

Approved 1/30/89  
Date

MINUTES OF THE Senate COMMITTEE ON Federal and State Affairs

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

11:00 a.m./~~p.m.~~ on January 24, 19<sup>89</sup> in room 313-S of the Capitol.

All members were present ~~except~~.

Committee staff present:

Mary Galligan, Legislative Research  
Mary Ann Torrence, Revisor of Statutes Office  
Marty Robison, Secretary

Conferees appearing before the committee:

John Petersen, Governor's Chief Counsel  
Robert T. Stephan, Attorney General  
Emil Tonkovich, Professor, KU Law School  
Delbert Fowler, President, Kansas Peace Officers Assn.  
Chief-of-Police, Derby, Kansas  
Marion L. Cox, President, Kansas Sheriffs' Assn.  
Sheriff, Wabaunsee County  
Darrell Wilson, Secretary/Treasurer, Kansas Sheriffs' Assn.  
Sheriff, Saline County  
John Woody, Chief-of-Police, Salina  
Paul Heitzman, Eudora, representing himself  
Gerald Shoaf, Wichita, representing himself  
Mike Solaberry, Roeland Park, representing himself

Chairman Reilly called the meeting to order for the purpose of hearing the proponents of Senate Bill 38, the death penalty for certain crimes.

John Petersen appeared before the committee to assure the members that SB 38 does meet constitutional safeguards and that the Governor will support and sign such legislation (Attachment 1).

Attorney General Robert Stephan gave the committee members three actual cases which depicted the three areas where the death penalty would apply (Attachment 2). He urged the members to reinstate the death penalty to allow the system of justice to run full cycle.

Emil Tonkovich spoke to the three arguments offered by opponents of SB 38: 1) deterrent factor, 2) cost, and 3) public opinion. The U.S. Supreme Court has stated that the death penalty is undoubtedly a deterrent to premeditated murder and a study by the Department of Justice also supports this view. In order to reach the cost figures of \$7 to \$10 million, Professor Tonkovich said that would require Kansas to impose eight times the national average to get to that amount. He thought that would be very unlikely since the proposed bill is drawn very narrowly. The polls taken show that 80% of the population accepts the death penalty. The fact that 37 states have the death penalty shows public support. An article on the "Death Penalty Debate" was given to members (Attachment 3).

Delbert Fowler appeared in support of SB 38 and the section dealing with the killing of a criminal justice officer and those engaged in drug trafficking (Attachment 4).

Marion Cox appeared in support of SB 38 on behalf of the Kansas Sheriffs' Association.

Darrell Wilson told members that one convicted murderer told him that he might not have killed someone if Kansas had the death penalty. However, since he had already committed a crime which would give him a life sentence,

CONTINUATION SHEET

MINUTES OF THE Senate COMMITTEE ON Federal & State Affairs,  
room 313-S, Statehouse, at 11:00 a.m. ~~PM~~ on January 24, 1989.

he felt he had nothing to lose.

John Woody told the committee that there were 93 murders in Kansas in 1972. After the death penalty was removed, there were 135 in 1973, 156 in 1974, 125 in 1975 and they have been in the hundreds since then. He also stated that from 1958 to 1972, 1,079 were murdered in Kansas. That compares with 1,918 killed in the last 15 years. He believes constituents are saying in their polls that they won't tolerate these kinds of crimes in Kansas and urged the committee to support the death penalty.

Paul Heitzman, father of a victim, urged the committee to make capital punishment an option in Kansas so that vicious criminals may receive the due reward of their deeds (Attachment 5).

Gerald Shoaf testified that he believed SB 38 would reduce crime (Attachment 6).

Michael Solaberry spoke on behalf of his slain daughter and urged the committee to reinstate the death penalty (Attachment 7).

The meeting was adjourned at 12:00 noon.

GUEST LIST

COMMITTEE: Senate Federal & State Affairs

DATE: 1/24/89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
<i>Bill L...</i>	1176 Warren Top (04)	KS coal AGAINST O.P.
Therese Bangert	118 NW Fillmore Top <sup>06</sup>	"
<i>John Woody</i>	Salina Kansas	Chief of Police
<i>Laurel Wilson</i>	Salina Kansas	Salina Co. Sheriff
John P. Milburn	Lawrence, KS	University Daily Kansan
David Clouston	Salina, KS	Salina Journal
Lina Poyca	Fairway, KS	KCTV 5
<i>Dave Simons</i>	Wichita, KS	KWCH-TV
Ken Estens	Topeka KS.	WIBW-TV
<i>Greg Gilstrap</i>	"	"
<i>Jay Dal ...</i>	Fairway KS	KCTV 5
<i>John ...</i>	Wichita, KS	KWCH
Marie de Paul Combo	2505 Metro KCK <sup>66/66</sup>	Sisters of Charity
Dona Knewis ex	Topeka KS	Amnesty International
Darlene Jean Stearns	Topeka	HEAD A
PAUL HEITZMAN	EUDORA, KS	NONE ..
Sally Heitzman	Lawrence KS	NONE
Marion L. Cox	Alma KS	WABAUNSEE SHERIFF
<i>Ang ...</i>	Topeka	WIBW-TV
Hazel Gibbs	Wichita, KS	Senate Intern
Al ...	Wichita	KPOA
Robert ...	Doddy, KS	KPOA
<i>May ...</i>	Topeka	AG's office
<i>Bob ...</i>	Topeka	AG's office
<i>Bobby ...</i>	Topeka	AG

