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3/5/87
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Edward F. Reilly, Jr. at
Chairperson

11:00 a.m./~~p.m.~~ on February 26, 1987 in room 254-E of the Capitol.

All members were present.~~except~~

Committee staff present:

June Windscheffel, Secretary to the Committee.

Conferees appearing before the committee:

Representative Clyde Graeber
Attorney General Bob Stephan
Mr. Clark Owens, Sedgwick County District Attorney
Mr. Jim Huff, President, Kansas Peace Officers Association (KPOA)

The Chairman asked the Committee to please turn its attention to HB 2062, concerning capital punishment. He welcomed the conferees to the meeting. All appearing today will be proponents of the legislation.

Representative Clyde Graeber was the first conferee to speak in favor of the bill. He gave his written statement (Attachment #1) and answered questions from the Committee.

The next conferee was Attorney General Bob Stephan. His statement is attached (Attachment #2), and he answered questions from the Committee members.

Mr. Clark Owens, Sedgwick County District Attorney, then appeared before the Committee. He will send a formal copy of his statement for the Minutes. (Attachment #3)

The Chairman then recognized Mr. Jim Huff, President, of the Kansas Peace Officers Association, who also spoke as a proponent of the measure. (Attachment #4)

The Chairman thanked all the conferees for appearing.

The meeting was adjourned at noon.

2/26/87
Attachment #1

TESTIMONY BEFORE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS
February 26, 1987 - Representative Clyde Graeber

Mr. Chairman - Members of the Committee

My name is Clyde Graeber, I am the prime sponsor of H.B. 2062, which would, if passed, restore Capital punishment in Kansas.

You may ask yourself why does he persist so hard to get this law passed. I can only say it is because I do value ^{human} life; ~~also~~ I value

~~the~~ lives of our law-abiding citizens, ~~and~~ I feel those of us in society who do live law-abiding lives deserve that a resolve be made; a resolve where the individual who contemplates taking the life of one of our citizens can know he or she is subject to the supreme price and can ^{be forced to} pay for the act of murder by being executed.

Let me set the record straight. I have never said Capital punishment is a deterrent in all instances--I have said, however, I do believe Capital punishment is a deterrent in some instances. If it is never a deterrent, then we are saying no one values their own life and we might as well do away with all warnings such as bridge out; dangerous curve; 50,000 volts--all of which are no more than warnings and deterrents to acts which could cause our own deaths.

You no doubt will hear those well ridden statistics that states that have Capital punishment have just as many or more murders than states that do not. Statistics cannot tell us if the rate has been altered if we have no way of knowing precisely what the rate would have been during a specific time frame had the death penalty not been imposed. How many murders did not take place because of fear of Capital punishment?

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I will give you some statistics -- According to a United Press report in September, 1967 -- there were more murders, rapes and violent killings in London, England, in 1966, the second year after England's death penalty was abolished than in any other year of England's 2000 year history.

During 1966/67 the last two years Capital punishment was actually used with any frequency in the U. S. - No policemen were slain from ambush in the U.S. The first two years after the Death penalty was abolished, 49 policemen were slain from ambush.

One last comment in regard the deterrent factor, not even the most liberal--can argue--It simply cannot be contested that a killer, once executed is forever deterred from killing again.

There comes to mind the case of Ted Bundy--If Bundy had been executed after his second murder there would likely be up to 30 innocent women still alive; several of whom were tortured and then murdered.

I wonder if ~~some~~ ^{possibly} of ~~these~~ ^{this} issues liberal opponents didn't cringe a small bit when the Associated Press carried the story recently of a 3 time convicted killer, one Alton Coleman, convicted still one more time of the brutal strangulation murder of a 9-year old Wisconsin girl.

I hope all of us ~~will~~ ^{will} suffer some remorse anytime a human being is executed, even for great cause, by the state. I do wonder. however, if John Carlin didn't suffer a little remorse when Daniel Remeta went on his murderous rampage in western Kansas a couple of years ago.

