

Approved \_\_\_\_\_

3/4/87  
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

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

11:00 a.m./~~xxxx~~ on March 2, 1987 in room 254-E of the Capitol.

All members were present ~~except~~

Committee staff present:

Mary Galligan, Legislative Research  
June Windscheffel, Secretary to the Committee

Conferees appearing before the committee:

The Honorable Bill Avery, Wakefield  
Mr. Jim Florey, District Attorney, Lawrence  
Professor Emil Tonkovich, Professor of Law, University of Kansas  
Mr. Douglas Wright, County Attorney, Cowley County, Winfield

The Chairman welcomed former Governor William Avery as the first conferee at the meeting. This meeting concerns HB 2062, concerning capital punishment, and all conferees will be proponents of the bill at today's meeting.

Governor Avery's written testimony was distributed to the Committee. (Attachment #1)

The next conferee was Mr. Jim Florey, District Attorney in Lawrence. An outline of Mr. Florey's remarks will be made a part of these Minutes. (Attachment #2)

Mr. Emil A. Tonkovich was the next proponent to appear. A copy of his statement is attached and was distributed to the Committee. (Attachment #3)

The statement of Mr. C. Douglas Wright, was distributed for the Members, and Mr. Wright made his presentation. (Attachment #4)

A copy of the Public Policy Statement of the Kansas Farm Bureau was handed out to the Committee. Although Mr. John K. Blythe, who prepared the remarks, did not appear he had requested that his statement be given to the Committee and made part of the Minutes. (Attachment #5)

Also distributed to the Committee were copies of a letter from the Kansas Department of Corrections to Mr. Gary Stotts, dated January 27, 1987, concerning Fiscal Note 87-3; and copy of a Fiscal Note from Mr. Gary Stotts, to Representative Robert H. Miller, dated February 24, 1987. (Attachments #6 and #7)

The meeting was adjourned at noon.

3/2/87  
Attachment #1

STATEMENT BEFORE THE FEDERAL AND STATE AFFAIRS COMMITTEE  
KANSAS STATE SENATE  
ON HOUSE BILL NO. 2062

March 2, 1987

William H. Avery

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

SOME MEMBERS OF THE COMMITTEE MAY RECALL THAT I APPEARED BEFORE YOU TWO YEARS AGO IN SUPPORT OF A BILL SIMILAR TO HOUSE BILL 2062. MY COMMENTS HERE TODAY WILL REFLECT MY CONTINUED SUPPORT FOR CAPITAL PUNISHMENT AS WAS SET OUT AT THAT TIME. WHEREAS MY SUPPORT FOR HOUSE BILL 2062 IS WITHOUT RESERVATION, IT IS WITH A SENSE OF SADNESS THAT I APPEAR AGAIN. I AM HERE TODAY ONLY BECAUSE IT IS MY THOUGHTFUL CONCLUSION THAT IN EXCEPTIONAL CASES, HUMAN BEHAVIOR IS SUCH, THAT, ON OCCASIONS, A DEATH PENALTY SHOULD BE ENACTED IN ORDER TO HELP SUSTAIN A STABLE AND ORDERLY SOCIETY.

MY POSITION ON THIS CONTROVERSIAL ISSUE WAS NOT REACHED AS A RESULT OF DEMONSTRATION BY THE PROponents OR OPPONENTS, NOR BY A POLL OF THE VOTERS. NO DOUBT, BOTH OPPONENTS AND PROponents CAN FIND COMFORT IN THEIR SELECTED BIBLICAL PASSAGE.

THE DEATH PENALTY WAS NOT AN ISSUE WHEN I CAMPAIGNED FOR THE OFFICE OF GOVERNOR, AND I HAD NOT GIVEN THE CONTROVERSY ANY IN-DEPTH CONSIDERATION PREVIOUS TO ASSUMING OFFICE. I SOON DISCOVERED THAT THE OFFICE CARRIES WITH IT THE AWESOME RESPONSIBILITY OF SITTING AS THE LAST AND ULTIMATE LEVEL OF APPEAL TO POSTPONE OR TO COMMUTE THE PENALTY OF A DEATH SENTENCE, NOT WITHSTANDING THE SOMETIMES

Attachment #1  
FSA 3/2/87

HIDEOUS NATURE OF THE CRIME COMMITTED. THAT RESPONSIBILITY IS NOT MADE LESS BURDENSOME EVEN AFTER THE ACCUSED HAS BEEN FOUND GUILTY BY A JURY OF HIS PEERS, SENTENCED BY A PRESIDING JUDGE, AND THE ENTIRE PROCEEDINGS REVIEWED BY EVERY LEVEL OF APPEAL ONE OR MORE TIMES. GOVERNOR MIKE HAYDEN HAS MADE CLEAR HIS ACCEPTANCE OF THIS RESPONSIBILITY.

THIS OBLIGATION DESCENDED UPON ME SOON AFTER TAKING OFFICE. I WAS CONFRONTED BY AN APPEAL FROM THE LAWYERS FOR PERRY SMITH AND RICHARD HICKOCK AND THE FAMILY OF RICHARD HICKOCK. THESE TWO YOUNG MEN, WHILE ON PAROLE FROM THE KANSAS STATE PRISON, HAD BEEN FOUND GUILTY OF THE WANTON MURDER OF FOUR MEMBERS OF THE HERB CLUTTER FAMILY IN THEIR FARM HOME NEAR HOLCOMB, KANSAS.

IT WAS MY DECISION FROM THAT CONFRONTATION, AND A SERIES OF CRIMES WHICH FOLLOWED, THAT PROMPTED ME TO APPEAR BEFORE THIS COMMITTEE IN 1985, AND AGAIN TODAY.

SMITH AND HICKOCK WERE TAKEN INTO CUSTODY IN LAS VEGAS, RETURNED TO GARDEN CITY, ARRAIGNED, AND EACH CHARGED WITH FIRST DEGREE MURDER OF FOUR MEMBERS OF THE CLUTTER FAMILY ON NOVEMBER 15, 1959. THEY WERE FOUND GUILTY BY A JURY IN THE COURT OF JUDGE ROLAND TATE. THE RESULTING DEATH SENTENCE WAS APPEALED TO THE KANSAS SUPREME COURT, THE DISTRICT COURT OF KANSAS IN TOPEKA, AND ON THREE SUBSEQUENT OCCASIONS, TO THE SUPREME COURT OF THE UNITED STATES. THE SUPREME COURT REJECTED EACH APPEAL AND THE CONVICTION WAS LEFT STANDING.

AFTER THE THIRD REFUSAL BY THE SUPREME COURT TO REVIEW THE CASE, IT BECAME EVIDENT THAT AN APPEAL WOULD BE MADE TO THE GOVERNOR

AND I IMMEDIATELY COMMENCED TO STUDY THE HISTORY OF THE CASE. AS AN ASIDE, PERMIT ME TO POINT OUT THAT THIS WAS FIVE YEARS AFTER THE CRIME WAS COMMITTED, AND DURING THOSE YEARS I WAS OUT OF THE STATE SERVING AS A MEMBER OF CONGRESS AND HAD NOT BEEN EXPOSED TO THE HEADLINES FROM DAY TO DAY DURING THE COURSE OF THE JUDICIAL PROCEEDINGS. I MENTION THIS TO SET ASIDE ANY FEELING THAT I MAY HAVE BEEN CAUGHT UP IN THE EMOTION THAT WAS ASSOCIATED WITH THE TRIAL. FURTHER, TRUMAN CAPOTE'S BEST SELLING BOOK, "IN COLD BLOOD," HAD NOT YET BEEN PUBLISHED.

I REVIEWED THE TESTIMONY FROM THE TRIAL RECORD AND DIRECTED MY LEGAL AIDES TO STUDY THE APPEALS FROM JUDGE TATE'S COURT TO ASCERTAIN IF, DURING THE APPEAL PROCESS, ANY COURT OR JUDGE HAD TAKEN ISSUE OR QUESTIONED (A) THE CONDUCT OF THE TRIAL, (B) THE AVAILABILITY OF COMPETENT LEGAL COUNSEL AND (C) IF FURTHER APPEALS MIGHT BE EXPECTED. NEGATIVE COMMENTS FROM THE APPEALS COURT WERE NOT FOUND.

SEVERAL PARTIES ASKED TO BE HEARD ON BEHALF OF THE CONVICTED FELONS. I ELECTED TO HEAR THE ATTORNEYS FOR THE DEFENDANTS AND THE MOTHER AND BROTHER OF RICHARD HICKOCK. THIS WAS THE MOST DIFFICULT PART OF THE ENTIRE PROCEEDING. IT WAS AN EMOTIONAL EXPERIENCE TO LISTEN TO A MOTHER PLEAD FOR THE LIFE OF HER SON. DURING HER APPEAL, HOWEVER, I COULD NOT DISPLACE FROM MY MIND THE PICTURE OF HERB CLUTTER PLEADING FOR HIS LIFE AND THE LIFE OF HIS FAMILY. THAT IS, HE WOULD HAVE BEEN PLEADING IF HE HAD NOT BEEN BOUND AND GAGGED.

FOLLOWING ARE SEVERAL PARAGRAPHS THAT WERE INCLUDED IN MY STATEMENT IN 1985. AT FIRST IT WAS MY THOUGHT NOT TO INCLUDE THEM THIS YEAR AS THEY COULD BE VIEWED AS INFLAMMATORY. THEY ARE, HOWEVER, A SAMPLE OF THE TESTIMONY THAT, TO SOME DEGREE, LED TO MY DECISION NOT TO COMMUTE THE VERDICT OF THE COURT, AND THAT THE POSSIBILITY OF A MEANINGFUL REHABILITATION WAS REMOTE AT BEST.

The final and futile search for the safe kind of blow for them, Smith indicated. "All hell broke out ... that's when the violence started," he said. They were frustrated, disappointed, mad. They had to decide what to do ... had to do something. Everyone in the house had seen them good. They argued about shooting because of the noise it would make. Hickock patted the knife. There was a quieter way, he said. Then there was silence. "Well, I'll do it," Smith said at last. He took the knife. Back downstairs, he made a pretense of adjusting the cord on Clutter's hands as he knelt over him. Then he raised the knife and plunged it into Clutter's throat. Mr. Clutter struggled, thrashed about, got a hand loose and grabbed at his throat. There was a gurgling sound. Unnerved, Hickock said, "Take the shotgun." Smith did and handed over the knife. As he

walked away, he heard the slap of the knife going in once more, maybe twice. Hickock came up beside him and said, "Let's get the hell out of here." The gurgling and struggling continued in the furnace room. Smith protested that they couldn't leave the man that way. "Should we shoot him?" he asked. "Go ahead, go ahead," Hickock answered. "So I went over close, raised the shotgun and pulled the trigger," Smith said. Hickock picked up the shell. "You'd better get the boy, too." Smith did. Hickock held the flashlight and picked up the shell.