GUEST LIST

COMMITTEE: Senate Federal & State Affairs      DATE: 1/24/89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Tiffanie Forby		Topeka World High School
Melinda MEXER		TWHS
ANGIE NELSON		TWHS
Roshell Frias		H.W.L.
Maureen		TWHS
Priscilla Smith		Sen. BOGNA
Dawn Stephens		Intern for Senator Dan Burke
Clint Bibler		T.W.H.S.
Michelle Ramirez		T.W.H.S.
Beth Wabulom		T.W.H.S.
Mark Buebis		TWHS
Tracy Whisenand		<u>TWHS</u>
Stephanie DeBuck		TWHS
Mike Shutt		T.W.H.S.
John Thayer		TWHS
Angela Shumate		TWHS
Valerie Joene	Topeka KS	
Michael		TWHS
Doreen Wright		TWHS
Jerry Toltz	Paysonville	
Alan E. Ellman	Atcheyville	Lebanon Coffee
CATR	KU Law School	
B.D. Kaman	KE 15	Proff
Michael D. Solaberry	Roeland Park KS	Self
Carole Duffield	Platteville KS	Self





RESTORATION OF CAPITAL PUNISHMENT

\*THANK YOU, CHAIRMAN REILLY, AND MEMBERS OF THE COMMITTEE. I APPRECIATE HAVING THE OPPORTUNITY TO APPEAR BEFORE YOU THIS MORNING.

\*AS CHIEF COUNSEL TO GOVERNOR HAYDEN, I HAVE WORKED WITH THE GOVERNOR IN PREPARING AND REVIEWING THE BILL THAT IS BEFORE YOU, SENATE BILL 38, RESTORING CAPITAL PUNISHMENT.

\*MY PURPOSE IN APPEARING BEFORE YOU THIS MORNING IS NOT TO DISCUSS THE MERITS OF RESTORING CAPITAL PUNISHMENT. THERE ARE A NUMBER OF OTHER INDIVIDUALS WHO YOU'LL HEAR FROM TODAY WHO CAN MOST APTLY DO THAT.

\*I APPEAR BEFORE YOU THIS MORNING TO ASSURE YOU THAT WE ARE CONFIDENT THAT THIS BILL MEETS CONSTITUTIONAL SAFEGUARDS. THE QUESTION OF CONSTITUTIONALITY IS ONE THAT HAS BEEN AND WILL CONTINUE TO BE OF PRIMARY CONCERN TO GOVERNOR HAYDEN. I KNOW IT IS TO EACH OF YOU, AS COMMITTEE MEMBERS, AS WELL.

\*CHAIRMAN REILLY, ON BEHALF OF GOVERNOR HAYDEN, I COMMEND YOU FOR THE WORK YOU HAVE DONE IN HELPING PREPARE THIS BILL AND FOR PROVIDING THE OPPORTUNITY FOR IT TO BE CONSIDERED.

\*WITH THAT, I'D BE HAPPY TO TRY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

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SF & SA  
1-24-89  
Attachment 1



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

Testimony of Attorney General  
Robert T. Stephan  
Before the Senate Federal and State Affairs Committee  
Re: Senate Bill 38  
January 24, 1989

I am here today not because I want to be, but because I have an obligation as Attorney General to support or suggest legislation which will best protect our citizens from violent predators. I refer to violent predators who have no respect for human life and whose voluntary actions show that they take pleasure in torturing, brutalizing and planning the taking of a human life.

Senate Bill 38 defines aggravated murder in the first degree as the premeditated killing of a human being, or the killing of a criminal justice officer who is performing his or her duty, or the killing of a human being while the perpetrator is engaged in certain illicit drug activity.

When reading the bill in its cold black on white printed form, it is difficult to envision the atrocities alluded to which can give rise to a death penalty against those who commit such crimes. Although it is with difficulty that I describe in real terms when the death penalty could be imposed, I feel I must do so in order to remove this issue from an academic exercise to the real world in which it belongs. Only through a graphic description can I

SF & SA  
1-24-89  
Attachment 2



adequately explain why the majority of Kansans and I believe that capital punishment should be a part of the criminal justice system.

Subsection One of section One, which is the premeditated killing of a human being, would apply to a horrible event that occurred in Miami County. In October of 1984, David Andrews brutally stabbed to death his wife Jean and his two step-daughters, Tiffany and Tamara Massey, while his eight-year-old stepson Brian looked on. The two young girls, ages 13 and 11, were found sprawled in a corner of their bedroom with blood stains on the bed and walls. Jean Andrews, who was 28-years-old, was stabbed 15 times, one of which was through her heart. After killing his wife and step-daughters, David Andrews kidnapped Brian and took him to a bar in Olathe. Andrews purchased some beer and then sodomized Brian in the back of his Bronco vehicle. Brian was sodomized about a dozen more times before he and Andrews arrived in Michigan at David's sister's home. It was there that authorities were called.

Subsection Two of section One, which is the killing of a criminal justice officer, would apply to an event that occurred on the Kansas Turnpike near Matfield Green to Trooper Conroy O'Brien. In May of 1978, the 26-year old trooper had stopped a car along the turnpike and was sitting in his patrol car writing a traffic ticket. Without warning, the three occupants of the stopped car removed trooper O'Brien from his car. They took his gun, marched 60 feet away from his patrol car and made him kneel in the grass. Trooper O'Brien was pistol whipped with his own gun and then shot twice execution style - once in front of the left ear. He was killed instantly. The three criminals later exchanged gunfire with other law enforcement officials before being captured.

Trooper O'Brien's death left his wife alone and pregnant. The bullet proof vest he was wearing did little good against an execution-style slaying and gun shots to the head.

Subsection Three of Section One, which is the killing of a human being while the perpetrator is engaged in illicit drug activity, would apply to an event that occurred in Wichita just last year. A veteran Sedgwick County sheriff's narcotics officer, Detective Terry McNett, was killed while helping serve a search warrant at a Wichita residence last February. McNett was one of ten officers who served a search warrant at a house where an undercover drug buy had been made earlier in the evening. McNett was assigned to search the kitchen where he had been told one of the seven occupants of the house had fled. A 49-year-old drug suspect then fired a handgun at McNett from a hiding place beside a refrigerator. McNett was killed by a bullet which struck him in the right eye. He is survived by a wife, a son and a daughter.