If society has the moral right and obligation to act in collective self defense against aggression emanating from without; for example against Nazi and communist assaults on freedom and human rights -- then society likewise has the moral right and obligation to defend itself against aggression emanating from within as an example against people who rape and murder children.

Sometimes those of us who defend the death penalty are pictured as being intolerant. But, isn't it true that one of our real problems in America today is too much toleration of evil. Too many Americans accept acts of violence, cruelty, lying, fraud, and civil turmoil with all too little response in the way of righteous indignation. Intolerance of such acts is simply a reflection that a person is seriously concerned with the question of right and wrong. Perhaps it is time for all Americans to begin taking right and wrong more seriously.

I have listened to the social theorists talk about the inhumanity of tough punishment and have heard all the questions concerning the deterrent value of Capital punishment. I believe it is time we as a state and as a society showed some concern for the "humanity" of the murderer's potential victim.

Nothing can undermine more the common citizens respect for the law than the failure of that law to impose upon criminals the punishment they justly deserve.

The death penalty is the only punishment that can adequately reflect societies revulsion for particularly heinous acts of murder.



*Attachment # 2
2-26-87*

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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STATEMENT OF
ATTORNEY GENERAL ROBERT T. STEPHAN
TO THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
RE: CAPITAL PUNISHMENT
FEBRUARY 26, 1987

Mr. Chairman and Members of the Committee:

I am here today to support the reenactment of capital punishment in Kansas. The great majority of Kansans have long supported such legislation, and I believe it is time their wishes are acted upon.

In the past, the focus of death penalty opponents was to rely on misleading and invalid survey data to attempt to demonstrate that the death penalty is no deterrent. Studies are of no help in this regard. There simply is no adequate way of accounting for the many variables which could affect such a field study. Although statistics won't prove or disprove deterrence, I do maintain that capital punishment is a deterrent to some individuals. I also have no qualms about saying there is a measure of retribution involved, and through that retribution, society is provided a release for its rage and some reason for restoration of faith in our system of justice -- that at times the penalty does fit the crime.

*Attachment # 2
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This year the focus of opponents has switched to maintaining that capital punishment is too costly. We have been told that the cost of capital punishment is so great that Kansas cannot afford the death penalty. Such arguments are nothing more than a smoke screen designed to confuse and obscure the issue. Indeed, we should not determine this issue based on cost. Even so, I believe cost claims are greatly overstated.

Supposedly, because of the appeals in capital cases, each case will cost the state millions of dollars. I don't believe that's true -- that is if we truly act in a "fair-minded" manner to our taxpayers and the victims of murderers and eliminate New Section 28 from House Bill 2062. This section would appear to be an attempt at a self-fulfilled prophecy. To insure that capital punishment will be costly, it allows a defendant to hire at state expense the most expensive criminal defense attorney admitted to practice law in Kansas with no limitations. It would open up the taxpayers' pocketbooks to pay such unnecessarily high costs. This section is indeed offensive to Kansans who are seeking justice, and this committee should strike it.

In regard to more reasonable cost issues and ignoring New Section 28, I see no reason why a trial of an individual would be any different under a life imprisonment bill (House Bill 2057) which many death penalty opponents support than under

the death penalty provisions of House Bill 2062. The same elements are present in the trial including a separate sentencing proceeding if a verdict of first degree murder is rendered.

There may be additional cost under either bill as a result of a bifurcated trial, but this would be offset in the case of capital punishment by more pleas of guilty in an attempt to avoid the possibility of a death sentence. At the present time with no death penalty, individuals have absolutely nothing to lose by going to trial, even if their guilt is obvious under all circumstances of the case. If capital punishment was a part of our law, there would be more hesitancy to play games with the judicial system.