As they started for the stairs, Smith said, he didn't know how to explain how or what he felt. He told Hickock, "I can't do anything else." Hickock handed him the knife and said, "Well, then give me the gun." They went to Nancy's room upstairs. She turned her head to the wall as they approached. Hickock raised the gun and fired at her head as Smith held the light. Smith picked up the shell. Then they went to Mrs. Clutter's room and repeated the procedure: Smith held the flashlight, Hickock fired the shot. They had to search for a while to find the shell.

(THE ABOVE STATEMENTS ARE NOT FROM THE TRANSCRIPT OF THE TRIAL, BUT WERE LATER SUMMARIZED BY AGENT ALVIN DEWEY BASED ON STATEMENTS MADE BY THE DEFENDANTS UPON INTERROGATION AND MADE TO THE COURT BY AGENT DEWEY UNDER OATH).

MY CONCERN OVER COMMUTING A SENTENCE FROM A CONVICTED MURDERER WAS FURTHER REINFORCED BECAUSE OF THE CASE OF BOBBY JOE SPENCER. SINCE THE BOBBY SPENCER STORY HAS SOME POLITICAL OVERTONES, I WILL QUOTE FROM A PARAGRAPH IN TRUMAN CAPOTE'S BOOK. (THE FACTS IN THE PARAGRAPH WERE CONFIRMED, THE SUPPOSITION IS THAT OF MR. CAPOTE.)

"EARL WILSON, A HUSKY, HYMN-SINGING NEGRO, HAD BEEN SENTENCED TO DIE FOR THE KIDNAPING, RAPE, AND TORTURE OF A YOUNG WHITE WOMAN: THE VICTIM, THOUGH SHE SURVIVED, WAS LEFT SEVERELY DISABLED. BOBBY JOE SPENCER, WHITE, AN EFFEMINATE YOUTH, HAD CONFESSED TO MURDERING AN ELDERLY KANSAS CITY WOMAN, THE OWNER OF A ROOMING HOUSE WHERE HE HAD LIVED. PRIOR TO LEAVING OFFICE IN JANUARY, 1961, GOVERNOR (GEORGE) DOCKING, WHO HAD BEEN DEFEATED FOR REELECTION (IN A LARGE MEASURE BECAUSE OF HIS ATTITUDE TOWARD CAPITAL PUNISHMENT), COMMUTED THE SENTENCE OF BOTH THESE MEN TO LIFE IMPRISONMENT, WHICH GENERALLY MEANS THAT THEY COULD APPLY FOR PAROLE IN SEVEN YEARS. HOWEVER, BOBBY JOE SPENCER SOON KILLED AGAIN: STABBED WITH A SHIV ANOTHER YOUNG CONVICT, HIS RIVAL FOR THE AFFECTION OF AN OLDER INMATE.-----THIS DEED EARNED SPENCER A SECOND LIFE SENTENCE. BUT THE PUBLIC WAS NOT MUCH AWARE OF EITHER WILSON OR SPENCER:-----"

THERE IS CONFLICTING TESTIMONY WHETHER ENACTING THE DEATH PENALTY WOULD SERVE AS AN EFFECTIVE IMPEDIMENT AGAINST OTHER POTENTIAL MURDERS. THE SPENCER CASE SAID TO ME THERE IS SERIOUS DOUBT THAT A PERSON WHO HAS COMMITTED A HIDEOUS CRIME CAN BE REHABILITATED. THE FELON CAN REMAIN A MENACE TO SOCIETY, IN OR OUT OF PRISON.

ON THE NIGHT OF THE SCHEDULED EXECUTIONS I KEPT AN OPEN TELEPHONE LINE WITH THE DIRECTOR OF PRISONS IN THE EVENT A LAST MINUTE CALL MIGHT

COME FROM A JUSTICE OF THE COURT. NO CALL WAS RECEIVED FROM THE DIRECTOR BUT, QUITE UNEXPECTEDLY, ON ANOTHER LINE, CAME CONTINUOUS CALLS THROUGHOUT THE NIGHT. THESE CALLS WERE FROM PERSONS PLEADING OR DEMANDING THAT THE EXECUTIONS BE STAYED. THE CALLERS RANGED FROM MINISTERS INSISTING ON A STAY TO OTHER PERSONS WHO IDENTITIES WERE NOT DISCLOSED, DEMANDING THE "EXECUTION BE STOPPED" AND IF NOT, THREATENING ME AND ALSO THE LIVES OF MY TWO TEENAGE CHILDREN.

IT IS INTERESTING TO NOTE THAT THESE PROTESTS OF THE DEATH SENTENCE CAME FROM TWO DIVERGENT ATTITUDES AND PERSPECTIVES. THE CLERGY, I ASSUME, INTERVENED BECAUSE OF THEIR MORAL CONVICTIONS, AND, AT THE OPPOSITE END OF THE SPECTRUM, CAME THREATS OF VIOLENCE. IS IT NOT REASONABLE TO ASSUME THAT THE GREAT MAJORITY OF CITIZENS NOT HEARD FROM, LIKE ME, WERE SADDENED AND DISTRESSED BY THE WHOLE EPISODE, BUT FELT JUSTICE WAS BEING CARRIED OUT?

IT SHOULD BE STATED HERE THAT I DID NOT KNOW THE HERB CLUTTER FAMILY. I MET HERB ONCE WHEN I WAS A MEMBER OF THE HOUSE OF REPRESENTATIVES WHEN HE WAS WORKING FOR WHAT LATER BECAME THE KANSAS WHEAT COMMISSION. I DID KNOW JUDGE TATE VERY WELL AND IT WAS NO SURPRISE TO ME THAT NO FLAW COULD BE DISCOVERED IN HIS CONDUCT OF THE TRIAL NOR INSTRUCTIONS TO THE JURY.

THERE IS ANOTHER INTERESTING ASPECT OF PUBLIC REACTION TO THE APPLICATION OF THE DEATH PENALTY. A FEW MONTHS LATER A SIMILAR SITUATION AROSE IN THE CONVICTION OF JAMES LATHAN AND GEORGE YORK. THEIR CASE HAD BEEN ON APPEAL FROM A CONVICTION IN 1961, AFTER

BEING FOUND GUILTY OF MURDERING SEVEN PERSONS IN FIVE STATES WITHIN A TEN DAY PERIOD. THEIR CASE AND PENDING EXECUTION RECEIVED CONSIDERABLE PUBLICITY THROUGHOUT KANSAS AND IN THE OTHER STATES WHERE THE MURDERS HAD BEEN COMMITTED. AGAIN, ON THE NIGHT OF THE EXECUTION, MY TELEPHONE LINE WAS OPEN TO THE DIRECTOR OF PRISONS, AS WELL AS ANOTHER OPEN LINE. NOT ONE CALL CAME IN. I FOUND IT PECULIAR THAT SO MUCH CONCERN HAD BEEN REGISTERED ON THE LIVES OF SMITH AND HICKOCK AND YET NO ONE SEEMED INTERESTED IN THE OTHER TWO. IF I HAD FELT SO MUCH CONCERNED OVER THE LIFE OF ANY ONE INDIVIDUAL, I WOULD HAVE HAD THE SAME CONCERN FOR EVERY OTHER LIFE, NOT ON A SELECTIVE BASIS.

THE OPPONENTS FURTHER ALLEGE THAT THE DEATH PENALTY CARRIES WITH IT CERTAIN RACIAL OVERTONES. KANSAS RECORDS REFUTE THAT ALLEGATION. PLEASE NOTE ATTACHMENT #1 TO THIS STATEMENT. THIS RECORD INDICATES THAT OF THE 24 EXECUTIONS IN THE STATE IN THE LAST 123 YEARS, ONLY THREE HAVE BEEN BLACKS, WITH TWO OTHERS OF MIXED RACIAL IDENTITY. THIS IS NOT A GREAT VARIANCE FROM THE RACIAL MIX IN OUR STATE. THIS RECORD FURTHER INDICATES THAT THE DEATH PENALTY HAD BEEN IMPOSED ON A VERY LIMITED BASIS EVEN UNDER STATUTES THAT DID NOT SET OUT THE STRICT GUIDE LINES THAT ARE CONTAINED IN HOUSE BILL 2062. THE AUTOMATIC REVIEW OF THE DEATH SENTENCE BY THE SUPREME COURT OF KANSAS IS A FURTHER LIMITATION SET OUT IN THE BILL.

GENERALLY SPEAKING, THE PSYCHIATRIC FRATERNITY HAS BEEN OPPOSED TO THE DEATH PENALTY. THAT CONCERN SHOULD BE MITIGATED BY A 1985



SUPREME COURT DECISION WHICH HELD THAT IMPOVERISHED CRIMINAL SUSPECTS, WHOSE SANITY IS IN SERIOUS DOUBT, HAVE A CONSTITUTIONAL RIGHT TO A PSYCHIATRISTS'S HELP AT TAXPAYER EXPENSE. THE OPINION FOR THE MAJORITY WAS WRITTEN BY JUSTICE THURGOOD MARSHALL. MOST STATES ALREADY HAD THIS PROVISION, BUT NOW ALL MUST COMPLY.

DURING THE CONSIDERATION OF THIS LEGISLATION IN THE OTHER BODY, THE MEDIA GAVE EXTENSIVE COVERAGE TO THE ARGUMENTS OF THE OPPONENTS THAT THE COST OF CARRYING OUT THE PROVISIONS OF THE BILL WOULD ADD A FINANCIAL BURDEN TO THE STATE. IN MY OPINION, SUCH AN ARGUMENT IS FATUOUS. I HAVE BEEN IN AND OUT OF THE CAPITAL BUILDING FOR MORE THAN THIRTY YEARS, AND NEVER BEFORE HAS THAT ARGUMENT BEEN RAISED. BECAUSE CONSIDERABLE PUBLICITY HAS BEEN GIVEN TO THE FISCAL PROBLEMS OF THE STATE, IT WAS NO DOUBT, DREDGED UP WITH THE HOPE IT MIGHT PROVIDE AN EXCUSE FOR A NEGATIVE VOTE. IT WOULD APPEAR TO HAVE NO RELEVANCY TO THE CRITICAL QUESTION INVOLVED WITH THE PROPOSED LEGISLATION. AND IF COSTS ARE TO BE CONSIDERED, WHAT WERE (AND ARE) THE COSTS TO EVEANNA AND BEVERLY CLUTTER, THE SURVIVING MEMBERS OF THE CLUTTER FAMILY, SURVIVING ONLY BECAUSE THEY WERE NOT AT HOME ON THE FATEFUL NOVEMBER EVENING? AND THERE IS AN EQUIVALENT COST TO THE FAMILIES OF OTHER VICTIMS WHOSE NAMES WE DO NOT KNOW.

