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Testimony to the House Committee on Corrections and Juvenile Justice in Opposition of HB 2282

February 19, 2019

Chairman Jennings, Vice Chairman Delperdang, Ranking Member Highberger, and Committee Members,

The Johnson County Sheriff's Office asks you to oppose HB 2282. This bill is yet another attempt to meddle with the criminal justice system in the hope that some undetected, undefined, or perceived error with our capital punishment statute be corrected. Rather than pragmatically working to fix the alleged error, those that support this bill choose to repeal the law. Give the death penalty to the death penalty.

A common objection to the death penalty is it is unconstitutional. The Kansas Death Penalty statute has been held to be constitutional by the U.S. Supreme Court.¹ The constitutionality of the law is not in question. Those that argue otherwise refuse to acknowledge the case law. *"We hold that the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional. Accordingly, we reverse the judgment of the Kansas Supreme Court, and remand the case for further proceedings not inconsistent with this opinion. It is so ordered."*²

The basic question, of those opposed to the death penalty, is whether, as a general matter, imposition of the death penalty is consistent with the Constitution. Ordinarily, those who see an inconsistency argue that the death penalty violates the Eighth Amendment's ban on "cruel and unusual punishments."

This argument lacks merit. The Constitution contains two due-process clauses that explicitly contemplate that the government may deprive a person of "life" (as well as "liberty" and

¹ KANSAS v. MARSH (2006), No. 04-1170, Argued: December 7, 2005 Decided: June 26, 2006, <https://caselaw.findlaw.com/us-supreme-court/548/163.html>, accessed Feb. 17, 2019.

² Ibid.

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“property”) if it provides “due process of law.” Moreover, the Fifth Amendment provides that “no person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury.” If the death penalty were unconstitutional the Constitution would not impose conditions such as these for the taking of a life by government.

Another common argument made by opponents is that the death penalty is too costly. There is no evidence in Kansas to support this statement. Opponents frequently refer to two sources to back up this claim – 1) the 2003 Kansas Post Audit Report “Costs incurred for death penalty cases: A K-GOAL audit of the Department of Corrections,” and 2) Report of the Judicial Council Death Penalty Advisory Committee, February 13, 2014. Both documents are suspect and built on assumption.

The LPA report makes it clear that there is no way to know what the cost of a death penalty case, or **any criminal case** is in Kansas. “Actual cost figures for death penalty and non-death penalty cases in Kansas don’t exist,” states the report. It is based on conjecture, estimates and guesses.³ It uses government accounting, the infamous cost per FTE estimate. The cost of a salary of a judicial employee is the same, regardless of the type of case. It doesn’t change based on case type. The most variable cost would be incurred by the defense attorney who charges an hourly rate.

Let’s use the results of the LPA study for discussion purposes to examine the cost argument. According to the study the median cost for a case by type is \$1,200,000 for a death penalty case, \$900,000 for a death penalty case where the sentence was imprisonment instead of the death penalty, and \$700,000 for a non-death penalty case. These estimates include all State and local costs incurred to-date (even though cost records aren’t kept)⁴, as well as projected

³ 2003 Kansas Post Audit Report “Costs incurred for death penalty cases: A K-GOAL audit of the Department of Corrections, <http://www.kslpa.org/media/files/reports/media/files/temp/04pa03a.pdf>. Accessed Feb. 17, 2019. The post audit report states “judges, attorneys, court staff, and local law enforcement officers don’t keep case-specific time records. We had to rely on their memories and best estimates of how much time they spent on these cases, many of which occurred several years ago.”

⁴ Ibid, “The Kansas Supreme Court did not provide estimates for the time the justices spent on the 2 death cases that have had their direct appeal to the Supreme Court, and on other cases they have heard. The Office of Judicial Administration declined to provide information about how long the justices spent on these cases because of “concern about invading the justices’ decision-making process.” Of the entities we surveyed in this audit, they were the only ones who didn’t estimate their time. As a result, we had to rely on sparse comparative data from North Carolina to estimate this.”

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costs for things that haven't yet occurred—such as appeals, incarceration, and executions. When you compare costs there really isn't much difference.