In like manner, there would be very little difference between the preparation of an appeal in the first degree murder case, with or without the death penalty. It is correct there would probably be more appeals, but in almost every instance, the issues raised would have been raised in previous cases throughout the nation. As a result, there would be very little difference from case to case in regard to legal issues. This would reduce the cost of preparation of motions and writs which would be used by an individual sentenced to death, and the cost of the states' attorneys is likewise being overstated. The attorneys general in death penalty states have developed a brief bank to assist in responding to this

paper mill. Much of the research used to handle these appeals already has been done.

It should also be kept in mind, there would be very few individuals who would receive the death penalty. As I mentioned in my testimony before the House Committee, there have been only 24 individuals sentenced to death in the history of our state. This fact, together with my 13 years experience as a district court judge and eight years as attorney general, leads me to believe that the death penalty would be imposed only rarely and only in those cases in which it is proper. From my own experience on the bench, I recall only one case in which I believe the death penalty would have been seriously considered.

This bill requires aggravating circumstances to be found before the death penalty may be imposed. In addition, it sets forth the circumstances which may mitigate against imposition of the death penalty. Consideration of these circumstances will adequately ensure that the death penalty is not used where inappropriate. I believe the bill is constitutionally sound.

I support the original bill's application to first degree murder, including felony murder. Some of the most heinous of murders would not be first degree murder without the felony murder rule. While I understand the art of legislative compromise and that some members of the House were not willing

to accept the act's application to felony murder, I hope this committee will restore the bill to its original form.

In summary, I urge you to amend this bill as I have outlined and recommend its enactment into law. I believe in regard to the issue of costs that the opponents of the death penalty have thrown up a smoke screen and tossed millions of dollars around without any valid basis for such costs. I don't believe their case has any basis in fact.

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Attachment #3

SEDGWICK COUNTY DISTRICT ATTORNEY
18th Judicial District

Sedgwick County Courthouse
Annex — Second Floor
535 North Main
Wichita, Kansas 67203

CLARK V. OWENS
District Attorney

(316) 268-7281

HENRY H. BLASE
Chief Deputy

TESTIMONY OF CLARK V. OWENS ON HOUSE BILL 2062
SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
February 26, 1987

I. Original House Bill 2062

The death penalty bill as it was originally introduced in the House is a workable piece of legislation that complies with all of the constitutional requirements that have been mandated by the United States Supreme Court. The only change that I would suggest regarding this bill would be to provide for a method in which the prosecutor may waive the application of the death penalty in appropriate cases. There is a difference of opinion among prosecutors as to whether this may be done in the proposed legislation.

The issue of cost in implementing the death penalty has become a subject for debate. One source has estimated that there will be seventy capital murder trials each year in the State of Kansas as a basis for the cost figures. As long as prosecutors have the ability to use their judgment in deciding which of their first degree murder cases have sufficient evidence of aggravating circumstances to present to a jury, that estimate has to be exceedingly high. In Sedgwick County, we will file approximately ten first degree murder cases in an average year. From that number, I would estimate that perhaps one case per year would have the necessary evidence of aggravating circumstances to present to a jury. The remainder of the cases would be negotiated by plea to life in prison. If that estimate would apply statewide, I would imagine that a more realistic figure of between five and ten capital murder trials per year in the entire state would be a more accurate figure.

Furthermore, if the prosecutor has the authority to negotiate a plea to life in prison, it would probably require fewer jury trials than we presently have. Under existing State law, a defendant

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charged with first degree murder has no incentive to plead to the charges regardless of the strength of the evidence. The only incentive the prosecutor can presently offer is the reduction of charges to second degree murder which may not be appropriate in many circumstances.

If the prosecutor has the authority to take only strong cases of aggravating circumstances to jury trial, the increased cost of litigation of a capital case would be offset by the number of cases that would plead to life imprisonment that would otherwise have gone to jury trial under existing Kansas law.

II. House Bill 2062 as Amended

The amendments to the original bill as passed by the House of Representatives has unnecessarily added considerable costs to implementing the bill and provides for inconsistency in its application.