MR. CHAIRMAN, I DO NOT VIEW THE ENACTMENT OF A DEATH PENALTY AS "AN ACT OF VENGEANCE," AS IT IS FREQUENTLY CHARACTERIZED BY THOSE IN OPPOSITION TO THE LEGISLATION. THROUGHOUT HISTORY, EVERY CULTURE

AND SEGMENT OF SOCIETY HAS SET OUT CERTAIN RULES FOR HUMAN CONDUCT AS DETERMINED TO BE IN THE BEST INTERESTS OF MAINTAINING A STABLE SOCIAL ORDER. AT THE SAME TIME, A PENALTY HAS BEEN ASSESSED FOR THE VIOLATION OF THOSE RULES. IN OUR SYSTEM OF JURISPRUDENCE, THE MOST SEVERE PENALTY, THE DEATH PENALTY, CAN ONLY BE IMPOSED BY A PUBLIC TRIAL, AND BY A VERDICT OF GUILT AS DETERMINED BY A JURY OF "PEERS" OF THE ACCUSED. HOUSE BILL 2062 IMPOSES FURTHER LIMITATIONS AND RESTRICTIONS.

FINALLY, MR. CHAIRMAN, IT WOULD SEEM TO ME THAT THIS ISSUE REDUCES DOWN TO A VERY DIFFICULT, BUT RELATIVELY SIMPLE, DECISION. IS THE IMPOSITION OF THE DEATH PENALTY, UNDER CAREFULLY DEFINED CIRCUMSTANCES A MATTER OF RETRIBUTION OR A MATTER OF THE ADMINISTRATION OF JUSTICE? IT WAS MY DIFFICULT DECISION IN 1965, THAT IT WAS THE ADMINISTRATION OF JUSTICE, AND I STILL SUPPORT THAT CONCLUSION.

I URGE THE COMMITTEE TO FAVORABLY CONSIDER HOUSE BILL 2062.

THANK YOU, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, FOR THIS OPPORTUNITY TO SUBMIT MY VIEWS TO YOU.

OFFICE OF DISTRICT ATTORNEY

JUDICIAL & LAW ENFORCEMENT CENTER

111 E. 11th STREET • LAWRENCE, KS 66044

TELEPHONE 913-841-0211

CHILD SUPPORT DIVISION 913-841-7700 EXT. 316

3/2/87  
Attachment #2

SEVENTH JUDICIAL DISTRICT  
DOUGLAS COUNTY, KANSAS

JAMES E. FLORY  
DISTRICT ATTORNEY

March 3, 1987

The Honorable Edward F. Reilly  
Chairman, Senate State and Federal  
Affairs Committee  
State Capitol  
Topeka, Kansas 66612

Re: House Bill No. 2062

Dear Senator Reilly:

I take no position on the question of whether legislation implementing a death penalty should be enacted since that is a legislative decision for the duly elected representatives of the people of the State of Kansas. I do, however, believe that the decision should be reached based upon fact, not fiction, and that many of the statistics presented thus far relating to the number of capital cases and the cost of implementation have been greatly exaggerated.

From my experience, the estimate of 70-80 capital trials per year in Kansas is totally inaccurate and is quite probably ten times the actual number of actual capital trials that can be expected. Since the cost estimates are based upon this erroneous figure, they too are quite likely grossly overstated.

Procedurally, I believe three amendments should be made to H.B. 2062 as follows:

1. The provision for separate juries in the trial phase and sentencing phase should be eliminated. Although a bifurcated proceeding is required, the case law clearly does not require two juries. The result of two juries would be that state must actually present the entire case twice, which is a clear waste of time and money.
2. The language in Sec. 5(2) which would allow challenge of a juror for cause if their personal views of capital punishment would "substantially impair" their ability to perform should be included. By eliminating this language, the bill would severely limit the State's right to a fair and impartial sentencing jury. It would be virtually impossible to show that such views would "prevent" performance of duty, and the burden so established is higher than required by the United States Supreme Court.

Attachment #2  
FSA 3/2/87

The Honorable Edward Killy

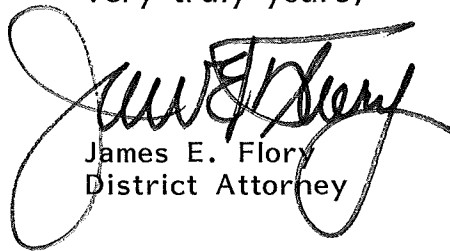
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3. The bill should clearly, on its face, provide prosecutorial discretion as to whether the State seeks the death penalty. Read literally, it appears that any crime which falls within the category of a capital offense must proceed as a death penalty case. The prosecutor, who is most familiar with the facts and evidence of the case, should have the authority by statute to seek or not seek a death sentence.

In conclusion, I ask that the legislative decision on capital punishment be made on facts rather than an emotional speculation and distorted statistics. Additionally, the ultimate legislation should be a clear, workable law for the prosecution, juries and judiciary to work with.

Very truly yours,



James E. Flory  
District Attorney

JEF:ca



3/2/87  
Attachment #3

## THE UNIVERSITY OF KANSAS

School of Law  
Lawrence, Kansas 66045-2380  
(913) 864-4550

March 2, 1987

Senate Committee on  
Federal and State Affairs  
Kansas Senate  
Topeka, Kansas 66612

Re: Death Penalty (House Bill 2062)

Dear Senators:

I believe that the death penalty is a cost-effective deterrent to certain types of murder. Although I am designated in this hearing as a proponent of the death penalty, I do not consider myself an advocate. I did not publicly express my views on this subject until after the House bill was passed.

In my opinion, the opponents of the death penalty have distorted the facts and clouded the debate in Kansas. This has undoubtedly caused some legislators to abandon their support for the death penalty and others to agree to ill-advised compromise amendments. Consequently, I feel compelled to offer my views and provide the Legislature with a balanced analysis.

I am a firm believer in a cost-benefit approach. If the death penalty either was not a deterrent to murder or was too costly, I would not support it. After reviewing the facts, however, I believe that the death penalty is a cost-effective deterrent.

Thank you for the opportunity to testify. Attached is a memo that details my position and recommendations. Please make this memo available to other members of the Legislature. I will be glad to answer any questions and, if requested, I will testify at any future hearings.

Sincerely,

*E.A.T.*

Emil A. Tonkovich  
Professor of Law

Attachment #3  
FSA 3/2/87

MEMORANDUM

TO: Kansas Senate  
FROM: Emil A. Tonkovich, Professor of Law\*  
DATE: March 2, 1987  
RE: Death Penalty (House Bill 2062)

The death penalty is a cost-effective deterrent to certain types of murder. Furthermore, this constitutionally valid punishment is supported by the vast majority of Americans and state legislatures.

Opponents of the death penalty have distorted the facts and clouded the debate in Kansas. After briefly discussing the constitutionality of the death penalty, this memo will respond to the opponents' arguments and recommend amendments to the Kansas bill.

I. Constitutionality of the Death Penalty

The death penalty is clearly a constitutional form of punishment. Under the Eighth Amendment punishment clause, a criminal sentence must be proportionate to the crime and comport with contemporary standards of decency. The United States Supreme Court has consistently held that the death penalty in murder cases complies with these Eighth Amendment requirements.<sup>1</sup>

The Court has held that the death penalty is a proportionate sentence for deliberate murders. As the Court stated, the death penalty is an "extreme sanction suitable to the most extreme of crimes."<sup>2</sup>

Furthermore, the Court has held that the death penalty comports with contemporary standards of decency. After recognizing the death penalty's long history of acceptance in the United States, the Court, in 1976, found that it is "evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."<sup>3</sup> To support this finding, the Court cited the fact that 35 states had death penalty statutes and that public opinion polls indicated that the majority of Americans favored the death penalty.

Today, support for the death penalty is even stronger. The number of states with death penalty statutes has increased to 37.<sup>4</sup> On the national level, Congress is considering expanding the scope of the federal death penalty statute.<sup>5</sup> Furthermore, a November 1986 Associated Press poll showed that 86% of Americans favor the death penalty and only 11% oppose it. The poll demonstrated that the widespread support for the death penalty cuts across all racial, ethnic, economic, and regional lines.<sup>6</sup> This support for the death penalty was dramatically demonstrated

by a recent California election. Rose Bird, the Chief Justice of the California Supreme Court, was voted out of office by a two-to-one margin because of her repeated reversals of death penalty sentences. The election showed the depth and intensity of death penalty support.

Evidence of public support for the death penalty is relevant not only for constitutional purposes, but also to whether Kansas should enact a death penalty statute. Opponents of the death penalty argue that it does not deter murder and that it is extremely costly. It is illogical that the vast majority of legislatures and taxpayers would support the death penalty if it was totally ineffective and cost millions of dollars to implement.

## II. Response to Opponents' Arguments

Opponents of the death penalty have made several arguments. Their arguments include: the death penalty is not a deterrent; retribution is not an appropriate reason for punishment; death sentences discriminate against minorities; and the death penalty will cost millions of dollars per year. These arguments are based on distorted facts and inferences.

### A. Deterrence

The death penalty is a deterrent to certain types of criminal homicides, including premeditated murder. The United States Supreme Court, referring to premeditated murders, stated that "the death penalty undoubtedly is a significant deterrent."<sup>7</sup> The Court has consistently recognized that the death penalty serves a valid social purpose by deterring murders.

Opponents of the death penalty, citing statistical studies, disagree with (or ignore) the Supreme Court. These studies do not prove that the death penalty is a deterrent. Therefore, the opponents argue that the death penalty is not a deterrent.

Simply because deterrence cannot be proven statistically, however, does not mandate the opponents' conclusion. As the Supreme Court recognized, these studies are inconclusive because it is impossible to establish deterrence through statistical methodology.<sup>8</sup> Thus, the opponents base their argument on inconclusive studies that cannot effectively measure deterrence.

