MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

Held in Room 526, at the Statehouse at 3:30 a. m./p. m., on January 29, 19 79

All members were present except:

The next meeting of the Committee will be held at 3:30 a. m./p. m., on January 30, 1979.

These minutes of the meeting held on January 25, 19 79 were considered, corrected and approved.

JOSEPH J. HOAGLAND
Chairman

The conferees appearing before the Committee were:

Representative Robert Frey
Representative Ferguson
Representative Roth
Attorney General Robert T. Stephan
Major Behrend, Wichita Police Department
Robert Tilton, Shawnee County Sheriff's Association
Dr. Bridgegens, Shawnee Mission Medical Center, Shawnee Mission
Dr. Gene Martin, Chairman, Dept. of Pharmacy, Kansas University

Chairman Hoagland opened the meeting at 3:30 p.m. and the minutes of the last meeting were approved as the first order of business. The Chairman then passed out written testimony from Mrs. Velma Post, who supports the death penalty bills, but was unable to attend the hearing. (ATTACHMENT # 1 - 1 page).

Chairman Hoagland then introduced Representative Frey, co-sponsor of HB 2160, who described the bill to the committee (ATTACHMENT # 2 - 4 pages).

The Chairman then introduced Representative Ferguson, co-sponsor of HB 2042, who provided a brief explanation of the bill and outlined the differences in this bill and HB 2160. He concluded with the fact that this bill contains nothing regarding the way to carry out the sentence.

Chairman Hoagland then introduced Representative Roth, Sponsor of HB 2038, who explained his bill to the committee (ATTACHMENT # 3 - 4 pages).

Attorney General Robert Stephan was next introduced by Chairman Hoagland and he stated his support of this type of legislation and his opinion that the majority of citizens in the state support the same. (ATTACHMENT # 4 - 5 pages).

Robert Tilton, Shawnee County Sheriff's Association, then testified his own and the association's support of the bills.

Major Behrend of the Wichita Police Department next gave a brief statement indicating the support of his department of the above bills. (ATTACHMENT # 5 - Page 1).

Chairman Hoagland next introduced Dr. Bridgegens, Shawnee Mission Medical Center, who reviewed the different methods of carrying out the sentence, and some facts surrounding those methods. He recommends the "death by injection" method above the others available.

Dr. Gene Martin, Chairman of the Department of Pharmacy of Kansas University testified next. He indicated he was not testifying in favor of the death penalty, but felt the method of carrying out the penalty should be left "open" because of the new drug discoveries made each year. He further suggested that if the bill becomes law, a panel of several professionals in different areas (such as pathologist, anestheologist, clinical physiologist and even possibly a veterinarian) be selected to aid the Secretary of Corrections.

There were no further testimony's so Chairman Hoagland adjourned the meeting at 4:45 p.m.

A CASE FOR CAPITAL PUNISHMENT

When I read of another victim of premeditated murder, I think of countries around the world whose citizens walk their streets without fear. If we can put a man on the moon, we can make our own part of this planet fit to live upon.

I have read many comments from persons in the legal profession who indicate capital punishment is long overdue. There are some mentalities which are just not fit for humane confinement. They are a threat to fellow inmates. Murder can be a psychological phenomenum like sky-jacking and kidnaping. It breeds upon itself. The only factor which deters is fear of the consequences. No one will argue that it is a cure-all. No one can logically deny we have given other alternatives a fair trial.

We are a society so beset by crime that our laws no longer function. It would be naive to believe we can continue on this course without reaching the same destination as Italy where no government lasts for more than a few months at best and no official serves without feat of assassination.

I would like to speak for all the innocent victims of murderers whose assailants walk our streets freely or who still live and have their being at society's indulgence. It should be as certain as death and taxes that when someone kills in cold blood, he will pay with his own life. It isn't a pagan concept--I find it in the Bible.

Crime and not inflation is our number one problem today--but reducing the first will certainly have a tremendous impact upon the other. Consider the cost to us in terms murder, arson and theft. If we had a reporting system similar to that for highway fatalities the magnitude of our losses would be more in the public eye. It makes no sense to spend billions of dollars on public health programs, car safety, environmental protection or preach about human rights and so nothing about the mutilated bodies picked up daily and hauled to the morgue. We are in a state of seige. If we lose the home front war we cannot defend ourselves against revolutionary forces around the world.

We are going to have to demand accountability on the part of all of us. The problem of teen-age crime is deeply rooted in a feeling of instability. If we want young people to respect the law we are going to have to give them laws they can respect.

As it is now Crime really does pay. When we refuse to pick up the cost with our tax dollars we will begin to make progress. I have a little slogan which sums up how I feel about funding legal aid to law-breakers.