A. Limited Application for Felony Murder

The House amended House Bill 2062 to provide that the death penalty may be imposed for only selected felony murder charges. By limiting the application to only felony murders involving the underlying felonies of aggravated kidnapping, rape or aggravated criminal sodomy, the law would not be available for other felony murders that happen to involve especially aggravating circumstances.

For example, if a grocery store clerk is killed during an armed robbery, the death penalty will not ordinarily be available under the amended bill, even if there are other aggravating circumstances such as the defendant having prior convictions for murder or armed robbery. The reason for this is that the defendant in such circumstances would ordinarily be charged with felony murder rather than premeditated murder since it would be very difficult to prove that the robber entered the store with the premeditated intent to kill the store clerk. This also creates an inconsistency within the statute since robbery is an aggravating circumstance under New Section [8](3), but could be used only in charges of premeditated murder.

B. Dual Jury Trials

The House amended the bill to require separate trial and sentencing juries. The United States Supreme Court decisions do not require a special sentencing jury, but rather that the original trial jury be provided a separate sentencing hearing in which the defendant may introduce evidence of mitigation that was for various reasons not admitted for the issue of guilt or innocence.

The selection of a new sentencing jury would substantially increase the cost of a capital murder trial by extending the trial in selection of a second jury panel and reintroducing the circumstances of the crime. The case would essentially be tried twice.

Additionally, the bill was amended in New Section [5] so that a prospective juror in the guilt or innocence phase of the trial may not be challenged for cause based on the juror's view regarding capital punishment.

This will not provide for an impartial jury and will probably result in frequent hung juries caused by death penalty opponents. The original House bill provided for the correct criteria for the selection of jurors following the United States Supreme Court case of Wainwright v. Witt, (1985), 83 L.Ed.2d 841, 105 S.Ct. 844, where any juror may be excused if his views on capital punishment are deemed by the trial judge to prevent or substantially impair the performance of his duties.

C. Selection of Defense Attorney

The House amended the bill by adding New Section [28] which provides for the defendant to select any attorney of his choosing to be paid at the going rate for attorneys of his experience and expertise. This again added unnecessary cost to the bill and will not provide the intended result. The defense attorney would in effect be given a blank check to expend an unlimited amount of time and out-of-pocket expenses at premium rates and not be subject to the scrutiny of the court or a state agency for the reasonableness of the fee.

Under the existing system, the court has every reason to be assured that the appointed attorney will be competent to handle the complex nature of capital litigation. If the Public Defender or appointed attorney does not have the necessary experience to handle the case, it would make any conviction subject to attack on appeal for ineffective assistance of counsel.

III. Conclusion

The original version of House Bill 2062 as introduced is a far superior piece of legislation in both effectiveness and cost to the taxpayer. With the one suggested amendment to provide for prosecutorial discretion in selecting the appropriate cases to waive the death penalty, the cost of litigating capital murder cases will not be a significant factor.

JIM HUFF, President
Salina Police Department
Salina, Kansas 67401

ROBERT SCHUMAKER, President-Elect
Santa Fe RR. 1
Topeka, Kansas 66606

DELBERT FOWLER, Vice-President
Chief of Police
Derby, Kansas 67037

ALVIN THIMMESCH, Secretary-Treasurer
Wichita Police Department
Wichita, Kansas 67202

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Attachment #4

Kansas Peace Officers' Association

INCORPORATED



February 25, 1987

BOARD OF GOVERNORS

GOVERNORS (At Large)

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Sedgwick Co. Sheriff's Office
Wichita, Ks. 67203

DENNIS TANGEMAN
Kansas Highway Patrol
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Ks. Bureau of Investigation
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Ks. Bureau of Investigation
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Junction City, Ks. 66441

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Salina, Ks. 67401

NATE SPARKS
Kansas Highway Patrol
Junction City, Ks. 66441

DISTRICT 3 LAWRENCE YOUNGER

Chief of Police
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DISTRICT 4 GLENN WELSH