The United States Supreme Court, on the other hand, bases its finding on sound legal principles and logical reasoning. Deterrence is a fundamental purpose of criminal punishment. The greater the punishment, the greater the deterrence.<sup>9</sup> This basic legal principle leads to the inescapable conclusion that the death penalty provides a greater deterrence than a term of imprisonment.<sup>10</sup>

Thus, as the Supreme Court recognizes, premeditated and

deliberate murders covered under the bill will be deterred.<sup>11</sup> Furthermore, the underlying felonies of the covered felony-murders (e.g., rape) may also be deterred. For example, a potential rapist may be deterred from committing the rape because he will be subject to the death penalty if the woman dies. Also, a rapist-kidnapper has a motive to kill the victim-eyewitness if there is no death penalty -- he has already committed a life sentence crime and has nothing to lose and everything to gain by killing the victim-eyewitness. Finally, the death penalty also serves as a specific deterrent to future crimes that the convicted murderer may commit. Over 65% of death row inmates have prior felony convictions and 9% have prior homicide convictions.<sup>12</sup> If these murderers are paroled from prison, many will commit felonies and some will surely kill again.<sup>13</sup>

In short, on the issue of deterrence, the logical finding of the United States Supreme Court that "the death penalty undoubtedly is a significant deterrent" is far more persuasive than the opponents' reliance on inconclusive statistical studies. Thus, it is reasonable to believe that the Kansas bill will significantly deter murder.

#### B. Retribution

The Supreme Court also has consistently recognized that the death penalty serves another social purpose -- retribution. The Court stated that "capital punishment is an expression of society's moral outrage at particularly offensive conduct."<sup>13</sup> Although opponents of the death penalty believe that this is an inappropriate rationale, the Court stated that retribution is "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."<sup>14</sup>

#### C. Discrimination

Opponents argue that the death penalty is imposed in a racially discriminatory manner. Their emotional argument is based on statistical studies that purport to demonstrate this proposition. The significance of these studies, however, is often exaggerated and the methodology is often questionable. Most importantly, the courts have consistently rejected these studies.

The Baldus study, a report that is most frequently cited by death penalty opponents, is generally recognized as the most comprehensive study in this area. Baldus analyzed death penalty sentences imposed in Georgia between 1973 and 1979. He found that there was no correlation between the race of the defendant and the imposition of the death penalty. He did find, however, that there was a slight correlation based on the race of the victim, i.e., that the death penalty is 6% more likely to be imposed if the victim is white.



Despite these unpersuasive findings, opponents cite the Baldus study as evidence that the death penalty is imposed in a racially discriminatory manner. This argument, however, has been rejected by the Georgia Supreme Court, the U.S. District Court for the Northern District of Georgia, and the U.S. Court of Appeals for the Eleventh Circuit (en banc).<sup>15</sup>

The district court found that the Baldus study "results were not the product of good statistical methodology."<sup>16</sup> The Eleventh Circuit assumed the validity of the Baldus study, but found that the study "confirms rather than condemns the system"<sup>17</sup> and demonstrates that the Georgia death penalty system is "operating in a rational manner."<sup>18</sup> Thus, even based on the opponents' most favorable study (of a state notorious for racial discrimination), there is certainly reason to believe that, in Kansas, the death penalty will be imposed in a fair and rational manner.<sup>19</sup>

#### D. Cost

Opponents argue that the death penalty will cost millions of dollars per year to implement. During these times of budget deficits, this argument is certainly timely. Ironically, but not surprisingly, the most costly aspects of the Kansas bill -- special sentencing juries and state-funded private attorneys' fees -- are unprecedented amendments supported by the opponents.<sup>20</sup>

Cost estimates for the death penalty must be carefully scrutinized. Many questions must be asked. Who is making the estimate and what is their bias? What is the source of the statistical base for the estimate? Are the statistics accurately interpreted? Have all the variables been considered? Do the estimates duplicate costs inherent in prosecuting any first degree murder case?

The Kansas Legislative Research Department estimates the death penalty will cost over \$11 million per year; Professor Gottlieb estimates the cost at over \$7 million per year. (Although the K.L.R.D. is "neutral," it is obvious that their estimates are based in large part on data supplied by opponents and poor statistical analysis.) Careful analysis of these cost estimates reveals that they are grossly overestimated.

The greatest flaw in these cost estimates involves the actual number of death penalty cases per year. To analyze cost, the process must be divided into 3 categories: (1) trials -- the number of capital cases tried; (2) sentencing -- the number of guilty verdicts in capital cases; and (3) appeals -- the number of death sentences imposed. Although specific estimates are difficult because of inadequate data in Kansas, it is apparent that the costs have been grossly overestimated. The overestimation is even greater when the cost-per-case within each phase is analyzed. For purposes of analysis, it is easier to examine the costs of the 3 phases in reverse chronological order.

## 1. Appeals

The appellate process cost estimate involves the number of death sentences imposed. The Kansas Legislative Research Department estimates this number at 10; Professor Gottlieb, relying on the Board of Indigent Defense Fund figures, estimates this number at 16. For these estimates to be accurate, Kansas would need to impose the death sentence 5 to 8 times more frequently than the national average.

A realistic estimate is that there will be 2 death sentences per year in Kansas. This estimate is obtained by computing the per capita death sentence rate in the 37 states that have the death penalty and adjusting the result to the Kansas murder rate.<sup>21</sup> This estimate is further verified by comparing the number of death sentences in Missouri. In 1985 (1986 figures are unavailable), Missouri imposed only 8 death sentences.<sup>22</sup> Missouri has over twice the population of Kansas and nearly twice the murder rate.<sup>23</sup> Thus, a comparison with Missouri, which had nearly four times as many murders as Kansas, will also result in an estimated 2 death sentences in Kansas. It should be noted that the estimate of 2 death sentences per year in Kansas does not consider that the scope of the Kansas bill is narrower than other death penalty statutes and will result in even fewer death sentences. Finally, if this estimate seems low, consider that in Colorado and Nebraska during 1985 there were no death sentences imposed.<sup>24</sup>

The fact that there will only be a few death sentences per year in Kansas is appropriate. The proposed Kansas statute focuses on the most heinous murders. Thus, the deterrent benefit of the death penalty will be obtained through a limited number of sentences.

The estimated cost of a death sentence appeal must also be carefully scrutinized. Several factors must be considered. Any first degree murder conviction will be thoroughly appealed. Thus, cost estimates should only include the appeals of the death sentence and not trial issues. Furthermore, the length of future death sentence appeals will be significantly shorter. Challenges to the death penalty are being exhausted and the Supreme Court clearly is impatient with lengthy appeals.<sup>25</sup> Finally, a "death row" would hardly be needed, or at least substantially reduced, if only two people were sentenced to death each year.

## 2. Sentencing

The sentencing procedure cost estimate involves the number of guilty verdicts in capital cases. The Kansas Legislative Research Department estimates this number at 35. (Professor Gottlieb did not estimate this number.) This estimate is not only exaggerated, but also impossible. According to the Department of Corrections, there were only 18 first degree murder

convictions last year.<sup>26</sup>

A realistic estimate is that there will be between 6 and 8 guilty verdicts in capital cases per year in Kansas. (This figure could be more precisely determined if the 18 first degree murder convictions are individually analyzed.) This estimate is made by subtracting from the 18 first degree murder convictions the following: (1) felony-murders not covered by the House bill, e.g., murders occurring during robberies, burglaries, and arsons, and all unintentional felony-murders; (2) murders covered by the House bill that either do not display an aggravating circumstance or display an outweighing mitigating circumstance; and (3) those otherwise capital cases in which the defendant would plead guilty to a term of imprisonment. These three categories undoubtedly constitute more than one-half of the first degree murders. Furthermore, working backwards from the estimate of 2 death sentences, if only 1 out of 3 capital sentencing procedures resulted in a death sentence, then there would be 6 guilty verdicts in capital cases. Thus, it can safely be estimated that there will not be more than 8 guilty verdicts in capital cases per year in Kansas.

The estimated cost of the sentencing procedure must also be carefully scrutinized. Several factors must be considered. Any first degree murder conviction will require an extensive presentence report and at least a short hearing. Thus, cost estimates should only include the death sentencing procedure. Although this procedure will be extensive, the cost can be drastically reduced by repealing the House bill amendment requiring a special sentencing jury. This costly special sentencing jury is unprecedented, unnecessary, and unfair. (See the recommendations below.)

### 3. Trials

The trial cost estimate involves the number of capital cases tried. The Kansas Legislative Research Department estimates this number at 70. (Professor Gottlieb, relying on the Board of Indigent Defense Fund figures, estimates that 80 first degree murders will be filed annually. This figure is irrelevant because it includes noncapital first degree murders and does not estimate how many cases will be tried.) This estimate is also greatly exaggerated. According to the K.B.I., in 1985 there were only 121 criminal homicides that could be categorized as either first degree murder, second degree murder, or voluntary manslaughter.<sup>27</sup> It is incredulous to estimate that 70 of these will result in capital first degree murder trials.

A realistic estimate is that there will be between 10 and 15 capital cases tried per year in Kansas.<sup>28</sup> (This figure could be more precisely determined if the criminal homicide charges are individually analyzed.) This estimate is made by subtracting from the 121 criminal homicides the following: (1) voluntary manslaughters, i.e., "heat of passion" killings; (2) second

degree murders, i.e., intentional, but not premeditated, killings; (3) felony-murders not covered by the House bill, e.g., murders occurring during robberies, burglaries, and arsons, and all unintentional felony-murders; (4) murders covered by the House bill that either do not display an aggravating circumstance or display an outweighing mitigating circumstance; and (5) those capital cases in which the defendant pleads guilty. These five categories undoubtedly constitute the vast majority of the criminal homicides, i.e., the vast majority of criminal cases are noncapital. Furthermore, working backwards from the high estimate of 8 guilty verdicts in capital cases, if only 66% (a low estimate) of capital trials resulted in a guilty verdict, then there would be 12 capital cases. Thus, it can safely be estimated that there will be less than 15 capital cases tried per year in Kansas.

The estimated cost of these trials must also be carefully scrutinized. Several factors must be considered. The only additional cost in the trial will involve additional time for jury selection.<sup>29</sup> (This cost will be incurred if the special sentencing jury amendment is repealed. The additional cost of questioning prospective trial jurors about their death penalty views is insignificant compared with the extreme costs of the unnecessary special sentencing jury. See the recommendations below.) Opponents of the death penalty argue that capital cases are far more expensive because the defense attorney "pulls out all the stops." This argument is without merit for two reasons. First, the trial phase of the case is distinct from the sentencing phase and the potential for a death sentence is irrelevant to the issue of guilt. Thus, the trial is the same for a first degree murder irrespective of the potential sentence. Second, defense attorneys presumably "pull out all the stops" in all first degree murder cases -- even those that "only" involve a life sentence. Finally, the only significant additional cost in capital cases will result from the House bill amendment requiring state-funded private attorneys' fees in all capital cases. This costly amendment should be repealed because it is unnecessary and ineffective. (See the recommendations below.)

#### Conclusion re. Cost

It is evident that the cost estimates of \$7-11 million per year for the death penalty are grossly overestimated. These estimates can be reduced by 80% merely by realistically estimating the number of capital trials, sentencing procedures, and appeals. Thus, these estimates are initially reduced to approximately \$2 million per year. This figure must then be reduced by the exaggerated costs within each phase of the process, and hopefully, by the elimination of the special sentencing jury and the state-funded private attorneys' fees. With these reductions, the figure could be reduced to under \$1 million.