PUBLIC DEFENDERS FOR FIRST TIME OFFENDERS.
They are on their own after the first offense and mistrials.

* Seymour Wishman is a criminal lawyer in New York. "Many of my clients are monsters who have done monstrous things. People of bestial cruelty. You learn to defend them," he says, "by conjuring up emotions to influence the jury. These contrived emotions are nothing less than deceitful performances." We hear a great deal from these defenders about justice for their clients knowing in their hearts the only true justice would be conviction.

x - Book - Nothing Personal
K.C. Star - Nov. 26 - 1978

Mrs. Velma E. Poole
R #2 Independence, Ks
67301

(over)

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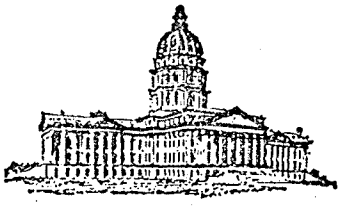
STATE OF KANSAS

ROBERT G. FREY
MAJORITY LEADER
ROOM 381-W CAPITOL BUILDING
TOPEKA, KANSAS 66612
(913) 296-2302



TOPEKA

HOME ADDRESS
451 HAROLD BLVD.
LIBERAL, KANSAS 67901
(913) 624-7575

HOUSE OF
REPRESENTATIVES

January 29, 1979

STATEMENT

HB 2160

Chairman Hoagland and Members of the Judiciary Committee:

As many of the members on the committee know, I have come before this committee on previous occasions in support of legislation which would reinstate the death penalty in Kansas. I come again before you with House Bill 2160, which I feel is a fair, adequate and constitutional bill to reinstate the death penalty. There has not been a great deal of discussion this year amongst legislators as to the question of whether or not a death penalty bill should be passed. Primarily, the mood of the people in the State of Kansas as well as in the House of Representatives appears to be one of support for passage of some legislation which would reinstate the death penalty. My commitment to this effort has maintained firm throughout the several years during which I have supported efforts to pass legislation in the House and in the Senate.

HB 2160 is a bill which generally follows the lines of other death penalty measures which have been introduced in the 1979 legislature. The difference between this bill and some of the others centers mainly around matters of peripheral concern such as how an execution would be carried out and whether or not the accused is entitled to select his or her own counsel to defend them. There is also a provision in the bill in Section 18 which

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would allow the protection of a convicted and sentenced woman should she be found pregnant at the time that the sentence is to be carried out. Under the bill it would provide that the execution shall be postponed until such time as the pregnancy is terminated or the child is born.

Other than those specific areas of change, the bill provides that the present crime of first degree murder will no longer include the crime of "felony murder" and a new crime of felony murder is created in the bill. The sentencing provisions are amended to provide that first degree murder is the only crime which would become subject to the death penalty provisions in the sentencing act. Under this amendment, first degree murder is the malicious, willful, deliberate, and premeditated murder of a human being and that crime is the crime which will subject a person who commits it to a possible death sentence or life imprisonment.

The trial of the person accused of first degree murder is a two-stage trial. The first trial is conducted purely for the purpose of determining guilt or innocence on the charge. The second trial is for the purpose of sentencing should the defendant be found guilty. The jurors are to be selected in the manner provided by law, however, there is a new section, new section 4, which provides for specific questions which may be put to jurors to determine whether or not they may be challenged for cause on the grounds that the juror is opposed to the death penalty. Should a second jury be required to determine the sentence, it is possible that a new jury can be impaneled and selected for that purpose or the defendant may waive a jury as provided by law and the sentencing process can be conducted before the court.

HB 2160 contains the provisions for consideration of mitigating and aggravating circumstances as is required by constitutional case law and once the jury reaches its decision, should that decision be for imposition of the death penalty, automatic review is required by an appeal to the Supreme Court. Prior to certification of the case to the Supreme Court, however, the District Court is required to review the entire case in order to "ascertain whether the imposition of the death sentence is supported by the evidence."

Section 12 merely provides for exceptions in the normal sentencing procedure in cases where the death penalty has been assessed by a jury or by the court.

New Section 13 provides that the mode of carrying out the sentence of death shall be by intervenous injection of a substance or substances in a quantity sufficient to cause death. This provision is modeled after laws which have been passed in Oklahoma and Texas and has as yet not been tested in the courts in terms of its constitutionality. Because of that, there is a provision in new Section 13 which provides that if the injection is found unconstitutional then the method would be as provided by present law. If that method is found to be unconstitutional, then the sentence of death shall be carried out by electrocution.