These real life human beings did not have the same opportunities afforded to their murderers. They did not have the right to a defense, they did not have the right to an attorney, they did not have a right to a psychological evaluation and treatment, they did not have a right to an impartial jury and judge or the legal presumption that is to afford to us all a constitutional right to life, liberty and the pursuit of happiness. They were executed in a cruel and unusual manner, probably to the glee and delight of their executioners. It is for them that I speak today. It is for them that I ask the Kansas legislature to allow the system of justice to run full cycle.

# THE KANSAS DEATH PENALTY DEBATE

Emil A. Tonkovich\*

The death penalty has been fiercely debated in Kansas for more than ten years. During this period, the Kansas Legislature passed four bills that would have reinstated the death penalty. Former Governor Carlin, however, vetoed these bills. Last year, newly-elected Governor Hayden advocated the passage of a death penalty bill. The bill, which passed the House, was narrowly defeated by the Senate. Undoubtedly, a new death penalty bill will be introduced in the Kansas Legislature and the debate will continue.

Rather than take a position on capital punishment, this article surveys the death penalty debate. After briefly reviewing the constitutional aspects of the death penalty, it will analyze the primary arguments against the death penalty and examine the latest Kansas bill.

## I. CONSTITUTIONAL ASPECTS OF THE DEATH PENALTY

The death penalty is 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.<sup>1</sup> The United States Supreme Court has consistently held that in murder cases the death penalty complies with these eighth amendment requirements.<sup>2</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>3</sup> The Court also 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>4</sup> To support this finding, the Court cited the fact

\* Professor of Law, University of Kansas. J.D. 1977, *summa cum laude*, Notre Dame.

<sup>1</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>2</sup> *Id.* at 176-78. In 1972, however, death penalty *procedures* were held unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972). Only two Supreme Court Justices have ever written opinions stating that the death penalty is unconstitutional *per se*.

<sup>3</sup> *Gregg*, 428 U.S. at 187.

<sup>4</sup> *Id.* at 179.

SF & SA  
1-24-89

Attachment 3

that 35 states had death penalty statutes and that public opinion polls indicated that the majority of Americans favor 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>5</sup> Furthermore, a 1986 Associated Press poll showed that 86% of Americans favor the death penalty.

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

## II. ARGUMENTS AGAINST THE DEATH PENALTY

Although death penalty debates typically focus on the morality issue, the death penalty opponents in Kansas made an essentially economic argument. They argued that the death penalty would cost the state millions of dollars. Furthermore, they argued that the death penalty does not deter murder. Thus, through a cost-benefit analysis the opponents claimed that the death penalty is not cost-effective. Although the deterrence and cost arguments were very persuasive, they do not withstand close scrutiny.

### A. Deterrence

The United States Supreme Court, referring to premeditated murders, stated that "the death penalty *undoubtedly* is a *significant deterrent*."<sup>6</sup> The Court has consistently recognized that the death penalty serves a valid social purpose by deterring murders.<sup>7</sup> This finding is based on sound legal principles and logical reasoning. Deterrence is a fundamental purpose of criminal law. The greater the punishment, the greater the deterrence.<sup>8</sup> This basic legal principle leads to the inescapable conclusion that for some types of murder the death penalty provides greater deterrence than a term of imprisonment.<sup>9</sup>

<sup>5</sup> U.S. Department of Justice Bureau of Justice Statistics.

<sup>6</sup> *Gregg*, 428 U.S. at 185-86 (emphasis added).

<sup>7</sup> For example, the Court held that the death penalty should not be imposed upon an accomplice to a robbery felony-murder, who did not actually kill or intend to kill, because in that situation the death penalty would not serve as a deterrent. The Court reasoned that the death penalty should be imposed only in those situations in which it serves as a deterrent. *Enmund v. Florida*, 458 U.S. 782, 798-800 (1982).

<sup>8</sup> Most murderers, like most other criminals, certainly consider the likelihood of apprehension and the potential punishment when deciding whether to commit the crime.

<sup>9</sup> Although some murders are deterred by the death penalty, many types of criminal

A recent United States Department of Justice report unequivocally supports this analysis.<sup>10</sup> The report states that it is "clear that capital punishment has a deterrent effect."<sup>11</sup> After thoroughly analyzing the latest deterrence studies, the report finds that "the death penalty is the most effective deterrent for some kinds of murder"<sup>12</sup> and that "deterrence appears to be an undeniable fact of life."<sup>13</sup>

Opponents of the death penalty, citing their own statistical studies, disagreed with the Supreme Court and the Justice Department. Although their studies at best raised doubts as to the death penalty's deterrent effect, the opponents apparently were able to persuade many senators that the death penalty does not deter murder.<sup>14</sup> Thus, many of the senators were persuaded that there was no benefit to the death penalty.

Logically, this perception alone probably would have defeated the death penalty bill. The overwhelming public support for capital punishment,<sup>15</sup> however, required that the senators also find that the death penalty would be too costly to implement.

### B. Cost

Opponents argued that the death penalty would cost millions of dollars per year to implement. Although the opponents offered several estimates, the most comprehensive estimate was \$7 million per year.<sup>16</sup> Careful analysis, however, reveals that the opponents grossly overestimated the death penalty cost.

