Approved 4-25-89 Ginger Barr, Chm.
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Representative Ginger Barr (Chairperson) at 1:36 ~~a.m.~~/p.m. on March 23, 1989 in room 526-S of the Capitol.

All members were present except:

Representative Mike Peterson
Representative Sam Roper - Excused
Representative Joan Wagnon - Excused

Committee staff present:

Mary Torrence, Revisor of Statutes Office
Mary Galligan, Kansas Department of Legislative Research
Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:

Senator Richard Bond
Ed Van Petten, Deputy Attorney General, Criminal Division
Chris Savage, American Civil Liberties Union (ACLU)
William R. Arnold, Assoc. Prof. Sociology, University of Kansas

SB 77

Senator Bond explained the bill has 18 sponsors and passed the senate on a vote of 39-1. It provides a mandatory 40 year prison term for persons convicted after July 1, 1989, of pre-meditated murder. The bill - defines pre-meditation; provides that a person subject to the 40 year mandatory sentence is not eligible for probation, suspension or modification; was amended in the senate to delete references to the mentally retarded; requires that the county or district attorney file a written notice of intent to seek the mandatory sentence; requires a separate sentencing trial for someone found guilty of pre-meditated murder; contains aggravating and mitigating circumstances to be presented to the court in regard to the imposition of the 40 year mandatory sentence; and an additional mitigating circumstance regarding the defendant suffering from post-traumatic stress syndrome was incorporated in the bill. Imposition of this sentence would be subject to automatic review by the state supreme court. The senator recognized the bill as a vehicle for the death penalty. He reminded the committee of that bill's failure to pass the senate each of the previous sessions and cautioned that any attempt to make the bill a death penalty bill would doom it to failure in the senate.

Committee discussion:

1. There was strong sentiment in the senate committee discussions and on the senate floor that the mentally retarded should be excluded based on statistics presented during hearings.
2. All of the aggravating and mitigating circumstances contained in this bill were contained in the death penalty bills of 1987 and 1989 except for post-traumatic stress syndrome.
3. The fiscal impact of the bill could not be determined as there is no way to estimate the number of heinous crimes that would be committed.
4. One member of the committee asked the senator to address the argument used by corrections officials regarding a "devil may care" attitude displayed by those with a long term sentence. The senator cited statistics of death row inmates in Oklahoma, some of whom have had eight appeals and are now in the federal appeals system. Kansas can employ consecutive sentences which could result in terms in excess of 100 years.
5. There is a Habitual Criminal Act which can be applied to those convicted of several felonies and considerably extends their time of incarceration.
6. There is no prohibition in the bill from "stacking" this penalty in the case of multiple murders.
7. The senator stated no knowledge of any grounds for declaring the bill unconstitutional on the basis of cruel and unusual punishment.

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Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Ed Van Petten testified in support of the bill as a compromise solution to the death penalty and emphasized the point that the 40 year sentence is not automatic, Attachment No. 1.

Chris Savage spoke in opposition to the bill calling it unconstitutional and claimed it inflicts cruel and unusual punishment, Attachment No. 2.

Discussion:

1. The conferee was not aware of any case law proving the 40 year mandatory sentence unconstitutional.
2. When asked if she had law articles in which the sentence was discussed as unconstitutional, Ms. Savage stated she could find some. One member of the committee requested copies of such articles.
3. In response to a question from a committee member, Ms. Savage stated she assumed the ACLU would defend victims' rights since it defends violations of first amendment rights.
4. A member cited an example of the loss of hope depending on the type person involved. A businessman with a history of being honest, having committed a first offense could be devasted after six months imprisonment. Ms. Savage's response indicated the loss of hope was more devasting with a 40 year mandatory sentence regardless of the person.

Professor Bill Arnold offered arguments against the traditional claims that prison will achieve deterrence, rehabilitation, retribution, and incarceration by increasing the mandatory sentence from 15 to 40 years, Attachment No. 3.

Discussion:

1. Asked to address the cost, Professor Arnold stated keeping prisoners incarcerated 2½ times as long as the present time, would increase the cost by 250%.
2. Regarding the value of public safety, Professor Arnold explained the average convict serving the current 15 year mandatory sentence is around 40 years of age when released from prison. He stated the violence rate is lowered after age 40 and if the person is going to fail, he will fail in the first five years after release from prison. Overall rates indicate 1/3 will go back to prison and another 1/3 will commit crimes but not be returned to prison.
3. Professor Arnold further explained that the cost of public safety is a policy question regarding the amount and manner in which it is monitored.
4. The professor affirmed it was his recommendation to wait to determine guidelines until the legislature determined its guidelines on other types of cases. He favored the Minnesota model where the legislature set the principle by which the guidelines were constructed and the specifications were determined by the sentencing commission, providing a systematic approach.
5. Professor Arnold stated the present sentencing structure seems reasonable and in questions of victims' rights or public safety, the present system allows for flexibility in confining a murderer for a long period of time.