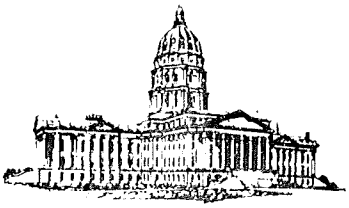
The Secretary of Corrections is the person who is given the responsibility of supervising executions and providing that the same be carried out. I feel that this bill does what the Supreme Court has mandated should be done for the states to reinstate capital punishment. I also feel that this bill meets some of the indicated requirements of this legislature by virture of the fact that death by injection has been implemented in this bill and that consideration be given for women who are determined to be pregnant.

This is a grizzly subject to discuss at any time but it is one that must be addressed. According to a recent television program in Topeka, there were 15 homicides investigated by Topeka police in 1978. According to police department figures murder is up 30% in Topeka. In my opinion those figures reflect a trend which, in varying degrees, is present in every city in Kansas. I know that persons will come forward in opposition to reinstatement of the death penalty. I know that they will speak primarily in terms of compassion and consideration for the accused, but we must never forget the victim. There were 15 people killed in Topeka alone since we met here last year. Some of the killing was even going on at the time we were debating this issue last year. We cannot forget that. We must be compassionate. We must give an accused all of the constitutional protections that they are entitled to, but we cannot ignore the fact that there are some persons who will deliberately, willfully, and with malice and forethought kill another person, and when that happens the person who commits that crime should do so knowing that he or she will be subject to the most severe penalty that man can deliver.

REP. ROBERT G. FREY

STATE OF KANSAS

KENT A. ROTH
REPRESENTATIVE 113TH DISTRICT
BARTON-STAFFORD COUNTIES
314 WEST THIRD
ELLINWOOD, KANSAS 67526



TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: JUDICIARY
INSURANCE
ELECTIONS

Chairman Hoagland and members of the Judiciary Committee:

I am appearing today in support of House Bill 2038 and new section 13-22 inclusive of HB 2160. Both change the method of execution from death by hanging to death by intravenous injection of substance or substances in a quantity sufficient to cause death. The language describing death by injection does not specify the drug which will be used. This is similar to the Texas law which provides death by "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead". The Oklahoma statute specifies the type of drugs which should be used. The language of the Oklahoma statute reads, "The punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-acting barbituate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice". The Committee may wish to decide as a matter of policy whether or not the language should specify the type of drug used.

Both proposals are similar in that they provide alternative modes of execution should intravenous injection be ruled unconstitutional. The due process clause of the 14th amendment to the Constitution prohibits carrying out execution in a cruel or unusual manner. This prohibition is aimed at punishments which shock the "sense of mankind",

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such as punishments involving torture or a lingering form of death. See In Re Kemmler, 136 U.S. 436 (1889), and King v. State, 130 P. 2d 105 1942). Various courts have found no violation of due process in carrying out of death sentence by such means as hanging, shooting, electrocution, or subjecting the condemned to lethal gas, and it is my opinion that death by intravenous injection would also be upheld by the courts as constitutional.

Both proposals designate the Secretary of Corrections to supervise the execution and grant him the authority to designate the executioner. Both proposals provide that in the event of pregnancy the execution will be postponed until the child is born.

Section 11 of HB 2038 and Section 23 of HB 2160 contain the repealer of KSA 22-4006. This statute provides for the postponement of execution in the event the convict is insane. Should the convict be insane, treatment would be afforded until the convict became sane whereupon execution would be carried out. This presents a situation where the cure is worse than the disease and for that reason the statute was included in the repealer section. I have reconsidered this issue and request the Committee amend whichever bill the Committee decides to act on so that KSA 22-4006 remain in effect.

Historically, state statutes such as KSA 22-4006 have been based on the aversion of society against killing an insane man even though under a sentence of death. Some of the more common arguments against executing insane people have been based on the idea that the condemned man may be deprived of the opportunity to recall some facts which might make his punishment unlawful or unjust. Another question which has arisen to cause public disfavor on executions of the insane has been: is an insane person in a state of mind such as to be able to make peace with God?

The general test of insanity or sanity of a person under death penalty has been whether such person has sufficient intelligence to understand the nature of the proceedings against him and has sufficient understanding to know any fact which would make his punishment unlawful or unjust. If the condemned person has such intelligence he is sane and if he does not have such intelligence, he is insane. Bingham v. State, 82 Okl. Cr. 305, 169 P. 2d 311 (1946).

Although the Supreme Court has not expressly ruled upon the constitutionality of executing an insane person, it is implied that such an execution would amount to a denial of due process. See Welch v. Beto, 234 F. Supp. 484 (1964), and Furman v. Georgia, 408 U.S. 238 (1971).