The opponents, relying on figures provided by the Board of Indigent Defense Services (B.I.D.S.), grossly exaggerated the number of death penalty cases per year.<sup>17</sup> To analyze cost, two figures must be determined: (1) the number of capital trials; and (2) the number of death penalty appeals, i.e., the number of death sentences imposed.<sup>18</sup> Although specific estimates are difficult because of inadequate data in Kansas, it is apparent that the B.I.D.S. estimates were ridiculously high.

The B.I.D.S. estimated that there would be 80 capital trials per

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homicide are not deterred. For example, "heat of passion" killings are not deterred. These homicides, however, are considered voluntary manslaughter and appropriately are not covered under death penalty statutes.

<sup>10</sup> U.S. Department of Justice, *Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission* (Feb. 13, 1987).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Thus, retribution remained the only justification for the death penalty.

<sup>15</sup> A 1987 survey showed that 69% of Kansans favor the death penalty and only 24% oppose it. University of Kansas Institute for Public Policy and Business Research, *Third Annual Public Opinion Survey of Kansas*.

<sup>16</sup> This estimate was made by Professor David J. Gottlieb, University of Kansas, School of Law.

<sup>17</sup> The Kansas Legislative Research Department's cost estimates also relied on the B.I.D.S. figures.

<sup>18</sup> Capital trials (particularly sentencing) and capital appeals are definitely more costly than noncapital trials and appeals.

year.<sup>19</sup> According to Kansas Bureau of Investigation (K.B.I.) statistics, in 1986 there were only 107 criminal homicides that could be categorized as either first degree murder, second degree murder, or voluntary manslaughter. It is incredible to estimate that 80 of these homicides would result in capital trials.

A realistic estimate is that there will be approximately 10 capital trials per year. This estimate is roughly made by subtracting from the 107 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 Kansas bill, e.g., murder occurring during robberies, burglaries, and arsons, and all unintentional felony-murders; (4) murders covered by the Kansas bill that either do not display an aggravated circumstance or display an outweighing mitigating circumstance; and (5) capital cases in which the defendant pleads guilty. Although specific numbers for each of these categories are unavailable, it is obvious that the vast majority of criminal homicides would *not* result in capital trials.

A specific estimate can be made by analyzing the Sedgwick County figures. There were 12 first degree murder cases filed in Sedgwick County in 1986. Only three of the cases, however, would have been death penalty cases.<sup>20</sup> According to K.B.I. statistics, 26% of Kansas criminal homicides in 1986 occurred in Sedgwick County. Thus, the Sedgwick County figures indicate that there would be only 12 capital cases filed in Kansas per year. This figure would be further reduced by capital defendants who plead guilty.<sup>21</sup>

In addition to exaggerating the number of capital trials, the B.I.D.S. grossly overestimated the number of death sentences. The B.I.D.S. estimated that there would be 16 death sentences per year.<sup>22</sup> For this estimate to be accurate, Kansas would need to impose the death sentence *eight* times more frequently than the national average.

A realistic estimate is that there would be two 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>23</sup> This esti-

<sup>19</sup> Apparently this is an estimate of first degree murder cases filed annually. This figure is irrelevant because it includes noncapital first degree murders and does not estimate how many cases will be tried.

<sup>20</sup> These figures were supplied by James Puntch, Chief Trial Attorney for the Sedgwick County District Attorney.

<sup>21</sup> It is reasonable to assume that a substantial percentage of capital defendants would plead guilty in exchange for a term of imprisonment.

<sup>22</sup> The number of death sentences represents the number of capital appeals. This is the most important estimate in the cost analysis because capital appeals are clearly the most expensive aspect of the death penalty.

<sup>23</sup> 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. According to the latest census, Kansas has a population of 2.3 million. (The 1985 figures were the latest available when the opponents' cost estimates were made.)

mate is further verified by comparing the number of death sentences in Missouri. Missouri has nearly four times as many murders as Kansas yet annually imposes only eight death sentences.<sup>24</sup> Thus, a comparison with Missouri will also result in an estimated two death sentences per year in Kansas. Furthermore, the Kansas estimate does not consider that the scope of the Kansas bill was much narrower than other death penalty statutes and would have resulted in even fewer death sentences.

Applying this reasonable estimate of death penalty cases to the *opponents'* cost estimates would reduce the cost to approximately \$1 million per year.<sup>25</sup> This figure would be reduced further by weighing the savings that would result from the death penalty. For example, the cost of incarcerating each murderer would be at least \$300,000 over his lifetime. Also, because defendants faced with the death penalty would be far more willing to plead guilty in exchange for a term of imprisonment, there would be fewer murder trials and more favorable plea bargains for the State.<sup>26</sup> Finally, the cost is arguably justified if only one murder per year would be deterred.

Although the opponents' cost estimates were grossly overestimated, they were extremely timely. Cost arguments—even those based on ridiculous figures—are persuasive when made to legislators facing a budget crisis.

### III. KANSAS DEATH PENALTY BILL

The Kansas House bill<sup>27</sup> was modeled after existing death penalty statutes. It differed from existing statutes, however, in three areas.<sup>28</sup> First, the House bill significantly limited the definition of capital murder. The Senate committee<sup>29</sup> version clarified this definition. Second, the House bill required a special sentencing jury. This provision was repealed by the Senate committee. Third, the House bill implied that prosecutors could not exercise discretion in seeking the death penalty. The Senate committee version expressly provided for prosecutorial discretion.

<sup>24</sup> U.S. Department of Justice Bureau of Justice Statistics (1985 figures).

<sup>25</sup> This assumes that the opponents accurately estimated the additional costs involved in capital trials and appeals.

<sup>26</sup> Defendants will certainly try to avoid the death penalty and, except under rare circumstances, prosecutors will accept offers to plead to life imprisonment. Under present Kansas law, however, if the prosecutor refuses a plea to a lesser charge, the defendant will go to trial because he will at worst, be eligible for parole in 15 years. Thus, a death penalty statute will result in 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>27</sup> H.R. 2062 (1987).