If you read further in the report it states, "Some aspects of the way Kansas has implemented the death penalty actually save money." Examples given are Kansas doesn't require a grand jury indictment, generally doesn't sequester juries during trials, and the Kansas Supreme Court doesn't conduct proportionality reviews⁵. All of these are cost saving measures.

The Judicial Council Report readily admits they did not attempt to do extensive research. "The Committee quickly determined that, given its limited time and resources, it would not be able to produce as thorough and detailed a report as the 2003 Post Audit report."⁶ They use the LPA report as a source document. They also looked at thirty-four cases that could have been charged as death penalty cases filed between 2004 and 2011. Of those cases sixteen had jury trials and eighteen had plea agreements. I'll comment on that later in my testimony.

Lastly the Judicial Council of 2014 was not an impartial body. Members included former Representative Steven Becker who was an adamant and vocal opponent of the death penalty. He used any opportunity possible to either introduce a bill to repeal the death penalty or to introduce an amendment to a bill to do the same. Senator Carolyn McGinn, another member, also has a history of supporting and sponsoring legislation to repeal the death penalty.⁷ Regardless of the findings of the Judicial Council these two legislators would and did offer bills to repeal the death penalty.

A third argument against the death penalty is Kansas has not executed anyone since the death penalty was reestablished in 1994. Kansas has never been a state to eagerly send a convicted felon to death, but Kansas has had a death penalty for most of its existence. As a territory, Kansas had a death penalty. The only crime eligible for the penalty was treason. There is no historical record that indicates anyone was ever executed in Kansas for the crime of

⁵ Ibid.

⁶ "Report of the Judicial Council Death Penalty Advisory Committee," Approved by the Judicial Council, February 13, 2014, <https://kansajudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf>, accessed Feb. 17, 2019.

⁷ Report of the Judicial Council Death Penalty Advisory Committee," Approved by the Judicial Council, February 13, 2014, <https://kansajudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf>, accessed Feb. 17, 2019.

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Treason. Upon statehood the crime of first-degree murder was added to the capital punishment statute.⁸

In 1872, the Legislature amended the statute and required all persons sentenced to death to "serve one year in the state penitentiary at hard labor" and after that the governor should sign the death warrant authorizing the execution. For thirty-five years no governor signed such a warrant. In 1907, capital punishment was abandoned in Kansas.⁹

In 1933, a controversy arose in the Legislature when evidence that some deliberate murders were committed in Kansas by persons who admitted to committing murders in surrounding states. Those surrounding states all had death penalties. The story was that such murders in Kansas were admittedly made for securing a sentence of life imprisonment in Kansas by consenting to extradition to Kansas, thus avoiding the death penalty in the other jurisdictions.¹⁰

In 1935, the death penalty is reinstated in Kansas and the death warrant requirement is removed. Juries are given the authority to authorize capital punishment.¹¹ The method of execution is hanging. In 1944, the first execution is conducted under the 1935 law.¹² From 1944 to June 29, 1974, fifteen people were executed.¹³ June 29, 1974 is when the U.S. Supreme Court in a 5-4 decision opined that capital punishment as practiced in most states, was unconstitutional.¹⁴ It is interesting to note that the court was not of the opinion that capital punishment was unilaterally unconstitutional. However, the lack of specificity caused all states to halt executions. The dissenting opinion, written by Justice Rehnquist, with Chief Justice Burger, Justice Blackmun, and Justice Powell joining, stated, in part, "**The use of the due process clause to disable the States in protection of society from crime is quite as dangerous**

⁸ Capital Punishment in Kansas – 4, "History of Capital Punishment in Kansas," <https://www.kansasmemory.org/item/209168/page/4>, accessed Feb. 17, 2019.

⁹ Capital Punishment in Kansas – 5, "History of Capital Punishment in Kansas," <https://www.kansasmemory.org/item/209168/page/5>

¹⁰ Capital Punishment in Kansas – 4, "History of Capital Punishment in Kansas," <https://www.kansasmemory.org/item/209168/page/4>, accessed Feb. 17, 2019

¹¹ "A History of Capital Punishment in Kansas through 1994," <https://www.kansas.com/news/local/crime/article37624236.html>, accessed Feb. 17, 2019.