Chairman Barr announced that Bill Lucero, Kansas Coalition Against the Death Penalty, was present as a resource person.

One member asked Mr. Lucero to address whether the 15 or 40 year mandatory sentence would make a difference in the case of Yorkie Smith. Mr. Lucero stated his group had no position on the bill. He reviewed the case which involved a second degree murder charge, release after a minimum period of time and the commission of a subsequent murder. Mr. Lucero stated, to his knowledge, after the Berman vs. the State of Georgia decision in 1972, no individual convicted of manslaughter or first degree murder and a subsequent murder of any sort, had received an early release.

Parole eligibility under the 15 year mandatory sentence was discussed. The revisor referred to page 11 of the bill, lines 397-401 regarding "good time" credits on the 40 year mandatory sentence. The deputy attorney general referenced page seven, line 256 of SB 77 which states that no "good time" credits shall apply toward the sentence.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS,

room 526-S, Statehouse, at 1:36 ~~a.m.~~/p.m. on March 23, 1989

SB 254

Representative Bryant gave the report of the subcommittee on suggested changes to the bill reflecting concerns expressed by the committee during the hearing of the bill, March 20, 1989, Attachment No. 4. The concerns were that the gaming devices must be registered under the federal gambling devices act; and devices used in the conduct of the Kansas lottery and parimutuel could be produced in Kansas under this bill. Representative Bryant moved to accept the amendments, seconded by Representative Aylward. After brief discussion regarding the proposed changes in line 59, page two, Representative Bryant suggested for purposes of clarification, that the changes be sub (a), sub (b) and sub (c) instead of (1),(2) and (3). The revisor agreed. The motion carried. Representative Ensminger moved to report the bill favorably, as amended. Representative Jones seconded the motion which carried on a voice vote.

The meeting was adjourned at 2:53 p.m. The next meeting of the committee is scheduled for March 27, 1:30 p.m. in Room 526-S.

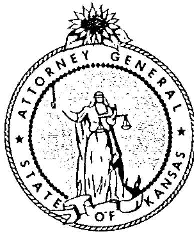
GUEST LIST

FEDERAL & STATE AFFAIRS COMMITTEE

DATE March 23, 1989

(PLEASE PRINT)

NAME	ADDRESS	WHO YOU REPRESENT
Paul Shelby	Topeka	OJA
[illegible]	Topeka	[illegible] / KCADP
Jon Bray	Topeka	Life at its Best
[illegible]	[illegible]	KCDAA
Alan Morgan	Lawrence	UOK
Ed Van Petten	TOPEKA	A.G.
Kris Savage	Topeka	ACLU
Donna Schneweis	Topeka	Amnesty International



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

STATEMENT OF
DEPUTY ATTORNEY GENERAL EDWIN A. VAN PETTEN
BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS
RE: S.B. 77
MARCH 23, 1989

The Attorney General would like to point out that while he is still a supporter of the death penalty for certain crimes, Senate Bill 77 appears to give a compromise solution to toughen sentencing for cold blooded killers, without going to the extent of putting these offenders to death, which appears to be abhorrent to some people.

Senate Bill 77 builds safeguards into sentencing such that this mandatory imprisonment will not be automatically imposed, much the same as Senate Bill 38 approached the death penalty, but still gives us the opportunity to remove these individuals from society on a more permanent basis.

There is a concern for control of individuals faced with mandatory time, within our system, however we will simply have to realize that some individuals deserve this treatment, and society will simply have to adjust in order to protect itself from the release of such criminals, and take the steps necessary for long term incarceration.

We would urge your support of this measure.

HOUSE FEDERAL AND STATE AFFAIRS
Attachment No. 1
3/23/89

March 23, 1989

SENATE BILL 77

TESTIMONY BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

My name is Chris Savage. I am a law student at Washburn University. I represent the ACLU of Kansas and I am here to express our unequivical opposition to Senate Bill 77, which concerns the establishment of a 40 minimum sentence for certain crimes. The ACLU is the only nationally recognized organization whose sole purpose is the defense of our constitutional liberties of freedom of inquiry and expression, free exercise of religion, privacy, due process of law and equal protection of laws.