<sup>28</sup> Other variances were due to poor drafting and failure to update the draft bill with recent case law.

<sup>29</sup> Kansas Senate Committee on Federal and State Affairs.

### A. Definition of Capital Murder

The House bill defined capital murder as premeditated murder and intentional murder in the commission of kidnapping, rape, and aggravated criminal sodomy.<sup>30</sup> Thus, the death penalty was limited to premeditated murders and intentional felony-murder when the underlying crime is an inherently dangerous felony against a person. Most death penalty statutes, on the other hand, include premeditated murder and all intentional felony-murders.<sup>31</sup>

Under the House bill, capital murder was wisely limited to the most heinous killings. Unfortunately, the bill was poorly drafted and did not consider either disparity of punishment or the impact upon plea bargaining.<sup>32</sup> The House bill simply stated that the defined murders would be subject to the death penalty.

The Senate committee amendments attempted to address these problems. Capital murder was separately defined as a new class AA felony<sup>33</sup> and subject to the death penalty or life imprisonment with eligibility for parole after 25 years of imprisonment.<sup>34</sup> These amendments clarified the definition of capital murder, lessened the disparity in punishment, and improved the plea bargaining process.

The Senate committee amendments, however, should have been more extensive. Enacting a death penalty statute requires a complete revision of the criminal homicide statutes.<sup>35</sup> Great disparity in punishment must be avoided and the parties must have reasonable latitude in plea bargaining.

### B. Special Sentencing Jury

A House bill amendment required that the death penalty be imposed by a special sentencing jury.<sup>36</sup> Under this provision, following a capital murder conviction, a new jury would be empaneled to decide whether to impose the death penalty. Opponents supported this provision on the theory that it would avoid conviction-prone "death qualified" juries at the trial's guilt phase.<sup>37</sup>

<sup>30</sup> H.R. 2062 §§ 1-3 (1987) (House amendments).

<sup>31</sup> U.S. Department of Justice Bureau of Justice Statistics. For example, death penalty statutes typically include felony-murder when the underlying felony is robbery, burglary, or arson.

<sup>32</sup> For example, a defendant found guilty in a death penalty case would either be sentenced to death or eligible for parole in 15 years. This disparity in punishment is too great and would inhibit flexible plea bargaining.

<sup>33</sup> H.R. 2062 § 1(b) (1987) (Senate amendments).

<sup>34</sup> *Id.* §§ 3(a), 15(b).

<sup>35</sup> Even without the death penalty, the Kansas criminal homicide statutes need to be revised in terms of classification and punishment. Inserting a death penalty provision, without considering its impact on the other statutes, further exacerbates the situation.

<sup>36</sup> H.R. 2062 § 7(2) (1987) (House amendments).

<sup>37</sup> In a capital case in which the same jury determines guilt and imposes sentence, potential jurors who indicate an inability to follow the law and impose the death sentence when the law requires may be excluded "for cause" from the jury panel. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986). Opponents of the death penalty argue that "death qualified" juries are prone to conviction. The Supreme Court rejected this argument. *Id.*



Special sentencing juries are unprecedented<sup>38</sup> and unnecessary.<sup>39</sup> Furthermore, this procedure is inconsistent with sentencing theory<sup>40</sup> and would be very time-consuming and extremely expensive.<sup>41</sup> Ironically, special sentencing juries may also be more likely to impose death sentences.<sup>42</sup>

The Senate committee repealed the special sentencing jury provision. Under the Senate amendment, the decision to impose the death penalty would be made by the trier-of-fact.<sup>43</sup> The Senate procedure has been specifically approved by the U.S. Supreme Court and is the standard procedure in states with death penalty statutes.<sup>44</sup>

### C. Prosecutorial Discretion

The House bill implied that prosecutors would not have discretion in seeking the death penalty.<sup>45</sup> This implication is unprecedented<sup>46</sup> and may violate the separation of powers doctrine.<sup>47</sup> Prosecutorial discretion is essential in criminal cases, particularly those involving the death penalty. The State, as well as the defendant, benefits when a prosecutor exercises his discretion not to seek the death penalty.<sup>48</sup>

The Senate committee amendments expressly provided for prosecutorial discretion. Under the Senate amendment, at the arraignment the prosecutor must notify the defendant of his intent to seek the death penalty.<sup>49</sup> This gives the defendant and the trial judge sufficient notice to prepare for capital jury selection. Following a guilty verdict or guilty plea, the prosecutor may move for a death sentence proceeding.<sup>50</sup> This allows the prosecutor to re-evaluate his earlier decision to seek the death penalty.

<sup>38</sup> No other state's death penalty statute provides for a special sentencing jury.

<sup>39</sup> See *supra* note 37.

<sup>40</sup> 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.

<sup>41</sup> A new jury would need to be empaneled. Furthermore, to ensure a fair sentence, virtually the entire case would need to be presented to the new jury.

<sup>42</sup> If the trial jury also sentences the defendant, jurors with "residual doubts" about guilt are extremely unlikely to impose a death sentence. (This also ensures that the death penalty will be imposed only when all jurors are absolutely convinced of guilt.) Jurors on a special sentencing jury, however, obviously will not have "residual doubts" and thus, will be more likely to impose a death sentence.

<sup>43</sup> H.R. 2062 § 6(2) (1987) (Senate amendments).

<sup>44</sup> *Lockhart*, 106 S. Ct. at 1768-69.

<sup>45</sup> Although prosecutorial discretion could be implied, both proponents and opponents assumed that the bill did not provide prosecutorial discretion.

<sup>46</sup> All other states' death penalty statutes permit prosecutorial discretion.

<sup>47</sup> It could be argued that the Legislature unconstitutionally infringed upon prosecutorial discretion.