Finally, against this figure of \$1 million per year, the following benefits must be weighed:

- 1) Some murders (and possibly rapes or kidnappings) will be deterred. If only one murder per year is deterred the cost is justified.
- 2) In addition to the intrinsic value of innocent human life and the emotional distress to the victim's family, the dollar cost to society of a murder must be considered. For example, the investigation, apprehension, conviction, and incarceration of the killer; the social service expenses to the victim's family; the lost productivity of the victim; etc.
- 3) The death penalty will result in fewer trials and more favorable plea bargains for the State. A defendant faced with the death penalty is far more willing to plead guilty to life imprisonment. Defendants will certainly try to avoid the death penalty and, except under rare circumstances, prosecutors will certainly accept offers to plea to life imprisonment. Without a death penalty statute, however, the defendant may bargain for a lesser sentence (or charge). If the prosecutor refuses the offer, the defendant will go to trial because he will only face a maximum life sentence. Thus, if there is a death penalty statute, there will be fewer trials and the State will save the entire cost of these first degree murder trials and appeals. Furthermore, if the prosecutor decides to plea bargain he will be in a stronger position and receive a better agreement.<sup>30</sup>
- 4) The cost of incarcerating each murderer will probably be \$300,000 over his lifetime.<sup>31</sup>

In sum, even a conservative estimate of these benefits of the death penalty demonstrates that it is cost-effective.

### III. Recommended Amendments to the House Bill<sup>32</sup>

#### A. Repeal Special Sentencing Jury Amendment

The special sentencing jury amendment should be repealed for the following reasons:

- 1) It is inconsistent with sentencing theory and procedure. The jury (or judge) who heard the guilt phase of the trial is in a far better position than a new jury to determine a fair sentence.
- 2) It is very time-consuming and extremely expensive. A new jury would need to be empanelled. Furthermore, to ensure a fair sentence, the entire case must be retried

to the new jury.

- 3) The likelihood of a death sentence will increase. If the trial jury also sentences the defendant, jurors with "residual doubts" about guilt are highly unlikely to impose a death sentence. Jurors on a special sentencing jury, however, obviously will not have "residual doubts." This "residual doubt" theory is recognized by the Supreme Court. Furthermore, experienced prosecutors know that it is virtually impossible to obtain a death sentence if a juror has a "residual doubt" about guilt. (This also ensures that the death penalty will be imposed only when all jurors are absolutely convinced of guilt.)
- 4) Numerous problems will be created. For example, inevitably there will be a variance in proof between the evidence at trial and the evidence at sentencing.
- 5) Appeals will be increased. For example, defendants sentenced to death will claim that they were entitled to be sentenced by the trial jury or that there was a variance in proof.
- 6) No other state's death penalty statute provides for a special sentencing jury.<sup>33</sup>

Recommendation: The decision to impose the death penalty should be made by the trier-of-fact. If it is a jury trial, the same jury should sentence the defendant. If it is a bench trial, the same judge should sentence the defendant.<sup>34</sup>

On a related issue, an amendment to the House bill modified the standard for challenging a prospective juror for cause. This modification makes the standard inconsistent with the Supreme Court standard.<sup>35</sup>

Recommendation: The pertinent language of new Sec. [5] should read: ". . . unless those views would prevent or substantially impair the performance . . ." [add underlined words].

B. Clarify the Prosecutor's Discretion to Seek the Death Penalty

The House bill is unclear as to whether prosecutors have discretion to seek the death penalty. It is absolutely essential that prosecutors have this discretion. Prosecutorial discretion benefits both the state and the defendant for the following reasons:

- 1) Some cases that technically fit within the statute may not warrant the death penalty.
- 2) Some cases that technically fit within the statute may

lack "jury appeal" and an attempt to obtain a death penalty would be futile.

- 3) Some capital cases (e.g., premeditated murder) will lack an aggravating circumstance or have a strong mitigating circumstance.
- 4) Without discretion, a prosecutor might "undercharge" the defendant to avoid an unwarranted capital case. For example, if the prosecutor felt that a premeditated murder was not a death sentence case, he might charge second degree murder to avoid the death penalty.
- 5) Unnecessary costs will be avoided because there will be fewer death sentence proceedings.
- 6) All other state's death penalty statutes permit prosecutorial discretion.<sup>36</sup>

Recommendation: The statute should clearly state that the prosecutor has reasonable discretion in seeking the death penalty and that he should follow the guidelines provided in the statute.

C. Repeal State-Funded Private Attorneys' Fees Amendment

This amendment should be repealed for the following reasons:

- 1) The criminal defense will not be improved.
- 2) It will be extremely expensive.

Recommendation: Designate three senior public defense attorneys to exclusively handle and/or assist in capital cases. These specialized attorneys would provide a better defense than private attorneys. Furthermore, it would not cost nearly as much as hiring private lawyers. (It should be noted that the cost will be less than anticipated because these attorneys would need to provide a defense even without the death penalty.)

D. Additional Aggravating Circumstances

It should be an aggravating circumstance if the defendant killed a judge, prosecutor, police officer, or correctional officer. These people are expected to deal with murderers and deserve additional protection.

It should be an aggravating circumstance that the defendant was convicted of multiple murders.

Note: These recommendations may be implicit in the House bill, however, they need clarification.

E. Life Sentence Without Possibility of Parole

Throughout the House bill the alternative to the death penalty is a life sentence. In Kansas, a defendant is eligible for parole after serving 15 years of a life sentence. The House wisely limited capital crimes to the most heinous murders. Because they designated these murders as the most heinous, the alternate sentence should be greater than other Class A felonies. Therefore, the alternate sentence should be a life sentence without possibility of parole. This would also reduce the disparity between the alternate sentences.

F. Repeal Appellate Proportionality Review Requirement

The House bill requires the Kansas Supreme Court to determine whether the death sentence is proportionate to sentences in similar cases. This unnecessary requirement should be repealed because it will be virtually impossible to apply and will encourage costly appeals. Most states do not require appellate proportionality review. Furthermore, the United States Supreme Court specifically held that this review process is not required.<sup>37</sup>

Conclusion

Hopefully these recommendations will assist the Legislature. It is essential that the special sentencing jury amendment be repealed and that the prosecutor have discretion in seeking the death penalty. If Kansas enacts a death penalty statute, these recommendations will benefit both the state and the defendant.



## Footnotes

- \* Emil A. Tonkovich is a Professor of Law at the University of Kansas School of Law. In addition to teaching criminal law and procedure, he is the Director of the Criminal Justice Clinic and Editor-in-Chief of the Kansas Criminal Procedure Review. He was a Special Trial Attorney for the U.S. Department of Justice Criminal Division before accepting his position at the law school. He received a J.D., summa cum laude, from Notre Dame Law School.
1. Gregg v. Georgia, 428 U.S. 153 (1976) [emphasis added]. Furthermore, only two Supreme Court Justices have ever written opinions stating that the death penalty is unconstitutional per se.
  2. Id. at 187.
  3. Id. at 179.
  4. U.S. Department of Justice Bureau of Justice Statistics. (This figure would be 39, except that in 1984 the New York and Massachusetts statutes were struck down.)
  5. The federal statute applies to aircraft piracy. Proposals have been made to expand the statute to include deaths associated with drug trafficking.
  6. For example, 67% of Blacks support the death penalty.
  7. Gregg, 427 U.S. at 185-86.
  8. Id. at 184-85.
  9. Premeditated murderers, like many other criminals, certainly consider the likelihood of apprehension and the potential punishment when deciding whether to commit the crime. This deterrence is a primary rationale for incarcerating criminals. For example, if a premeditated murderer were faced with a weekend in jail he would be much more likely to kill than if faced with 20 years imprisonment. Thus, increasing the penalty to a death sentence decreases the likelihood of the murder.
  10. Obviously, all types of criminal homicide will not be deterred by the death penalty. For example, "heat of passion" killings will not be deterred. These homicides, however, constitute voluntary manslaughter and appropriately are not covered under death penalty statutes.
  11. This simply means that some of these criminal homicides will be deterred by increasing the punishment from life imprisonment to death. Obviously, those deterred murders cannot be statistically proven because they cannot be statistically measured.

12. U.S. Department of Justice Bureau of Justice Statistics. This deterrence is also recognized by the Supreme Court. Gregg, 427 U.S. at 183, n.28.
13. Gregg, 428 U.S. at 183.
14. Id.
15. McCleskey v. Kemp, 753 F.2d 877 (1985). This was a 9-3 decision by the entire U.S. Court of Appeals for the Eleventh Circuit. The U.S. Supreme Court has heard arguments on the case this term.
16. Id. at 886.
17. Id. at 899.
18. Id. at 897.
19. Furthermore, the U.S. Supreme Court has recently severely limited the prosecution's use of peremptory challenges of prospective black jurors when the defendant is black. Thus, protection against racial prejudice in jury verdicts is now even greater. Batson v. Kentucky, 106 S. Ct. 1712 (1986). Also, the automatic review of death sentences by the Kansas Supreme Court under the House bill will further ensure fair sentences.
20. Recommendations section, supra.
21. U.S. Department of Justice Bureau of Justice Statistics. These 37 states have a total population of approximately 180 million and in 1985 imposed 273 death sentences. The national murder rate in 1985 was 7.9 per 100,000 compared to 4.9 per 100,000 in Kansas. (Note: 1986 national statistics are not available.) According to the latest census, Kansas has a population of 2.3 million.
22. U.S. Department of Justice Bureau of Justice Statistics.
23. Id. Missouri has a population of 4.9 million compared to 2.3 million in Kansas. The Missouri murder rate is 8.1 per 100,000 compared to 4.9 per 100,000 in Kansas.
24. Id.
25. See Barefoot v. Estelle, 463 U.S. 880 (1983).
26. Telephone conversation with Larry Cowger in February, 1987.
27. The actual number of arrests and prosecutions is less than 121.
28. This figure assumes that, under the proposed statute,

prosecutors are given reasonable discretion in seeking the death penalty.

29. An Indiana prosecutor, who has tried 8 capital cases, estimates this additional time at four to eight hours. He stated that very few prospective jurors express any opposition to the death penalty.
30. The Kansas Legislative Research Department reaches a contrary conclusion based on a paragraph from a law review comment written by a law student. This conclusion is wrong and obviously made by someone who has no experience prosecuting cases or negotiating a plea agreement.
31. According to the U.S. Department of Justice Bureau of Justice Statistics the median age of death row inmates is only 32. Thus, using any reasonable estimates, the lifetime cost of incarceration will easily total \$300,000 in 1987 dollars.
32. This memo does not address all of the author's recommendations. Furthermore, the author defers to the Kansas Attorney General to determine whether the House bill is constitutional.
33. This conclusion is based on the author's general research and telephone conversations with death penalty authorities.
34. This is the standard procedure in death penalty cases. See footnote 33.
35. Lockhart v. McCree, 106 S. Ct. 1758 (1986).
36. See footnote 33.
37. Pulley v. Harris, 465 U.S. 37 (1984).