Statutes such as those presently existing in Kansas which vest sole authority in the warden or sheriff to initiate insanity determination proceedings have been found to be constitutional. The Supreme Court, in Caritativo v. California, 357 U.S. 549 (1956), upheld a similar California statute and stated further that due process does not require a judicial hearing on the question of a condemned man's sanity. It has been argued that if a condemned man is allowed recourse to the courts as a matter of right upon a claim to be insane, he may set in motion an endless process of trial to appeal with regard to the question of sanity. K.S.A. 22-4006 provides a formal safeguard to help insure such delay would not occur. The warden or sheriff with custody of an inmate is in the position to make an initial determination as to whether a sanity proceeding is necessary. Therefore, I am recommending that the Committee retain K.S.A. 22-4006, 22-4007 and 22-4008 in existing law and remove the reference to such statutes in the repealer section.

As I stated last year, "K.S.A. 47-1401 et seq. provides for the humane slaughter of livestock whereby the animal is rendered insensible to pain in a rapid and effective manner. Certainly convicts should be subject to no less than a humane mode of inflicting death".

STATEMENT OF ATTORNEY GENERAL ROBERT T. STEPHAN
BEFORE THE HOUSE JUDICIARY COMMITTEE ON JANUARY 29, 1979

IN THE VARIOUS CASES WHICH HAVE CONSIDERED CAPITAL PUNISHMENT, THE HIGH COURT INVARIABLY DISCUSSED SOCIETY'S ATTITUDE TOWARD CAPITAL PUNISHMENT. AMONG OTHER STATEMENTS THE COURT HAS STATED THAT THE WIDESPREAD IMPOSITION OF CAPITAL PUNISHMENT SHOWS AN ACCEPTANCE OF THIS TYPE OF PUNISHMENT IN THE UNITED STATES AND WAS A FACTOR IN CONSIDERING ITS CONSTITUTIONALITY. I BELIEVE THE WILL OF THE MAJORITY OF THE PEOPLE OF KANSAS IS A FACTOR TO BE CONSIDERED. ALTHOUGH THERE IS NO EXACT MEASURING STICK IT WAS MY EXPERIENCE THROUGHOUT THE RECENT CAMPAIGN THAT THE VAST MAJORITY OF OUR PEOPLE DESIRE TO SEE THE REIMPOSITION OF CAPITAL PUNISHMENT. IT IS RIGHT AND PROPER THAT THEIR WILL SHOULD BE FOLLOWED BY THE ENACTMENT OF A CAPITAL PUNISHMENT LAW.

THE UNITED STATES SUPREME COURT IN ITS VARIOUS DECISIONS CONCERNING CAPITAL PUNISHMENT NOTED STATISTICS AND STUDIES ON BOTH SIDES OF THE ISSUE OF THE DETERRENT VALUE OF CAPITAL PUNISHMENT. THE REPORTS AND STATISTICS ARE CONFLICTING AND THE ONE THING THAT IS CERTAIN IS THAT WE DO NOT KNOW HOW MANY PEOPLE MIGHT BE THWARTED FROM THE COMMISSION OF A CAPITAL CRIME BY REASON OF THE FACT THAT THE PENALTY FOR THE TAKING OF THE LIFE OF ANOTHER IS TO FORFEIT YOUR OWN LIFE. DETERRENT VALUE ALONE SHOULD NOT BE THE ONLY CONSIDERATION IN THE BILL FOR CAPITAL PUNISHMENT. THE COURT HAS CONCLUDED THAT THREE PURPOSES ARE PROPERLY SERVED BY THE DEATH PENALTY: (1) RETRIBUTION; (2) DETERRENTS OF CAPITAL CRIMES BY POSSIBLE OFFENDERS, AND (3) PREVENTION OF CRIME BY THE

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INCAPICITATION OF DANGEROUS CRIMINALS. THE COURT PROCEEDED TO SPECIFICALLY SANCTION RETRIBUTION AS A LEGITIMATE PURPOSE OF PUNISHMENT BECAUSE IT CHANNELS SOCIETY'S OUTRAGE AGAINST PATENTLY OFFENSIVE CONDUCT AND SERVES TO PREVENT THAT FEELING FROM EXPRESSING ITSELF THROUGH VIGILANTE ACTION. DESPITE THE INCONSISTENCIES OF STATISTICAL STUDIES THE UNITED STATES SUPREME COURT STATED THAT THERE ARE UNDOUBTEDLY MANY OFFENDERS FOR WHOM THE ULTIMATE SANCTION IS A SIGNIFICANT DETERRENT.