<sup>48</sup> In addition to the obvious benefit to the defendant, the State would also benefit by saving the time and cost of unwarranted death penalty prosecutions. Many cases that technically fit within a death penalty statute may not warrant a death sentence.

<sup>49</sup> H.R. 2062 § 6(1) (1987) (Senate amendments).

<sup>50</sup> *Id.* § 6(2).

#### IV. CONCLUSION

The death penalty is a constitutional form of punishment that has been enacted by 37 states and is supported by the overwhelming majority of Americans. Furthermore, a strong argument can be made that the death penalty is a cost-effective deterrent for some types of murder.

Despite these facts, the Kansas Senate defeated the death penalty bill by a 22-18 vote. The vote was particularly unexpected because the Kansas Legislature had passed four death penalty bills in the past ten years. The defeat was caused by six senators withdrawing their support for the death penalty. Five senators actually switched their votes and one voted against the bill after campaigning with Governor Hayden and promising to vote for the death penalty.

Two explanations have been offered for the senators withdrawing their support for the death penalty.<sup>51</sup> First, it has been suggested that, when faced with a governor that would sign a death penalty bill, some senators could not vote for the bill on moral grounds. Although the morality of the death penalty is certainly questionable, this "morality switch" might indicate that the senators' prior support for capital punishment was politically motivated. Second, it has been suggested that some senators voted against the death penalty to embarrass Governor Hayden, who had vigorously campaigned on the death penalty issue and promised the voters a death penalty statute.

The death penalty debate undoubtedly will continue.<sup>52</sup> The only issue in this debate should be the morality of the death penalty. Perhaps the Kansas Senate made the right decision for the wrong reasons.

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<sup>51</sup> These explanations have been offered by death penalty proponents. It is possible that these senators withdrew their support for the death penalty because they did not carefully consider the issue when Governor Carlin was in office.

<sup>52</sup> Governor Hayden raised the death penalty issue in his 1988 State of the State Address.

SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

HEARING ON SENATE BILL NO. 38

Tuesday January 24, 1989 Room 313-S

Chairperson Reilly and members of the committee:

I am Delbert Fowler, Chief of Police of the City of Derby, Kansas and President of The Kansas Peace Officers' Association. I am here today representing The Kansas Peace Officers' association in support of Senate Bill No. 38.

The law enforcement officers of the State of Kansas feel their is a real need to reinstate the death penalty for certain crimes of murder in this State. Senate Bill No. 38 addresses the concerns we have for the safety of the criminal justice officer and the public we serve.

It can be argued whether or not the penalty of death is a deterrent, however, if a person who has committed such a heinous crime is put to death, that person certainly will not have the opportunity to commit such a heinous crime again. Today a person can only be sentenced to life in the State of Kansas regardless of how ruthless and cold blooded that person may be. In such a case, that person has a good chance of being paroled and put back into the community giving them a chance to commit murder again.

We are extremely pleased to see Section 1. (a) (2) dealing with the killing of a criminal justice officer and Section 1. (a) (3) dealing with the killing of another while engaged in drug trafficking included in the bill. If this bill is enacted into law, it will send a clear message that we will not tolerate this type of activity in the State of Kansas.

SF & SA  
1-24-89  
Attachment 4

Senate Foreign and State Affairs Committee

Testimony of Paul Heitzman

January 24, 1989

Members of the committee, friends. My name is Paul Heitzman. I live on a farm near Eudora, Kansas. I am a graduate of Wyandotte High School and Baylor University. I have a Master's Degree from the University of Kansas. I have taught history at Topeka High School, Wyandotte High School, Shawnee Mission West High School, and for the past twenty years, at Shawnee Mission Northwest High School. I would like to introduce my daughter, Sally, who is a sophomore at the University of Kansas. As an introduction to my remarks, I would like you to watch a two minute video presentation.

I am not a spokesman for any organized group. I do not necessarily speak for teachers, or farmers, or construction workers, or fishermen, or basketball fans. I would like to speak for that huge silent majority of Kansans who are committed to the idea of representative government and who have expressed themselves solidly in support of capital punishment. We elect our State Senators and Representatives and we depend on them to express the will of the people.

As a Kansas teacher, I emphasize pride in our heritage as Kansans and respect for our representative democracy. Since a vast majority of Kansans support capital punishment, I find it very difficult to explain to my students that a few Senators can nullify the will of the people of this state.

As far as I can determine, support of Capital Punishment in Kansas is both overwhelming and growing. This support is reflected in about every group in our state -- men and women, Protestants and Catholics, Democrats and Republicans, those who are college graduates and those who are not. The two groups I am aware of who oppose capital punishment are the 1987 Kansas Senate and the present House delegation representing Lawrence.

Some crimes are so brutal, wanton, and senseless that they are almost beyond belief. On Saturday, October 11, 1986, a killer entered the Sir Knight Formal Wear Shop at 15th and Grand in Kansas City, Missouri. He took less than \$150 in cash and forced the three employees to lie on the floor of a storage room.

He methodically murdered the three by shooting them in the back of the head at point blank range. My twenty year old daughter, Patricia, a sophomore at the University of Kansas, was one of the victims.

It is axiomatic that criminals of this nature, should, upon conviction, receive the maximum punishment available. It is ludicrous to suggest that the maximum punishment for a crime of this magnitude should be the same as the punishment meted out for less serious felonies, namely life in prison. The State of Kansas has a solemn obligation to its law abiding citizens to see that Justice is done. I am appalled by the lugubrious argument that capital punishment in Kansas would cost too much money. IF WE CANNOT AFFORD THE PRICE OF JUSTICE, WE ARE A POOR PEOPLE, INDEED!

