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ATTORNEY GENERAL OPINION NO. 79-300

The Honorable Edward F. Reilly, Jr.
State Senator, Third District
430 Delaware
Leavenworth, Kansas 66048

Re: Crimes and Punishments -- Classification of Crimes and Penalties -- Life Sentence without Parole

Synopsis: Provided the constitutional and procedural sentencing standards as mandated by Furman v. Georgia, 408 U.S. 238 (1972) are employed, the Kansas legislature may provide for the imposition of a life sentence without the opportunity for parole.

* * *

Dear Senator Reilly:

You have inquired of this office whether the Kansas Legislature may constitutionally enact legislation providing for the imposition of a life sentence without eligibility of parole for violation of criminal laws to be specified in such legislation. While it is premature for us to opine as to the constitutionality of specific legislation, your general inquiry is of importance to this office and the citizens of the State of Kansas.

In Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977) the court dealt with consolidated appeals involving the Kentucky life imprisonment

without parole statute. The Kentucky statute (Ky. Rev.Stat. §435.090), which was the subject of the appeal, states:

> "Any person who unlawfully carnally knows a female of and above twelve (12) years of age against her will or consent, or by force or while she is insensible, shall be punished by death, or by confinement in the penitentiary for life without privilege or parole or by confinement in the penitentiary for life, or by confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years." (Emphasis added.)

In upholding the constitutionality of the above, the court states as follows:

> "This leaves for consideration the issue common to all appellants -- the constitutionality of the Kentucky statutes under which they were sentenced.
>
> "Several challenges are advanced to the statute. The most significant are that the penalty of life imprisonment without parole constitutes cruel and unusual punishment in contravention of the Eighth Amendment, and that as the statute contains a classification by sex it violated federal constitutional guarantees of equal protection. The court does not believe that the other arguments which have been advanced have sufficient merit to warrant specific discussion.
>
> "As regards the claim that the penalty represents constitutionally impermissible cruel and unusual punishment, it is important to bear in mind that the statute did not require life without parole as a mandatory punishment for rape. That sentence was but one of the alternatives available to the jury. We must assume that the Kentucky juries considered the various alternatives before returning the sentences of life imprisonment without parole, and that their determinations were based on the facts before them in each case. Unless such a sentence is constitutionally invalid we cannot substitute our judgments for those of the juries in the cases before us.
>
> "In support of the claim that the penalty constitutes cruel and unusual punishment appellants argue that it has been

> substantially rejected in contemporary society, including repeal by the Kentucky legislature in 1974. Assuming for the sake of argument that the more enlightened view would be against what has been characterized as a 'life without hope,' we are here called upon to render a constitutional judgment, and while sociological factors may be relevant they are not controlling.
>
> "In the final analysis, having fully considered appellants' arguments on this aspect of the matter, we believe that at this time we are bound to apply the rationale of Schick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974). While the precise question presented in these actions was not before the Supreme Court in that case, the Supreme Court in sustaining the commutation of a death sentence to life without parole stated that:
>
> > " 'The no-parole condition attached to the commutation of [petitioner's] death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole; it does not offend the Constitution. 419 U.S. 256, 267, 95 S.Ct. 379, 385 (Emphasis added).'
>
> "Until the Supreme Court alters such view of the mandatory life sentence without parole we must reject the argument that such a sentence constitutes cruel and unusual punishment." Moore v. Cowan, 560 F.2d at 1302, 1303. [Footnotes omitted].

The court stated in footnotes that appellants submitted that the statute had been applied by juries in a racially discriminatory fashion. However, the court noted two of the appellants were white and two were black. Additionally, the court indicated the argument characterizing the punishment as "life without hope" disregarded the possibilities of commutation or pardon.

In Gov't. of Virgin Islands v. Gereau, 592 F.2d 192, 195 (3rd Cir. 1979) the court also faced the issue of a criminal sentence of life imprisonment which precludes the possibility that the defendant may be paroled, and concurs with Moore. Although the sentence in Gov't of Virgin Islands, supra, was not per se life without parole, the earliest parole date available to the inmate was August 13, 2053. Thus, the Court treated the issue as being substantially similar to that in Moore v. Cowan, supra.

It is of significant import to note that the above cited sentencing schemes did not involve procedures which mandate the imposition of a life sentence without parole automatically upon conviction of a specified crime or crimes. It is our opinion that such schemes are constitutionally suspect in light of the landmark capital punishment decisions of Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 238 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976). As established by Furman v. Georgia, supra, the unique nature of the death penalty necessitates sentencing procedures which insure that the punishment is not imposed in a wholly arbitrary manner.

The imposition of a life sentence without the eligibility for parole in our judgment, based upon the above and foregoing, should be preceeded by a proceeding in which the sentencing authority considers such factors as the characteristics of the crime and those of the offender subject to appellate review.

It is thus our opinion that life without parole may constitute a possible punishment of those who through criminal conduct injure the innocent in our society.

Very truly yours,

Robert T. Stephan

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Thomas D. Haney

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RTS:TDH:may