The primary basis of our opposition to SB 77 is that it is a violation of the Eighth Amendment to the Constitution of the United States which states:

> Excessive bail shall not be required nor excessive fines imposed, NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED

This bill is unconstitutional. Society through its legislation is inflicting cruel and unusual punishment on incarcerated persons. The basic hysteria over proving how "tough" the system is has resulted in this bill, a bill which is not any different from a death bill such as was proposed earlier this session. Why is it not any different? Because this bill removes hope, hope that a prisoner can change, hope that he will eventually leave prison, hope that OTHERS believe he can change. This bill attempts to remove every shred of that part of humanity which keeps one from turning into an animal who acts without thought for tomorrow.

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So where does this lead someone who has no hope? What state of mind does this create in someone who knows he cannot leave an already stressful situation? What behavior can we expect? He strikes out at others, he becomes violent, he gets depressed, he further endangers others. It has the potential to create a Kansas Willie Bosket, described on the front page of Wednesday's New York Times. This man, now 26, locked up at age 9, says, "I laugh at this system because there ain't a damn thing that it can do to me except to deal with the monster it has created." He went to reform school because he was truant, but left with the knowledge of purse snatching and mugging. Willy Bosket is now proclaimed the most violent inmate in the state of New York

Hope in form of belief that one can change, and hope that others know change is possible, this is the basis why an inmate after 15 years in prison may be a very different person from the person who once committed murder. But he or she, under this bill, still would face an additional 25 years, eliminating hope altogether, the same effect as a death sentence. If we as citizens pass permanent judgement on him, a judgement as final as a death sentence, it would be a socially sanctioned cruel and unusual punishment inflicted by all of us, collectively and individually, and it is WRONG.

Thankyou for allowing uss to express our views.

Testimony before the
House Federal and State Affairs Committee
Regarding Forty-Year Minimum Sentences for those
Convicted of Homicide of Specified Types

William R. Arnold, Kansas Council on Crime and Delinquency
Assoc. Prof. of Sociology, University of Kansas

The issues before us are, "What purposes do we attempt to achieve with legislation to increase the minimum term to be served for homicide?" and "Can we reasonably expect the provisions of the bill to achieve those purposes?" In addition, we need to relate this proposal to the overall attempt to bring some system, such as sentencing guidelines, to the punishment/prison capacity issues.

Let us assume that the bill is intended to achieve one of the classical purpose of punishment in general and imprisonment in particular. These are, as you are aware and as applied to this proposal.

1. Deterrence, either by spreading the word in general that homicide will result in more serious punishment than it has in the past or, alternatively, by "teaching" the offenders that they must not commit such a heinous act again, the classical general and special deterrence.

2. Rehabilitation, providing added time in which offenders are to mend their ways so as to join or rejoin society.

3. Retribution, simply allowing the public in general and the legislature in particular the feeling of having advanced justice by getting back at the offenders.

4. Incapacitation, increasing the amount of time during which the incarcerated offenders cannot commit crime on those outside the walls.

Assuming that one or more of the above capture the purposes of this legislation, let us turn to the second question, whether or not the legislation can likely achieve these ends.

1. Increasing the severity of punishment for homicide has not, in general, been effective in deterring people from killing each other, whether by instituting the death penalty or other increases in severity. A key reason, of course, is that homicide is most often a result of rage at someone known to us. The intractability of the homicide rate is illustrated, of course, by the fact that the southern states have the highest homicide rates and the most severe punishments for homicide. Individual deterrence seems little more effective. As you know, those released from prison after serving sentences for homicide have lower recidivism rates than those released after punishment for any other offense, about 16%, only a fourth of which, 4%, is for

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killing someone else. Increasing age, of course, appears to be the strongest deterrent factor, but the age at which crime declines most rapidly is in our twenties, with the sharpest decline at about age 27. This means that persons released after a fifteen year minimum term are already into the low crime years, and little purpose would be served by having them released at or near retirement age. Further, numerous studies have demonstrated that time served has very little effect on recidivism rates. When, for example, judges have ordered releases from prisons before terms have expired, those released early have almost exactly the same chances of failure on parole as do those who serve out their terms in prison.

2. Rehabilitation, although not the fashion at the moment, is making a comeback as a purpose of imprisonment, in part because prisons have not effectively deterred. When we were studying the rehabilitative effect of prisons, we discovered that the "optimal" time for releasing people from prison holding all other things constant was about two years. Apparently, this time allows absorption of all the rehabilitative programs most prisons can offer. We are not going to gain rehabilitative capacity by increasing terms from fifteen to forty years.