While there is some disagreement as to how effective capital punishment is in deterring crime, one fact is certain. An executed murderer has no opportunity to repeat his crime. For that murderer, capital punishment is 100 percent effective as a deterrent.

Some who oppose capital punishment argue that the State commits murder when it executes criminals. Let's understand the terms. Capital punishment is defined as "infliction of the death penalty for the commission of certain crimes." Murder is defined as "the unlawful killing of one person by another." The fallacy of this argument against capital punishment is easy for a thinking person to see. Most of us have at some point in our lives paid traffic fines, but who among us has accused the State of setting a bad example by robbing us of our money.

The crime of murder extends far beyond the victim who is slain. When Patty was murdered my family was victimized beyond description. I can say with certainty that on that October day, Kansas lost one of its best citizens. Those who knew her often referred to her as "one of the best and the brightest." I do not say this because she was a good athlete, although she was, nor because she was a very, very good student, which she was, but rather because she was the most decent human being I have ever encountered. I not only lost my daughter that day, but my best friend as well.

The impact of this vicious crime on our family has been devastating. I would do anything in my power to see to it that your families never have to endure this kind of tragedy. Over-riding all of the good things that have happened to me is the ever-present realization that Patty is gone. Our lives will never be the same again. I hope that you are able to at least partially understand the scope of this crime and the magnitude of our loss.

Since this crime occurred in Missouri, the murderer could face the possibility of capital punishment. I have been assured by the Jackson County Prosecutor's Office, that in the event they are ever able to build a case against the perpetrator of this evil act, they will not hesitate to seek the death penalty. This type of crime is the reason Missouri has the death penalty. It is the reason you, the Senators of Kansas, must restore the death penalty.

As a student at Wyandotte High School in 1948, I studied physics in the classroom of Mr. David Gray, an outstanding educator. Mr. Gray's son was brutally murdered, and I witnessed, first hand, the impact that tragic event had on his life. At the time, I never imagined that someday I would be a teacher myself, or that a similar tragedy would overtake me. At least Mr. Gray lived to see the day that justice was done by the State of Kansas, when the murderer, Nathaniel Germany, was executed for this crime. History has shown that not many of these vicious crimes occur in Kansas, only 15 executions took place between the early 1940's and 1967, however, capital punishment was available in our judicial system to aid in the maintenance of justice. The laws of the State of Kansas must provide for capital punishment as an option in crimes like these.

Recently a member of the Kansas House was quoted as saying, "It has never been, as far as I know, studying history during my lifetime, it has never been administered fairly." I would like to know if you consider it unfair that Nathaniel Germany paid the price for the killing of Mr. Gray's son. Was it unfair that Hickock and Smith were executed for the brutal slaying of the Clutter family, was it unfair that York and Latham were executed for a cross country spree of savage killings, and was it unfair that Lowell Lee Andrews was executed for butchering his entire family. A study of the 15 executions in this state will demonstrate to any thinking, rational person, that in this state capital punishment was administered fairly, in the Kansas tradition of justice. Let's forget slogans and platitudes and keep our minds riveted on the facts.

I have always tried to get my values from the Bible, and I strive to live according

to its teachings. I am particularly impressed by a passage in the Gospel of Luke, Chapter 23, verses 29-43, which describes an incident which happened when Jesus Christ was crucified. The scene is Calvary, three men are being put to death:

"And one of the malefactors who were hanged, railed at him saying, 'If thou be the Christ, save thyself and us.' But the other, answering, rebuked him saying, 'Dost thou not fear God, seeing thou art in the same condemnation. AND WE, INDEED JUSTLY, FOR WE RECEIVE THE DUE REWARD OF OUR DEEDS.'"

These words were spoken by a convicted criminal, but his logic was flawless. He had a clear understanding of justice. Jesus Christ did not have to correct his thinking, but was able to promise, "Today thou shalt be with me in paradise."

I urge you to make capital punishment an option in Kansas so that vicious criminals may receive THE DUE REWARD OF THEIR DEEDS.

As a victim of a heinous crime, I feel our family has a lot at stake in the decision you render on this matter.

I will attempt to answer any question you may want to ask. Two years ago I probably could not have discussed this matter openly, but I am able to do it now. I will not be offended, please do not hesitate to ask questions.

Ed Shoaf  
Wichita, Kansas

Diesel Engine Mechanics and Sales.

I am 62 years of age, have been a resident of Kansas for all but 3 years of my life.

I am speaking to you today on behalf of the pending Capital punishment Bill. I am a registered Republican but usually vote a split ticket. I hold no allegiance to Governor Hayden. In fact there is some things about him I don't like. But, I'm sure he is not a Blood-Thirsty Maniac like the Wichita Eagle-Beacon described him last week. Too bad we don't have another large newspaper in Wichita so we could get some other printed View.

I have no axe to grind or any revenge feelings. Fortunately, none of my family or close friend has ever been beat up or killed by a Criminal. So, I hold no personal hatred for Killers that would make me speak on behalf of returning the Death Penalty to Kansas.

During Governor Carlin's first term a survey showed that 75% of Kansans supported the death penalty. I don't see anything to indicate any change in the people of Kansas thinking. The State legislature passed the death penalty 4 times and Governor Carlin vetoed them 4 times. Some say now public opinion has changed, because of all the pressure and lobbying you get from death penalty opponents. But, whether its an issue of building a prison in our town or whatever, there is always a bunch who will oppose almost anything that always show up and protest the loudest. The majority of people who don't oppose it won't take the time or make any effort to support it. I'm sure thats the case here. You never hear much from supporters of issues. You hear mainly from the protestors.

Death penalty opponents will tell you that its not applied evenly. That larger number of minorities and low income people will be executed than the middle or upper income class. Thats true. Why? Because of frustration of being poor and discriminated against more of these people resort to violent crimes of killing other people. That is unfortunate but thats the way it is.