THE UNITED STATES SUPREME COURT HAS DETERMINED THAT THE DEATH PENALTY FOR MURDER WAS PER SE NOT UNCONSTITUTIONAL. THE EIGHTH AMENDMENT PROHIBITION PROHIBITING CRUEL AND INHUMAN PUNISHMENT WAS DEFINED AS A PROHIBITION OF A BARBAROUS METHOD OF PUNISHMENT THAT WOULD INVOLVE THE UNNECESSARY INFLICTION OF PAIN AND THE PROHIBITION OF PUNISHMENT THAT IS CRUELLY DISPROPORTIONATE TO THE SEVERITY OF THE OFFENSE. IT IS CLEAR THAT MANDATORY CAPITAL PUNISHMENT STATUTES PLAINLY VIOLATE THE EIGHTH AMENDMENT.

IT IS CLEAR THAT IN THE EVENT OF THE IMPOSITION OF CAPITOL PUNISHMENT THERE SHOULD BE A BIFURCATED TRIAL. THE FIRST TRIAL SHOULD BE A DETERMINATION OF GUILT BY THE FACTFINDER. IN THE EVENT OF A FINDING OF GUILT OF FIRST-DEGREE MURDER THEN A SEPARATE HEARING SHOULD BE HELD BEFORE A JUDGE AND A JURY RELATING TO THE AGGRAVATING AND MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSE.

LEGISLATION SHOULD INCLUDE SPECIFIC AGGRAVATING CIRCUMSTANCES WHICH MUST BE FOUND BEFORE CAPITAL PUNISHMENT IS IMPOSED. THE CAPITAL PUNISHMENT STATUTE OF FLORIDA CONTAINS THE FOLLOWING AGGRAVATED CIRCUMSTANCES TO BE CONSIDERED:

(A) THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

(B) THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

(C) THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

(D) THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING, OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

(E) THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

(F) THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

(G) THE CAPITAL FELONY WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS.

(H) THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

THE FLORIDA STATUTE FURTHER SETS OUT CERTAIN MITIGATING CIRCUMSTANCES TO BE CONSIDERED BUT IT IS IMPORTANT THAT THE LANGUAGE NOT LIMIT THE TYPES OF MITIGATING FACTORS TO BE CONSIDERED. STATUTORY MITIGATING CIRCUMSTANCES ARE:

(A) THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

(B) THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

(C) THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

(D) THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.

(E) THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

(F) THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

(G) THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

THE BEST LEGAL PROCEDURE, IN MY OPINION, WOULD BE FOR THE JURY TO WEIGH THE AGGRAVATING AND MITIGATING FACTORS AND THEN RENDER AN ADVISORY VERDICT OF DEATH OR LIFE IMPRISONMENT BY MAJORITY VOTE. THE ACTUAL SENTENCE WOULD BE IMPOSED BY THE TRIAL JUDGE AND IF A DEATH SENTENCE IS IMPOSED THE JUDGE MUST SPECIFY THE SPECIFIC STATUTORY CIRCUMSTANCES UNDERLYING THE CONCLUSION.

LEGISLATION SHOULD SPECIFICALLY DIRECT THE SUPREME COURT OF THE STATE OF KANSAS TO SCRUTINIZE THE EVIDENCE SUPPORTING

THE DECISION TO IMPOSE THE DEATH PENALTY AND ALSO COMPARE THE SENTENCE IMPOSED TO THOSE IN SIMILAR CASES TO DETERMINE ITS EXCESSIVENESS OR DISPROPORTIONALITY.

CAPITAL PUNISHMENT SHOULD APPLY TO ALL CRIMES OF FIRST-DEGREE MURDER WHICH INCLUDES MURDER WHILE COMMITTING A FELONY.

AS ATTORNEY GENERAL OF THE STATE OF KANSAS I SUPPORT THE IMPOSITION OF CAPITAL PUNISHMENT IN THIS STATE.

We in law enforcement are appalled at the lack of severity and deterence in our judicial system. The violent offenders in our community commit heinous crimes, revolve through the system, and again endanger and take the very lives of our law abiding citizens. The rights of the victims and their families should be foremost in the minds of all representatives of government while considering this proposal. A mandatory death sentence is not a part of this bill. The sentencing body is provided with aggravating and mitigating factors which are designed to provide special characteristics of the offender or circumstances surrounding the commission of the offense. These clear and concise sentencing standards assist in providing constitutional protection for the defendant. Whether or not the death penalty is a deterent is best left to the philosophers debate. Ours is a genuine concern for the safety and welfare of the innocent victims whom we have sworn to protect. It is in their interest that we appear here today in support of this change in the Kansas Criminal Code.

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