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*Attachment # 4 3-2-87*

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**C. DOUGLAS WRIGHT**  
**COUNTY ATTORNEY**  
COWLEY COUNTY

STATEMENT OF  
COWLEY COUNTY ATTORNEY, C. DOUGLAS WRIGHT  
TO THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE  
RE: CAPITAL PUNISHMENT  
MARCH 2, 1987

Mr. Chairman and Members of the Committee:

Long before the current debate, political philosophers addressed themselves to the question of justice and, thus of crime and punishment.

Do we know more about crime and punishments than did the ancients?

Are we better qualified to speak on these subjects than those generations that have gone before us? Are we more concerned with human rights than were the founding fathers of the school of human rights; than the founders of our own country which was established specifically to secure these rights? In the matters of morality, are we the superiors of men like Thomas Jefferson, George Washington, Abraham Lincoln?

Or, alternatively, have we become so morally ambivalent and in some cases so guilt ridden, that we cannot in good conscience punish anyone, and certainly not to the extent of putting one to death?

Why indeed do we punish criminals? Some of us try to ease our uneasy consciences by saying that the purpose of punishment is the rehabilitation of the criminal or we punish criminals in order to deter others from becoming criminals. Perhaps we can be

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FSA 3/2/87*

persuaded of the necessity to punish criminals in order to incapacitate them.

What we have not been able to do is to admit that we punish in part at least to pay back the criminal for what he has done to us, not as individuals, but as a moral community. We exact retribution and we do not like to admit this. Retribution smacks of harshness and moral indignation.

In the past when men reflected on the differences between human beings and other living things, human dignity was understood to consist of the capacity to be a moral being, a being capable of choosing between right and wrong and, with this freedom capable of governing oneself. Unlike other living things, a human being was understood to be a responsible moral creature. Have we lost all confidence in this opinion, in our belief of right and wrong, good and evil, righteousness and wickedness, deserving and undeserving, and human and inhuman?

The issue of capital punishment can be said to turn on the kind of world we live in, that is a moral world or a morally indifferent world.

We in the United States have always recognized the legitimacy of a retribution. We have schedules of punishment in every criminal code according to which punishments are designed to fit the crime; the worse the crime, the more severe the punishment. Justice requires criminals to get what they deserve; and what criminals deserve depends on what they have done to us.

To pay back criminals is not only just; but, useful as well. The capacity of the criminal law to promote obedience to the law by inculcating law abiding habits.

The criminal law works by praising as well as blaming. It attaches blame to the act of murder by making it a crime and threatening to punish anyone convicted of having committed that offense. This function of the law is familiar to us. What is not familiar is the way in which the law, by punishing the guilty and thereby blaming them for deeds they commit, also praises those persons who did not commit those deeds. The mechanism involved here is the satisfaction of the law abiding person's anger, the anger that person ought to feel at the sight of crime. This anger has to be controlled, and we rightly condemn persons who at the sight of crime take it upon themselves to punish its perpetrator. The anger itself is a condition of a decent community. When no one, whether out of indifference or out of cowardice, responds to a victim's screams and calls for help, we have reason really to be concerned.

The law must control or calm that anger and one way it can do that is by promising to punish the criminal. When it punishes the criminal, it satisfies that anger and by doing so, it rewards the law abiding persons who feel it. This is one purpose of punishment, to reward the law abiding by satisfying the anger that they feel or ought to feel at the sight of crime. It rewards by rewarding praises and therefore teaches law abidness.

Anger has to be controlled or tamed, but it is not in itself reprehensible and need not be selfish. A controlled anger can serve to unite us with others or strengthen the bonds that tie us to others. Anger is a passion that can cause us to act for reasons having nothing to do with selfish or mean calculation; indeed when tamed and educated it can become a most generous passion, the passion that protects the community by demanding punishment for its enemies. It is the stuff of which law abiding citizens are made; and when it is aroused for the right reasons it deserves to be rewarded. It is the duty of the law to define those right reasons.

So the question becomes how do we pay back those who are the objects of great anger because they have committed great crimes against us.

The criminal law must not be understood to be merely a statute that we enact or repeal at our pleasure and obey or disobey at our convenience. Whenever law is regarded as merely statutory, arbitrarily enacted out of no moral necessity, and reflecting no law beyond itself, people will soon disobey it, and those clever enough will learn how to do so with impunity. The purpose of the criminal law is not merely to control behavior - a tyrant can do that - but also to promote respect for that which should be respected, life, liberty and property.

Capital punishment serves that essential purpose: It reminds us or can remind us of the reign of moral order, and enhances, or can enhance its dignity. If human life is to be

held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made to be awful or awe inspiring, is to entitle it to inflict the penalty of death. Death is the most awful punishment available to the law of our time and place. In prison the offender still enjoys some of the pleasures available outside and some of the rights of citizens. Most of all a prisoner has not been deprived of hope - hope of escape, hope of a pardon or hope of being able to do some of the things that can be done even by someone who has lost the freedom of movement. A convicted murder in prison has retained more of life than has his victim. A maximum security prison may be a brutal place, and the prospect of spending ones life there is surely dreadful, but the prospect of being executed is even more dreadful. And for the worst of crimes, the punishment must be most dreadful and awful, not most painful, but awful in the sense of commanding a profound respect or reverential fear.

Justice Potter Stewart succinctly put this concept as follows:

"I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of capital punishment, he wrote. The instinct for retribution is part of the nature of man .... when people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, than there are sown the seeds of anarchy...."

The great majority of Kansans have long supported capital punishment, and I believe it is time their wishes are acted upon



by you as their elected representatives in an honest manner; otherwise the legitimate anger of a society against those who commit crime will exemplify itself in an even greater resurgence of the vigilante and "self help" attitudes on the part of our private citizens.

The legitimate demands of the people of the State of Kansas in their support of a constitutional death penalty bill will not be ignored without consequence. These consequences may even not be recognized by many who do not understand the nature of man. I cannot imagine that there is anyone on this committee or in the Kansas Legislature that would not agree that if deadly force is to be used it should be used only within the constraints and limitations as devised by law (to satisfy the anger of a civilized society against those who plunder the law abiding citizen.) The alternative is to encourage the "brute" to exercise his force, to support the vigilante concept, and to increase astronomically the occurrence of private citizens using deadly force out of utter frustration in protecting their liberty, their life and their property when criminals confront them.

The failure of this legislature to honestly face the legitimate demands of the people of this state and pass an effective death penalty bill will exemplify itself through such groups as posse comitatus. The law makers of this state have in recent times shown an eagerness to restore a proper balance to

the scales of justice. Your commitment to justice must go far deeper than a personal belief concerning capital punishment. There are principles of critical importance which will lose their meaning and the citizens of this state will lose faith in their system if we continue to haggle this issue along the lines of statistics and costs. The costs which really are at stake are not just dollar signs or the expense to the state, nor are the statistics which are referred to on both sides simply deciphers on a statisticians chart; but the cost involved is our faith in the justice system. The statisticians deciphers represent our fellow citizens. Yes, human beings who have experienced the ultimate loss because some among us choose in cruel and violent ways to defy the rules of law.

To quote United States Supreme Court Justice Stewart:

"Expression of societies moral outrage is essential in an ordered society that asks its citizens to rely on legal processes rather than self help to vindicate their wrongs."

Just as the courts have an obligation to defer to legislative judgments whenever possible, so also the legislature should not place itself in a position of dreaming up constitutional arguments against the death penalty.

By reviewing the present objections to capital punishment on a philosophical basis it is obvious that to some extent the legislature has developed a "knee jerk" reaction, in effect, feeling its need to judicially review and anticipate

constitutional problems resulting in the self fulfilling prophecy that capital punishment will be a problem and will be expensive. The requirement of two separate juries found in section 7 of HB 2062, is not only a monster guaranteeing that capital murder cases will take longer and cost more, but further, represents an abuse of witnesses, victim's families and the citizens of the state in multiplying the costs of the case. This provision also provides an avenue for additional appeals based on an allegation that there was a variance of proof between the guilt stage and the sentencing stage.

Another example of the cost intensive nature of HB 2062 is found in section 5 of line 108 concerning a jurors position on the death penalty. This provision will automatically place some jurors in a position of conflict without remedy - where they must decide either to ignore their personal conviction and uphold their oath as a juror; or in the alternative, uphold their moral beliefs and go against their required oath as a juror.

Section 28 of HB 2062 guarantees to anyone charged with a capital offense the right, regardless of their financial position, to counsel of their choice. Not only is this provision an unreasonable burden on the tax payers of the State of Kansas, but it also opens the door for challenges on the basis of incompetent counsel.

HB 2062 also fails to provide for prosecutorial discretion. If the prosecutor is given discretion to charge first degree

murder without asking for capital punishment, I believe the tax payers of the State of Kansas could be saved substantial money over the present situation.

To quote Kansas Attorney General Bob Stephan in his remarks to this committee:

"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 those cases where either by judicial review or jury verdict, a sentence is life imprisonment, the statute should provide for a parole eligibility date no sooner than 30 years.

The proportionality requirement as found in section 10 beginning at line 274 should be eliminated since there is no constitutional requirement and this would add substantial expense and time in the court process.

I believe it would be in the interest of this Committee to review other states' legislation particularly in regard to aggravating circumstances and circumstances used for mitigation. Consideration of these circumstances, both mitigating and aggravating will adequately ensure that the death penalty is not used inappropriately.

In summary I urge you to amend this bill and would urge you to enact it into law. I believe that in regard to the issues of cost, that the opponents of the death penalty have in the present

piece of legislation provided requirements which will needlessly cost the tax payers of this state substantial sums of money and are in effect throwing up a smoke screen to avoid its legitimate passage as demanded by the people of this state. HB 2062 has provisions, as I set forth above, which could raise themselves to the level of constitutional questions, and the better approach would be to follow statutes of other states which have been tested and approved by previous rulings of the United States Supreme Court.

3/2/87  
Attachment #5



# PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS  
Senator Edward F. Reilly, Chairman  
March 2, 1987

**RE: H.B. 2062 - Death Penalty**

Presented by:  
John K. Blythe, Assistant Director  
Public Affairs Division  
KANSAS FARM BUREAU

Mr. Chairman and Members of the Committee:

I am John K. Blythe, Assistant Director of the Public Affairs Division of Kansas Farm Bureau. I am speaking as a proponent of H.B. 2062. These brief comments are on behalf of the farmers and ranchers who are members of Farm Bureau in Kansas.