3. Retribution would, indeed, be served by the proposed increase in sentence length. The issue, of course, is whether or not we have significant gains in actual public safety along with our emotional satisfaction. As noted above in the analysis of the deterrent effect of punishment for homicide, public safety is little affected by changing sentence length.

4. Increasing sentence length does increase the public safety of citizens while the offenders are incarcerated. Careful analyses of the data produced when offenders are released early indicate that the increased time on the streets does give these offenders more opportunity for more crime, and some more occurs. The issue, of course, is how much difference it would make. As noted above in the analysis of deterrence, it would make precious little difference for homicide and, as others have noted, markedly increase the public expense. The change is likely not worth the cost.

Finally, there is the issues of a systematic approach to crime, such as the institution of sentencing guidelines. If such an approach is to be utilized in Kansas, we as ordinary citizens and legislators must refrain from proposing or adopting "piecemeal" action with regard to particular crimes. Experience in other states indicates that one of the most serious difficulties implementing guidelines is sudden legislative action outside the guidelines. Let's wait until we have looked at the larger picture before making any dramatic changes in our sentencing structure.

To reiterate, the proposed increase in sentence length would not materially achieve any of the traditional purposes of

punishment, save possibly our feeling of need for retribution. It seems clear, then, that the proposal should not be adopted at this time, especially in the light of attempts underway to approach the whole crime problem rather than take a fragmented approach.

As Amended by Senate Committee

Session of 1989

SENATE BILL No. 254

By Committee on Economic Development

2-13

AN ACT relating to crimes; concerning dealing in and possession of gambling devices; amending K.S.A. 21-4306 and 21-4307 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 21-4306 is hereby amended to read as follows: 21-4306. (1) Dealing in gambling devices is manufacturing, transferring or possessing with intent to transfer any gambling device or sub-assembly or essential part thereof ~~*for use in this state*~~.

(2) Proof of possession of any device designed exclusively for gambling purposes ~~*by any person other than the manufacturer of such device, or a transporter under contract with such manufacturer*~~, which *device* is not set up for use or which is not in a gambling place, creates a presumption of possession with intent to transfer ~~*for use in this state*~~.

(3) Dealing in gambling devices is a class E felony.

(4) It shall be a defense to a prosecution under this section that the gambling device is an antique slot machine and that the antique slot machine was not operated for gambling purposes while in the owner's or the defendant's possession. A slot machine shall be deemed an antique slot machine if it was manufactured prior to the year 1950.

(5) It shall be a defense to a prosecution under this section that the gambling device or sub-assembly or essential part thereof is manufactured, transferred or possessed by a manufacturer or a transporter under contract with such manufacturer with intent to transfer for use in a state other than the state of Kansas.

Sec. 2. K.S.A. 21-4307 is hereby amended to read as follows: 21-4307. (1) Possession of a gambling device is knowingly possessing

registered under the federal gambling devices act of 1962 (15 U.S.C. 1171 et seq.)

:

(1) By the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission;

(2) by a licensee of the Kansas racing commission as authorized by law and rules and regulations adopted by the commission; or

(3)

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or having custody or control, as owner, lessee, agent, employee, bailee, or otherwise, of any gambling device ~~by any person other~~
47 ~~than the manufacturer of such device, or a transporter under~~
48 ~~contract with such manufacturer~~.
49 Possession of a gambling device is a class B misdemeanor.
50 (2) It shall be a defense to a prosecution under this section that
51 the gambling device is an antique slot machine and that the antique
52 slot machine was not operated for gambling purposes while in the
53 owner's or the defendant's possession. A slot machine shall be
54 deemed an antique slot machine if it was manufactured prior to the
55 year 1950.
56 *(3) It shall be a defense to a prosecution under this section that*
57 *the gambling device is possessed or under custody or control of a*
58 *manufacturer or a transporter under contract with such manufac-*
59 *turer with intent to transfer for use in a state other than the state*
60 *of Kansas.*
61 Sec. 3. K.S.A. 21-4306 and 21-4307 are hereby repealed.
62 Sec. 4. This act shall take effect and be in force from and after
63 its publication in the statute book.
64

registered under the federal gambling devices act of 1962 (15 U.S.C. 1171 et seq.)

:

(1) By the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission;

(2) by a licensee of the Kansas racing commission as authorized by law and rules and regulations adopted by the commission; or

(3)