

STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

February 9, 1978

ATTORNEY GENERAL OPINION NO. 78- 57

Honorable Edward F. Reilly, Jr.
State Senator
Chairman, Committee On Federal
and State Affairs
Room 138-N, State Capitol
Topeka, Kansas 66612

Re: Death Penalty--Proposed Legislation--Constitutionality

Synopsis: Two separate legislative proposals instituting the death penalty for certain criminal offenses, House Bill No. 2863 and Senate Bill No. 599, both more than adequately comply with present, established constitutional parameters.

*

*

*

Dear Senator Reilly:

You inquire as to the constitutionality of two separate proposals before the legislature which would reinstate the death penalty for certain offenses.

House Bill No. 2863 would allow the death penalty for the offense of first degree murder, defined as "the killing of a human being committed maliciously, willfully, deliberately, and with pre-meditation." The imposition of the death penalty would be decided at separate proceedings apart from the adjudication of guilt, conducted by the trial judge before a new jury of twelve (12) persons. In order to impose the death penalty the jury must find "beyond a reasonable doubt" the existence of at least one of seven (7) specified aggravating circumstances, and further that the existence of such circumstance(s) is not outweighed by any mitigating circumstances found to exist, also specified by statute. The statute liberally allows, at such deliberations, the admission of any evidence relevant to the question of sentence, disregarding

Honorable Edward F. Reilly, Jr.

Page Two

February 9, 1978

the rules of evidence. The statute also provides for a special, direct appellate review by the Kansas Supreme Court for all capital cases of the appropriateness of an imposed sentence of death, as well as any other error asserted on appeal.

Senate Bill No. 599 is similar to the House version but differs in some significant respects. It would impose the death penalty for first degree murder defined as premeditated murder, as well as malicious and willful killing of a person during the execution or attempted execution of any one of five (5) felonies. It also uses a bifurcated system of determining the appropriateness of the death penalty in proceedings apart from adjudication of guilt, but would use the trial jury unless they were unable to reconvene. The Senate version also varies slightly the definition of some of the aggravating and mitigating circumstances. A further distinction is that the Senate bill deals with the appointment of counsel in capital and other felonies with great deal more particularity, which, in my opinion, is not a significant difference for the purpose of assessing the relative constitutionality of the proposed measures.

In 1972, the Supreme Court in its landmark decision Furman v. Georgia, 408 U.S. 238 (1972) struck down the death penalty as implemented in every state. That opinion held that the imposition of the death penalty by the then accepted practice of requiring a verdict to that effect to be returned by the jury with its determination of guilt, violated the strictures of the Eighth Amendment ban on cruel and unusual punishment. The unguided and uncontrolled discretion of the jury in invoking this ultimate sanction, the opinion reasoned, has resulted in the arbitrary and freakish application of the penalty, and, for such reason constituted "cruel and unusual punishment" as applied. It deferred consideration of whether the imposition of the penalty in and of itself amounted to a per se constitutional violation.

In the wake of the Furman decision and the resulting uncertainty as to the continued viability of any death penalty legislation no less than thirty-five (35) states enacted new legislation attempting to cure any constitutional defect. Finally in 1976, the Court reconsidered the issue in passing judgment on five (5) different state legislative schemes reinstating the death penalty in the post Furman era. The court found the legislation implemented by Georgia, Texas, and Florida to be constitutionally proper, Gregg v. Georgia, ___ U.S. ___, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, ___ U.S. ___, 49 L.Ed.2d 913 (1976); Jurek v. Texas, ___ U.S. ___, 49 L.Ed.2d 929 (1976); while attempted legislation in North Carolina and Louisiana were declared unconstitutional, Woodson v. North Carolina, ___ U.S. ___, 49 L.Ed.2d 944, (1976); Roberts v. Louisiana, ___ U.S. ___, 49 L.Ed.2d 974 (1976). These decisions provide definitive guidelines for avoiding constitutional infirmities in death penalty legislation.

Honorable Edward F. Reilly, Jr.

Page Three

February 9, 1978

In sustaining the Georgia approach, the Court held that the imposition of the death penalty was not per se unconstitutional. In the Gregg opinion the Court noted the traditional two-prong analysis in assessing Eighth Amendment "cruel and unusual punishments" violations: 1) whether the infliction of a punishment is considered barbarous or offends evolving standards of decency, and 2) whether the nature of the punishment is grossly disproportionate to the severity of the offense. The Court concluded that wide-spread, societal acceptance of the death penalty as evidenced in part by the positive reaction of thirty-five state legislatures precluded a finding of the former. As to the latter, the Court considered only the imposition of the penalty for the convictions in the instant appeals, first degree murder, and found it not disproportionate to the nature of the offense. It should be emphasized, though several of the statutes scrutinized authorized the death penalty for a variety of offenses, none of the affirming opinions treated the question of per se validity of the punishment as applied to crimes not involving deliberate murder. That question remained open.

"But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender . . ."
49 L.Ed.2d at 882.

In fact, a subsequent Supreme Court opinion has struck down that portion of the Georgia statute which authorized the imposition of death for the crime of rape. Coker v. Georgia, _____ U.S. _____, 97 S.Ct. 2861 (1977).

As to the defects in the arbitrary application of the penalty denounced in Furman, an analysis of the three core opinions sustaining enacted legislation provides clear guidelines for remedying the vice of unbridled jury discretion in imposing the penalty. Those decisions uniformly intimate that the following characteristics would be viewed favorably in assessing the constitutionality of any scheme imposing the penalty: 1) a bifurcated system of guilt determination and sentence imposition, with the liberal admission of any evidence relevant to sentencing at the latter notwithstanding the formal rules of evidence, 2) specific standards guiding the sentencing authority which focuses attention on the specific characteristics of the crime and the offender by requiring consideration of a specified list of aggravating circumstances and mitigating circumstances, and a definitive statement as to which aggravated circumstances were actually found to exist before imposing a death sentence, 3) providing extraordinary appellate review of capital offenses in which a sentence of death is imposed in order to insure the evenhanded application of the penalty in similar cases.

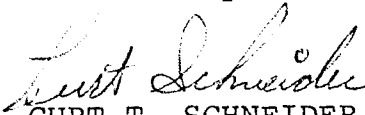
Honorable Edward F. Reilly, Jr.
Page Four
February 9, 1978

In implementing legislation as suggested by Gregg v. Georgia, et. seq., a critical consideration and continuing area of constitutional concern lies in the drafting of the list of aggravating and mitigating circumstances. These standards must be specific and must not overly broad or so vague as to provide the jury with too much discretion in applying the factors in the sentence determination process. Should such factors be found to provide a license for unlimited discretion, the legislation would be constitutionally deficient. Gregg v. Georgia, supra, at 889-891.

Both versions of death-penalty legislation submitted for opinion substantially track the guidelines provided in the 1976 Supreme Court decisions on the issue and in my opinion are constitutionally sound.

The list of aggravating circumstances specified in both the Senate and House versions are generally of the same genre as those specified in the Georgia and Florida statutes, which were approved as sufficiently limiting the sentencing authority's discretion. Any differences between House Bill 2863 and Senate Bill No. 599, though perhaps reflecting significant issues as to social policy, are of no consequence in assessing the constitutionality of the legislation.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:RNW:jj