The Kansas Farm Bureau is organized in all 105 counties with Boards of Directors and committees in each county. A most important activity of the Kansas Farm Bureau and the 105 county Farm Bureaus is the **development of policy** for the organization.

Policy development begins at the county level with the county policy committee. The suggestions and ideas for policy are sent to the State Resolutions Committee -- tentative resolutions are drafted by the Committee and are sent to the 105 county Farm Bureaus for their review and consideration prior to the Annual Meeting of the Kansas Farm Bureau. The voting delegates elected in each county meet at the annual Farm Bureau meeting where all issues are discussed and voted as policy for the organization.

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Mr. Chairman, I review this procedure simply to indicate the elaborate process of policy development of the Farm Bureau and the opportunity for input from the total membership. It was through this process that a policy supporting Capital Punishment was adopted in 1978 and has been reaffirmed each year since 1978.

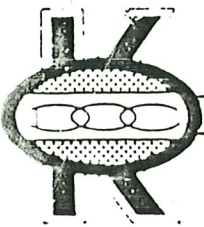
Kansas Farm Bureau policy on Capital Punishment is as follows:

#### **Capital Punishment**

**We believe capital punishment to be a deterrent to violent crime. Capital punishment should be reinstated in Kansas and the Kansas law should be in keeping with the U.S. Supreme Court ruling and guidelines for imposition of capital punishment.**

Thank you for the opportunity to present this policy and these few comments to the Committee.

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# KANSAS DEPARTMENT OF CORRECTIONS

MIKE HAYDEN — GOVERNOR

RICHARD A. MILLS — SECRETARY

JAYHAWK TOWERS • 700 JACKSON • TOPEKA, KANSAS • 66603-3798  
913-296-3317

FOR IMMEDIATE RELEASE  
February 19, 1987

FOR MORE INFORMATION CONTACT:  
Larry Cowger  
Special Assistant to Secretary  
Department of Corrections  
(913) 296-3317

DEPARTMENT OF CORRECTIONS RELEASES FISCAL NOTE  
ON  
DEATH PENALTY BILL

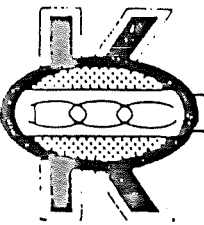
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The Department of Corrections today released the Fiscal Note prepared by the Department outlining the cost estimates associated with renovation work required to create death row facilities at the Kansas State Penitentiary and the Kansas Correctional Institution at Lansing. For Fiscal Year 1988 the cost to both institutions totals \$457,988; for Fiscal Year 1989 the correct figure is \$464,694. The total combined costs for the two fiscal years is \$922,682. The Department felt it necessary to issue this correction after the costs were inaccurately reported at \$1.3 million in a wire story which appeared February 13, 1987. The correct figure is broken down by institution and fiscal year in the attached Fiscal Note.

# # #

*Attachment #6  
FSA 3/2/87*





# KANSAS DEPARTMENT OF CORRECTIONS

MIKE HAYDEN — GOVERNOR

RICHARD A. MILLS — SECRETARY

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January 27, 1987

Gary Stotts  
Acting Director of the Budget  
Division of the Budget  
1st Floor, Statehouse  
Topeka, Kansas 66612

FISCAL NOTE 87-3

RE: HOUSE BILL 2062

Dear Mr. Stotts:

In accordance with your request, the following information is provided concerning the cited bill. House Bill 2062 would amend the Kansas Code of Criminal Procedure to provide for either a sentence of death or imprisonment for life upon conviction of the crime of first degree murder as defined by K.S.A. 21-3401 and amendments thereto. Provisions are made for a bifurcated hearing procedure as regards conviction or adjudication of guilt and subsequent determination of sentence. Aggravating and mitigating circumstances are set forth in the context of the bill to provide a basis for the determination of whether a sentence of death or life imprisonment should be imposed. Additionally, any sentence imposed, whether death or imprisonment for life, would be excluded from modification under K.S.A. 21-4603. Procedures for automatic appeals to the Kansas Supreme Court by offenders under Kansas sentence of death are set forth, and three means of execution would be statutorily provided in descending order of preference, vis: legal injection, hanging, and electrocution. If passed and signed into law, this legislation would take effect and be in force on and after July 1, 1987.

The bill provides that a sentence of death could only be imposed after conviction of murder in the first degree as set forth at K.S.A. 21-3401. During the period of FY 1980 through close of FY 1986, an average of 34 individuals had been admitted to the custody of the Secretary of Corrections for the commission of a Class A felony each year. These commitments are divided into two groups: 1) those convicted of murder in the first degree under K.S.A. 21-3401; and 2) those convicted of aggravated kidnapping under K.S.A. 21-3421. Based on the application

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of percentages derived from comparing the number of inmates confined on June 30 of years 1983 through 1986 for both offenses, it may be assumed that approximately 75% of all Class A felony commitments to the custody of the Secretary of Corrections are for murder in the first degree. In view of an average of 34 commitments per year for Class A felonies, an application of the 75% index for those assumed to be K.S.A. 21-3401 (murder in the first degree) commitments would produce a total of 26 admissions on an annual basis. It should be noted that our neighboring state of Oklahoma has added approximately 30 individuals to its death row in the past two years. Insofar as this amount approximates 30% of the individuals who have been convicted of first degree murder within the state of Oklahoma, the assumption that 15%, or approximately four individuals per year would be placed on death row within the state of Kansas would not appear to be unreasonable.

Although the housing of such inmates within a separate unit specifically designed for the housing of such persons would be most desirable, no experiential basis currently exists upon which a determination of the size of such a unit can be made. A higher rate of imposition of the death penalty than estimated herein or a higher rate of Class A offenses would, of course, increase the number of individuals added to death row each year. Consequentially, the department's response to the enactment of a death penalty should be from a short-term as well as a long-term perspective.

The short-term plan would be implemented to handle those inmates placed on death row prior to the construction of a separate unit. Through the experience of such a short-term plan, departmental officials would be afforded the opportunity to determine what size permanent unit would be needed. Although a dedicated unit built in the future would probably best be constructed to handle both male and female inmates, short-term planning would require renovation of existing spaces in both the Kansas State Penitentiary and the Kansas Correctional Institution at Lansing for the housing of male and female death row inmates, respectively.

Proceeding under the foregoing assumptions, the department would propose the following short-term initiatives in both capital construction and staff augmentation as a response to the enactment of House Bill 2062:

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KANSAS STATE PENITENTIARY (MALE OFFENDERS UNDER SENTENCE OF DEATH)

The department proposes that the first floor of the south side of the east wing of the existing Adjustment and Treatment Building ("A & T") be renovated to provide 10 high security cells for the detention of death row inmates. In addition to the security housing, facilities must be provided for visiting, attorney consultation, counseling and other administrative functions as needed. The existing space at the west side of the third floor of the A & T Building would be renovated to provide a room for these functions.

The renovation would include installation of solid steel divider walls and cell fronts at the front of the existing cells, thereby affording a secondary line of security plus capabilities for locking down unruly inmates. Additionally, a grill gate security wall would be installed on the west end of the run, thereby controlling access to that area of the building. An existing room at the west side of the third floor would be renovated to provide one non-contact visiting cubicle, an attorney consultation area, a counseling area, and an officer's station which would be used during visiting. An existing room at the west side of the third floor would be renovated to provide restroom facilities for visitors. Upon completion of renovation, this special class of inmate would be confined in the highest security area of the institution. Due to the security requirements of the existing operation, the following estimated costs for capital construction are based on private contract labor. The estimated time to complete the project is 90 days.

By placing this high security unit in the A & T Building, departmental officials would be able to use existing staffing within that structure to provide supervisory functions of the unit. In this manner, the only additional staff required would be those who provide day-to-day security and direct services to the inmates who would be placed within the death row section. Due to the very nature of a death row area, a two-man concept must be used whenever movement outside of a cell is required. This would include movement to showers, legal conferences, unit team involvement/interviews, and visits. Since each inmate must be afforded daily exercise, immediate supervision by two officers would also be required for this function.

Additional staff to man the one 24 hour (7 day) and one 16 hour post (7 days on 2 shifts) including relief requires the hire of nine Corrections Officer I/II's. Based on the effective date of the legislation as July 1, 1987, it may be reasonably assumed

that the first death row inmate would not be received at the penitentiary until early January, 1988. To allow for the requisite training of the nine new corrections officers who would replace the experienced employees who would be assigned to the death row unit, all hires should be scheduled for the pay period beginning November 18, 1987.

Based upon the capital improvements outlined above as well as the staff acquisitions as herein described, the following costs would proceed for construction and implementation of a death row at this facility:

FISCAL YEAR 1988

Renovation of A & T .....	\$ 101,612.00
FY 88 Salaries with fringe for 9 Correc- Officers I/II for 7 months .....	<u>\$ 95,063.00</u>
TOTAL COSTS FY 88 .....	\$ 196,675.00

FISCAL YEAR 1989

Salaries with fringe for 9 Corrections Officers I/II for 12 months.....	<u>\$ 176,488.00</u>
TOTAL FOR FY 89 .....	\$ 176,488.00

KANSAS CORRECTIONAL INSTITUTION AT LANSING (FEMALE OFFENDERS UNDER SENTENCE OF DEATH)

Insofar as usable living space is extremely limited in this facility and, in fact, more so than at other institutions, the segregation area of Perry Building has been selected as the most feasible site for renovation to a death row for females. The north wing of Perry I currently houses the administrative and disciplinary segregation inmates within the institution. Short-term plans would involve the conversion and renovation of the four north most cells as an area designated to house death row inmates. Three of these cells would actually be employed for the housing of inmates within death row, with the fourth room being converted for use as a shower area/visiting area/lawyer conference room.

A screened, secured metal doorway would be installed across the hallway to separate the death row area from the remaining segregation unit. The officer/officers assigned to this post would be physically located in the hallway area outside the death

row cells, and would be provided with a wall telephone unit. An alarm system with panic button would be made available to the death row officers, as well as an intercom hook-up to the control center. Close circuit TV's would be installed in the visiting room, hallway area outside the death row unit, and in the exercise area with a monitor hook-up in the control center.

It should be noted that even though this approach is the most viable one for housing a death row unit at KCIL, it may severely limit the institution's ability to exercise disciplinary control over the inmate population. Management problems currently existing at this institution require continual use of the segregation area. Should the plan be implemented, some future relocation of the segregation unit may be required.

