t jeopardize the defendant’s right to an adequate defense...”. In response the Board offers that it has established a dialogue with other states and hopes to have a meeting with the executive directors of surrounding states to both offer our experience and to learn from theirs.

Once again the Board appreciates the hard work and the recommendations of the audit team. We look forward to our continued work together.

Yours truly,

A handwritten signature in cursive script that reads "Patricia A. Scalia".

Patricia A. Scalia  
Executive Director