Coffeyville Police Dept.
Coffeyville, Ks. 67337

HOWARD KAHLER
Woodson Co. Sheriff's Office
Yates Center, Ks. 66783

DAVE MAYFIELD
Kansas Highway Patrol
Yates Center, Ks. 66783

DISTRICT 5 JIM DAILY

Great Bend Police Dept.
Great Bend, Ks. 67530

JACK ATTEBERRY
Pawnee Co. Sheriff's Office
Larned, Ks. 67550

F. DUANE DUGAN
Alcohol Beverage Control
Great Bend, Ks. 67530

DISTRICT 6 RANDY MAGNISON

Garden City Police Dept.
Garden City, Ks. 67846

LARRY MAHAN
Kansas Highway Patrol
Garden City, Ks. 67846

RAY MORGAN
Kearny Co. Sheriff's Office
Lakin, Ks. 67860

DISTRICT 7 DOUG MURPHY

Chief of Police
Maize, Ks. 67101

ED PAVEY
Sedgwick Co. Sheriff's Office
Wichita, Ks. 67203

LARRY WELCH
Ks. Law Enforcement Training Cen.
Hutchinson, Ks. 67504

DISTRICT 8 ROBERT HUDSON

Riley Co. Police Dept.
Manhattan, Ks. 66502

CLIFFORD HACKER
Lyon Co. Sheriff's Office
Emporia, Ks. 66801

HOWARD DOCKER
Kansas Highway Patrol
Topeka, Ks. 66603

SERGEANT-AT-ARMS
DALE HOLSEY
Kansas Highway Patrol
Sedgwick, Ks. 67135

KANSAS PEACE OFFICERS ASSOCIATION PROPONENT OF DEATH PENALTY

My name is Jim Huff and I am appearing here before you as a representative of the Kansas Peace Officers Association. Our organization represents some 3,000 plus members and over the years we have unanimously supported legislation in favor of Capital Punishment. We are once again appearing before you to ask for your support on the Capital Punishment bill. We in law enforcement feel that this particular piece of legislation is very important, especially since we have been assured by our new Governor that when a Capital Punishment Bill comes across his desk he will sign it into law.

I will attempt to keep this statement brief, but I feel that there are a few important points that I would like to touch on. The first argument that I would like to address is the cost factor. Having been around for a few years and having argued the death penalty for these same number of years, I would like to remind all of you that several years ago, we as the proponents, brought up the fact that in order to keep a convicted killer in jail for the rest of his life, the cost to the State of Kansas was astronomical. Multiply this times the number of killers in jail for murder in the first degree and it, of course, became much higher. As I recall, the opponents at that time said, "how can you place a price tag on a human life?" Now they are wanting to place the price tag. A price tag, I might add, that the Attorneys General's office has already said is very inflated.

The second argument by the opponents is that the State should not put itself in the position where it has to take a human life. What the State, and others, do not understand is that they are already in that position. When the State gives a Highway Patrolman a badge and a gun they are taking the responsibility of his having to take a life. We as law enforcement officers live with this fact every day. The real difference is that we may have to take this life on a seconds

In Unity There Is Strength

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notice, the State has the luxury to set back and examine the decision very carefully with a battery of attorneys. I am asking you, and telling you, never loose sight of the fact that when a law enforcement officer is forced to take a life, he is doing it for the state. Civil Liability Laws have proven this many times over.

The third and final point I would like to make is that we in the Kansas Peace Officers Association realize that we all have our own personnel feeling on the death penalty. Sometimes these feelings are very strong, both for and against. We are not asking you to change your own personnel feelings. We are asking that you set back and look at what the majority of registered voters from Kansas want. There is no doubt that each of you have been elected from your own districts by the majority of the people, to represent the majority of what the people want. It just seems totally out of context, then, that if the major majority of persons want a death penalty bill, how anyone of you can justify a vote against it. We in Law Enforcement, in the name of the State, are ready to take a human life, and have often had to give a life to do this. We are doing our job in representing the people and now we are asking you to do your part.

Sincerely,

Jimmy D. Huff
President