The existing perimeter fence is not sufficient to provide adequate and effective perimeter security as required for an institution housing maximum security or death row inmates. To alleviate this problem, a 12' high fence would be erected outside the existing perimeter. Plans would involve this installation approximately 10' from the existing fence with razor ribbon on top of the fence as well as the ground area between the new fence and the existing perimeter device. It must be noted that the construction of this fence is in the long-range plans of the Department of Corrections, even if the death penalty is not enacted. The enactment of the death penalty would advance the time table for the installation of this fence, but would not be sole basis for this project.

Plans would also involve the allotment of a separate fenced in area on the east side of the north wing of Perry Building to provide an exercise area for those individuals assigned to death row. Insofar as access to the area would be through the shower/visiting/lawyer conference room, a doorway and stairway leading to the ground would have to be installed and constructed on the east wall of this room to provide access to the exercise area. Additionally, an outside security post building would have to be erected for use by personnel required to effectively monitor inmate traffic around the fenced in exercise area.

Although commitments of females to the custody of the Secretary of Corrections for capital offenses would, assumptively, be lower in number than those for males, the presence of any death row inmates within the confines of this institution presents:

1. Staffing requirements similar to those which would be experienced at the Kansas State Penitentiary (as set forth above);
2. The need for CO III's to provide death row supervision rather than CO II's as the unit at KCIL is removed and remote from supervisory control; and
3. Additional staffing requirements based on the need to enhance overall security of this institution should death row inmates be maintained within its perimeters.

Based on the above, a total of five CO III's and four CO II's (one 24 hour post and one 16 hour post plus relief) will be required to staff the death row unit. Additionally, the outside perimeter control will have to be enhanced by one 24 hour, seven day per week CO I/II position, which with relief will require the hire of five CO I/II's. It must be noted that the five outside perimeter officers would have been in the long-range plans for this institution, even without enactment of the death penalty.

Based on the above, the following table sets forth the capital improvement, capital outlay and staffing requirements:

FISCAL YEAR 1988

Salary and Wages:

5 CO III positions (w/fringe for 7 Mo.) .....	\$ 63,006.00
9 CO II positions (w/fringe for 7 Mo.) .....	<u>95,063.00</u> <sup>1</sup>
Subtotal for Salary and Wages .....	\$ 158,069.00

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<sup>1</sup> There are five perimeter security positions included in this figure which would have been included in long-range plans of the Department of Corrections even without enactment of the death penalty. This figure totals \$52,813.00.

Construction/Renovation Work:

Erect fence inside perimeter fence .....	\$ 81,250.00	<sup>2</sup>
Renovate existing cells for death row area ..	1,850.00	
Install exercise area .....	2,250.00	
Erect outside security post building .....	1,950.00	
Install alarm system in death row area .....	<u>2,437.00</u>	
Subtotal for Construction/Renovation Work ...	\$ 89,737.00	

Furn./Equip. Deathrow Visiting/Lawyer Conference Area:

Desk and three chairs .....	\$ 220.00	
Typewriter .....	810.00	
Table w/screen mesh divider .....	95.00	
Law books/materials .....	<u>1,250.00</u>	
Subtotal for Furniture/Equipment .....	\$ 2,375.00	

Miscellaneous Equipment:

Metal detector for visitor shakedown .....	\$ 160.00	
3 hand-held portable radios .....	1,770.00	
Batteries for above radios .....	282.00	
1 battery charging unit .....	260.00	
2 sets of humane restraints .....	335.00	
Closed circuit TV equipment w/monitor .....	<u>\$ 8,325.00</u>	
Subtotal for Misc. Equipment .....	\$ 11,132.00	
TOTAL COST FOR FY 1988 .....	\$ 261,313.00	

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<sup>2</sup> This project had been included in long-range plans for this institution, even without enactment of the death penalty. The time table for installation would be advanced with enactment of this legislation.

FISCAL YEAR 1989

Salary and Wages:

5 CO III positions (w/fringe for 12 Mo.) ...	\$ 111,718.00
9 CO II positions (w/fringe for 12 Mo.) ....	<u>176,488.00</u> <sup>3</sup>
TOTAL COST FOR FY 1989 .....	\$ 288,206.00

In adding the dollar amounts to provide necessary staffing, capital improvement and renovation work and capital outlay for the two institutions, total fiscal impact for the Department of Corrections would be as follows:

FY 1988 .....	\$ 457,988.00 <sup>4</sup>
FY 1989 .....	\$ 464,694.00 <sup>5</sup>

As mentioned previously, long-term plans for a separate contained unit housing both male and female death row inmates would be developed based upon actual commitment experience. Some additional cost for an execution chamber would also be required. Unless the mode of execution is determined to be by electrocution, provision of adequate facilities should be at a relatively minimal expense. Since a number of years would probably pass before an actual execution became imminent, cost calculations for such a chamber could best be provided 1) in combination with long range plans for a separate death row unit; or 2) as required based upon imminent need for construction.

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<sup>3</sup> There are five perimeter security positions included in this figure which would have been included in long-range plans of the Department of Corrections even without enactment of the death penalty. This figure totals \$98,049.00.

<sup>4</sup> Of this figure, \$134,063 would have been included in long-range plans of the Department of Corrections, even without enactment of the death penalty.

<sup>5</sup> Of this figure, \$98,049 would have been included in long-range plans of the Department of Corrections, even without enactment of the death penalty.



Gary Stotts  
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Should you have any questions or comments concerning the information contained herein or the detailed description as set forth above, please do not hesitate to inquire.

Sincerely,

*Richard B. Thompson*  
*for*  
RICHARD A. SCHULTZ  
Deputy Secretary for  
Management Services

RAS/ABT:pa

#7

17	2062
Fiscal Note 1987 Session February 24, 1987	Bill No.

The Honorable Robert H. Miller, Chairperson  
 Committee on Federal and State Affairs  
 House of Representatives  
 Third Floor, Statehouse

Dear Representative Miller:

SUBJECT: Fiscal Note for House Bill No. 2062 by  
 Representatives Graeber, Jenkins, et al

In accordance with K.S.A. 75-3715a, the following fiscal note concerning House Bill No. 2062 is respectfully submitted to your committee.

Enactment of House Bill No. 2062, as introduced, would provide for imposition of the death penalty when the defendant is convicted of first degree murder as defined by K.S.A. 21-3401. Currently, the maximum sentence for this offense is life imprisonment. In imposing the death penalty, the jury's vote must be unanimous and take into account any aggravating or mitigating circumstances. Defendants less than 18 years of age cannot receive the death penalty. Any verdict imposing the death penalty will be reviewed, and modified to life imprisonment by the trial court whenever evidence does not support the death sentence. House Bill No. 2062 also requires the Kansas Supreme Court to automatically review any death sentence and provides guidelines regarding what will be reviewed with regard to imposition of the sentence as well as provides the Supreme Court the power to affix the date for execution or to reduce the sentence to life imprisonment.

The bill specifies three methods for executing an individual sentenced to death: intravenous injection, hanging, and electrocution. Should a court of competent jurisdiction rule the first method unconstitutional, the sentence shall be carried out using the second, unless ruled unconstitutional, whereupon execution will be by electrocution. Other provisions transfer to the Secretary of Corrections duties previously performed by the warden, postpones the execution of pregnant inmates and provides for the payment of counsel for defendants who appeal their district court convictions.

*Attachment #7  
 FSA 3/2/87*

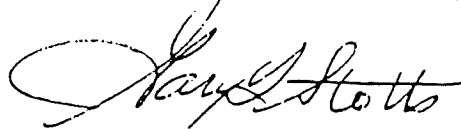
Upon review of information provided by and discussion with affected agencies and other interested parties, it is concluded that a reliable estimate of the fiscal impact of passage of death penalty legislation is not possible at this time, particularly in the long-term. There are a number of variables involved and a number of assumptions required concerning each, many of which weigh heavily in the fiscal estimates. Unfortunately, there is little consensus concerning the variables and assumptions to be applied. Furthermore, the fiscal implications of the act as it relates to deterrence cannot be quantified. Nevertheless, there will be some impact and the following information is presented for your consideration in review of the legislation.

The Judicial Branch estimates the primary impact will be in additional court time. The Judicial Branch indicates the additional jury and prosecution time will lead to higher court costs which impact county finances. However, the Judicial Branch believes the act will have no immediate impact on the local or the state Judiciary's operations and since the timing of the impact would be speculative no reliable cost estimate can be made.

The Board of Indigents' Defense Services reports passage of House Bill No. 2062 will result in additional trial motions being filed, the need for additional expert testimony and investigation, and extended periods for jury selection. Should House Bill No. 2062 pass, the Board has proposed establishment of a centralized Capital Defender Office (CDO) to fulfill their statutory obligations. Costs for support of the Capital Defender Office are estimated to be \$598,000 for FY 1988. Establishment of an office to defend all capital offenses would allow reductions in amounts currently recommended for assigned counsel to defend similar offenses under current law. Accordingly, as proposed, the net additional amount of funding required to establish a Capital Defender Office would total approximately \$400,000 in FY 1988. Depending upon the number of cases filed, the future year costs for the CDO will vary accordingly. In addition, there would be some additional costs to counties related to prosecution of capital offense cases. However, the potential for these costs will vary from jurisdiction to jurisdiction and cannot be reliably estimated at this time.

The Department of Corrections reports it would need suitable housing for an estimated four death row inmates each year beginning in FY 1988. The Department believes some immediate provisions for housing male offenders must be made available to accommodate death row inmates should House Bill No. 2062 be passed. The Department proposes to renovate a portion of the A&T Building at the Kansas State Penitentiary at an estimated cost of \$101,612. The Department indicates nine correctional officers would be required to properly supervise the area at a projected cost of \$95,063 should there be convictions under this act in FY 1988. Should a female(s) be convicted, facility improvements, some of which are proposed notwithstanding passage of the death penalty, and staffing would also be required for the Correctional Institution at Lansing. The Department estimates staffing costs of \$103,244 and \$158,069, respectively. The staffing costs presented are partial-year estimates. Annualized, these amounts are estimated to be \$176,488 for the Penitentiary and \$288,086 for the Correctional Institution at Lansing. The Department views these initiatives as a short-term solution and indicates a separate housing unit and execution chamber should be built should this act be passed and the level of convictions so warrant. However, due to the length of the proceedings leading up to an execution, the Department does not believe funding for a separate unit would be needed in the initial years. Reliable estimates of long-term facility needs and the related costs are not available at this time. Finally, an indeterminable amount of savings would occur as a result of reduced long-term incarceration costs under current law.

Any state expenditures resulting from passage of House Bill No. 2062 would be from the State General Fund and would be in addition to amounts contained in the FY 1988 Governor's Budget Report.



Gary L. Stotts  
Acting Director of the Budget

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