SF & SA  
1-24-89

Attachment 6



The main reason for supporting the death penalty is that I'm convinced it is a deterrent and if you will listen with an open mind a few more minutes I'll prove it to you. People who say the Death Penalty is not a deterrent get their information from surveys taken from prisoners on death row. Sure most of them will say no for two reasons. Some want to hold to their tough image, but most want to influence lawmakers like you to strike down the death penalty laws so they won't get executed.

Several years ago when California had the electric chair death penalty, a TV talk show host had a guest who was a criminal lawyer who made his living defending people who were charged with crimes. He said that he personally had defended over sixty people for crimes (mostly robbery) where that person deliberately took a toy gun, an unloaded gun or a gun that would not fire when he set out to rob a store. The reason was that during the robbery something might go wrong and they would panic and kill someone. Then they would become a candidate for the electric chair. This is some good hard evidence it's a deterrent. If this one attorney had sixty of these circumstances there were likely to be hundreds more out there. Criminals in Kansas value their lives just as much as criminals in California.

The nation of Turkey grows more poppies for heroin than anyone in the world but they don't have a drug problem. Why? You get caught selling drugs in Turkey and you are dead. Tough, but effective. My Brother-in-law spent some time in Germany last fall. He said Germany doesn't have a drunk driving problem. You get caught driving while intoxicated in Germany and you just don't drive any more period. Up until lately a person in Kansas could drive under the influence and even kill someone and only be charged with involuntary manslaughter and likely do no prison time. The penalty for any crime has to be tough enough to get some attention or it's not of any value.

Some people say we can't afford the death penalty because it costs a million dollars or more to execute someone. Maybe - in the past we have spent that much but it's dumb to have policies that will keep a killer on death row for 10 years and 8 different appeals and charge the public for all of it. We somehow have got into a mind set where we are more concerned about a killer's rights than the innocent person who this killer has tortured and killed.

Why do we put people in prison and or wear a fine? We do to give some sort of a deterrent to make people behave and obey the laws. It stands to reason that if the penalty is not severe enough to be a deterrent then we are wasting our time. Our prisons are now overcrowded, we are building new prisons and have plans for more. Why? We are losing ground fast to criminals because some judges are too lenient and our laws don't carry tough enough penalties. Also we sometime have to turn loose criminals on society to make room in prison to put new ones in. Maybe 3 or 4 more new prisons will remedy that.

Stronger penalties will reduce crime. It won't eliminate crime but it will surely reduce it. If it won't, then you might just as well pick up your marble and go home. An old philosopher once said, "When crime ceases to be profitable, crime will cease."

I'm not so naive as to believe the death penalty will solve all our crime problems. It won't, but it will sure help especially if applied fairly and swiftly. No need to pussy foot around for 8 or 10 years. By then it has lost most of its effective impact on people. Also I think my life and your life is just as important as the life of a law enforcement officer. I think the death penalty should be applied to every killer who intentionally takes the life of someone else. Not only the life of a prison guard or policeman but anyone else.

In closing I would like to ask you, Wouldn't you rather see a killer executed than have a killer execute you or one of your family? You have a chance to vote to put the odds more in your favor.

Served Shoaf  
2053 Westridge  
Wichita, Kansas 67203

MICHAEL D. SOLABERRY  
5516 JUNIPER DR.  
ROELAND PARK, KS 66205  
1-23-89

Leaders and citizens of Kansas.

I am here in behalf of my grand daughter,  
my daughter, my wife and many Kansas  
citizens. I ask you to support and vote  
for capital punishment for murderers.

Murderers of the first degree.

The Law does NOT punish to fit the crime.  
Some criminals get more jail time for sale  
of cocaine or robbery - than Murder.

Is a victims life so unimportant ?

Is a Mothers - or fathers - or child's life  
so unimportant ? that - They are just forgotten.

At the present time the law protects the  
Murderer. The taxpayers pay the care for  
the Murderer.

Who cares for the victims' families ?

Who pays for the victims' funerals - and how much.

- In one murder case -

How much money is being spent on the Murderer ?

How much money is being spent on the  
victims' families ?

Yes, the Murderer is a person and has rights.

Yes, the Victim is dead - and forgotten ?

SFA SA

1-24-89

Attachment 7

Page 2 -

A Murderer takes a life or lives and the impact of this Murderer being felt by many people, many ways - for ever. Only the people who been affected know the feeling - the pain deep in their hearts. The relatives and friends who care, help and try to understand the victims' families and their lives.

Each family member been affected in many different ways.

The adult may cry - feel the loss - the heartache day after day, the undescrivable feeling what the murderer imposed on them. The young child - My grand daughter is 3 years old - she saw her mother's butchered body for many hours in the apartment -

We as a family - see her day and night suffering from the Murderers impact.

How can you explain to a child that her mother was murdered? Stabed 163 times. She asks - why did he murder my mommy?

Why can't I talk with my mommy?  
I can only kiss my mommie's picture because she is in Heaven.

Page 3 -

MICHAEL D. SOLABERRY  
5516 JUNIPER DR.  
ROELAND PARK, KS 66205  
1-23-89

she says-

I don't want to go to sleep because I have bad dreams.

I don't want you to go to sleep, because you will go to Heaven too like my Mommy did. It is painful to hear the victim's child speak.

We believe in capital punishment because nobody can assure us that he will not murder again.

Most murderers will kill more than one time if have the chance, and kill without remorse.

My daughter, the victim, never had a second chance to stay alive.

Murderers should never have a second chance to kill again.

No murderer should walk the streets of Kansas.

MICHAEL D. SOLABERRY  
5516 JUNIPER DR.  
ROELAND PARK, KS 66205

*Michael D. Solaberry*