¹² Capital Punishment in Kansas – 3, "History of Capital Punishment in Kansas," <https://www.kansasmemory.org/item/209168/page/3> accessed Feb. 17, 2019.

¹³ Ibid.

¹⁴ "Furman v. Georgia." Oyez, www.oyez.org/cases/1971/69-5030, accessed Feb. 17, 2019.

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and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation."¹⁵

In 1976, the U.S. Supreme Court issued another opinion in *Gregg v. Georgia* that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances.¹⁶ They focused on what they determined was an "arbitrary nature" with which death sentences were imposed. Instead it made sure that the death penalty would not be administered in a capricious or discriminatory manner. Georgia's statute required a bifurcated proceeding where the trial and sentencing are conducted separately, as well as specific jury findings as to the severity of the crime and the nature of the defendant.¹⁷ Even more importantly, SCOTUS "was not prepared to overrule the Georgia legislature's finding that capital punishment serves as a useful deterrent to future capital crimes and an appropriate means of social retribution against its most serious offenders."¹⁸ This was a 7-2 opinion. The only change to the court was that Justice Douglas was gone, replaced by Justice Stevens. Justices Stewart and White held the affirmative position in both cases. Justice Douglas was in the affirmative on the *Furman* case. Justice Stevens was in the affirmative on the *Gregg* case.

Kansas attempted to pass a new death penalty statute in 1974 but was unsuccessful. In 1994, a new capital murder statute was passed.

This history lesson is to demonstrate that since Kansas became a territory of the United States in 1854 until the present day, Kansas has had a death penalty for most of that time – 115 of its 165 years of existence as a territory and state. In that 115-year period, forty-three people were executed in Kansas. Of those forty-three, twenty-four were under the jurisdiction of state courts. All committed murder. Executions have never been plentiful in Kansas, but they have been administered when heinous circumstances have occurred.

¹⁵"*Furman v. Georgia*." <https://supreme.justia.com/cases/federal/us/408/238/#tab-opinion-1949839>, accessed Feb. 17, 2019.

¹⁶"*Gregg v. Georgia*." Oyez, www.oyez.org/cases/1975/74-6257, accessed Feb. 17, 2019.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

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Kansas has used the death penalty since our final execution on June 22, 1965. There are ten men on death row in Kansas today. Death row is a misnomer. Kansas doesn't have one. Inmates sentenced to death are typically housed in the El Dorado Correctional Facility (EDCF), along with other inmates who are in administrative segregation.¹⁹ The problem in Kansas is not our use of the death penalty. The problem is the implementation of the procedure for the death penalty.

Kansas has an appeal process that is incredibly slow. **Our state supreme court consistently rules in favor of convicted murderers.** One ridiculous example of how farcical our judicial system has become on this issue is a convicted serial killer from Olathe, Kansas. He lured women in, used them for sex slaves, murdered them and put their remains in barrels in both Missouri and Kansas. He took a plea with prosecutors in Missouri to avoid the death penalty. Missouri has executed at least 87 inmates since 1976. Missouri sent him to Kansas for trial. He was found guilty but was willing to risk the death penalty here. Why? Kansas hasn't executed anyone since 1965 but the fault is not in our statute. Jeffrey Jackson, Washburn University School of Law professor and former death penalty attorney for the Kansas Supreme Court, said in an interview with the Wichita Eagle, ***"There's nothing broken about the Kansas system other than it's definitely not moving as fast as probably people envisioned. ... The Kansas statute is probably as good a death penalty that you're going to find."***²⁰

The Kansas Supreme Court has been repeatedly overturned by the U.S. Supreme Court on death penalty cases. It seems the Kansas Court cannot follow the law. One scathing rebuke of the Kansas Supreme Court from SCOTUS states, in part, "And when the Kansas Supreme Court **time and again invalidates death sentences** because it says the Federal Constitution requires it, "review by this Court, far from undermining state autonomy, is the only possible way to vindicate it." Marsh, 548 U.S., at 184. "When we correct a state court's federal errors, **we return power to the State, and to its people.**"²¹

¹⁹ "Capital Punishment Information," Kansas Department of Corrections, <https://www.doc.ks.gov/newsroom/capital>, accessed Feb. 17, 2019. Inmate Scott Cheever was sentenced to death for the murder of Greenwood County Sheriff Matt Samuels. Inmate Cheever is held in the Administrative Segregation Unit at Lansing Correctional Facility (LCF) due to the number of friends and family of Sheriff Samuels who are employed at EDCF.

²⁰ "Death Penalty: 'This is how it's supposed to work.' October 3, 2015, <https://www.kansas.com/news/local/crime/article37617216.html>, accessed Feb 17, 2019.

²¹ "Kansas v. Carr." Cornell Law School, <https://www.law.cornell.edu/supremecourt/text/14-449>, accessed Feb 17, 2019.

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The court continued in its 8-1 opinion, “Turning a blind eye” in such cases “would change the uniform ‘law of the land’ into a crazy quilt.” Marsh, supra, at 185. And it would **enable state courts to blame the unpopular death-sentence reprieve of the most horrible criminals upon the Federal Constitution when it is in fact their own doing.**²²

It took the Kansas Supreme Court from 1994 until 2015 to finally uphold a death sentence on appeal. Even in the case they upheld, **they threw out some of the convictions.** In every case that was not upheld in that time frame, **not one of them was because the guilt or innocence of the murderer was in question.** The death sentences were **thrown out on technicalities during the appeals process.**²³ The chastisement of our State Supreme Court by the U.S. Supreme Court clearly illustrates why the death penalty in Kansas doesn’t get used - The Kansas Supreme Court invalidates death sentences, repeatedly, and “blame[s] the unpopular death-sentence reprieve of the most horrible criminals upon the Federal Constitution when it is in fact their own doing.”²⁴

A fourth objection to the death penalty is innocent people are convicted and executed. There is no proof that any innocent person has been executed in Kansas – ever. Even those cases overturned by our Supreme Court have been on technicalities. The cases that were overturned later resulted in a plea to avoid the possibility of death when the charges were refiled, or a new trial was scheduled. Plea bargains are valuable tools to prosecutors. When facing these types of heinous crimes, pleas are common. The Judicial Council’s study of thirty-four cases demonstrates that – 53% of the cases were concluded by a plea.²⁵ Removing the death penalty removes pleas. Why plead to life without parole when you know if you are convicted you will receive life without parole?

²² Ibid.

²³ “Why Kansas has not used the death penalty.” KTEN Channel 10, ABC Texoma, Nov. 9, 2017. <http://www.kten.com/story/36795859/why-kansas-has-not-used-the-death-penalty>, accessed Feb. 17, 2019.

²⁴ “Kansas v. Carr.” Cornell Law School, <https://www.law.cornell.edu/supremecourt/text/14-449>, accessed Feb 17, 2019.

²⁵ “Report of the Judicial Council Death Penalty Advisory Committee,” Approved by the Judicial Council, February 13, 2014, <https://kansajudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf>, accessed Feb. 17, 2019.

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“Criminal defendants who are facing the death penalty — which today must be pleaded by prosecutors up front — often want to make a deal by pleading guilty to first degree murder in exchange for a sentencing recommendation of life without parole. The existence of the death penalty as a possible sentence leads to guilty pleas that save the money spent on trials and limit the opportunity for appeals.”²⁶

The death penalty is an effective deterrent to future crime. A murderer sentenced to death and that sentence being carried out guarantees that person will not commit another murder. Life in prison does not guarantee that. Given that eighty percent of all inmates in Kansas prison will eventually be set free, those inmates are at risk of being injured or killed by someone who is convicted of capital murder while they serve their sentence. There is a plethora of studies on the deterrent effect of capital punishment. The results are inconclusive but only because the death penalty is rarely used and takes years before an execution is carried out. However, to make the statement that the death penalty is not a deterrent is a fallacious argument. It ignores those who choose not to murder because of the possibility that they will be put to death.

Punishments which are swift and sure are the best deterrent. This is evidenced by the Olathe, Kansas serial killer. He pled guilty in Missouri to avoid the death penalty because they implement the death penalty. He took his chances with Kansas, knowing our court errors on the side of convicted felons. I imagine he was surprised when our State Supreme Court upheld his sentence.

In my twenty-two-year career in law enforcement I worked jurisdictions where a lot of violent crime was committed. I’ve been a law enforcement officer in three states. I’ve responded to many murder scenes, more than I wanted to. I’ve watched people die, despite the best medical care at the scene. It is horrific. I’ve held a mother as her child, who was shot in the head, died in her arms. I will never forget these incidents and other like them. Years later I still have nightmares about them.

I’ve experienced this type of crime on a personal level. Twelve years ago, my 18-year-old daughter, Kelsey, was kidnapped, raped, sodomized, and strangled to death. Her case made

²⁶ "Local View: Thoughts about the Death Penalty: Correcting the Record," Robert B. Evnen, JD, Attorney and Co-founder of Nebraskans for the Death Penalty, journalstar.com, July 11, 2015, accessed Feb. 17, 2019.

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national and international news because the crime was so heinous. She was missing for four days. Her killer was charged with capital murder in Kansas. He took my daughter across the state line, into Missouri. He could just as easily have been charged in Missouri or even by the federal government.

Those other jurisdictions, Missouri and the federal government, played a part in Kelsey's killer pleading guilty to avoid the death penalty. He pled to life without the possibility of parole in Kansas to make sure that he wouldn't be subject to a death penalty elsewhere. As I said earlier, the death penalty is a tool that can be used to bring cases to a successful conclusion. There is no doubt Kelsey's killer is the person who did all those terrible things to her. There was video evidence, DNA evidence, and fingerprint evidence. He was apprehended with the clothing he wore the day he murdered my daughter. Her DNA was on and in his clothing.

The average death penalty case in the United States takes 11 to 15 years to run its course. Kansas is above the national average. Four of the ten men in Kansas have been in prison for longer than 15 years, undergoing the appeal process. Kelsey's killer was convicted and in prison within 19 months after murdering her. That would not have been the case had the threat of a death penalty sentence not existed. It saved money for the state.

There are several moral and religious arguments against and for the death penalty. I have no intention of going into those today short of sharing this quote: *"The death penalty is the only appropriate punishment that expresses society's moral outrage at those who commit murder. Those who oppose the death penalty are guilty of a misplaced sense of mercy that erroneously equates retribution with vengeance."* - BEN KASIRER Brooklyn, July 9, 1991 Letter to the Editor. I would be happy to offer my thoughts on the moral and religious side of the issue should the committee have questions of me about that.

I provide a unique perspective. Not only have I responded to crime scenes and worked with the families of a homicide victim, I have been that family member as well. I call them "Homicide Survivors," – the family left to cope with the unspeakable. The holidays where the empty chair at the table is a constant reminder of the loss. I refuse to be silent on this issue. I must speak on behalf of Kelsey. Her voice won't be silenced. If I was not testifying in opposition to this bill on

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behalf of the Johnson County Sheriff's Office I would be here testifying in opposition to it as Kelsey's dad – for Kelsey.

And yes, every family deals with grief in a different way. I am not here to cast judgement on the validity of another homicide survivors' feelings concerning this issue. Yet, every time the Legislature decides to bring this issue up, you force every Homicide Survivor to relive their worst day. The pain, the grief, the shock, and the horror all comes back as fresh as the day our loved one was murdered. The "good willed" attempt to salve a conscious causes harm to those who have suffered irreparable harm.

I can say that I support the death penalty. To repeal it would be a miscarriage of justice. Homicide survivors and victims of violent crime often feel that the justice system is really the "just us" system. All the attention falls on the criminal and so little is paid to the victim whose life was brutally, **and without due process**, taken away. There was no consent given to be murdered or sexually assaulted. No consideration of 8th or 14th amendment rights. So many safeguards are in place for the criminal while there are none for the victim or Homicide Survivor.

Today I speak for the Johnson County Sheriff's Office, the largest law enforcement agency in the state of Kansas. We oppose HB 2282 and we ask this committee to do likewise.

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