



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

February 17, 1976

ATTORNEY GENERAL OPINION NO. 76-57

Honorable Edward F. Reilly, Jr.  
Kansas State Senator  
District No. 3  
State Capitol Building  
Topeka, Kansas

Re: Senate Bill 740 -- An act requiring a sentence of death upon conviction of murder in the first degree.

Synopsis: Senate Bill 740 does meet the constitutional requirements of *Furman v. Georgia* in providing for a mandatory sentence of death upon conviction of murder in the first degree.

\* \* \*

Dear Senator Reilly:

You inquire whether Senate Bill 740, a proposal mandating the death penalty for those convicted of premeditated first degree murder, meets the dictates of the Eighth and Fourteenth Amendments to the Constitution of the United States.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court in a 5-4 decision declared that the death penalty, as imposed by the particular statutes of Georgia and Texas which were then before the Court, was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Because each member of the majority and dissent wrote a separate opinion, the precise scope of the decision is unclear. The Court did not hold, however, that capital punishment per se violated the Eighth

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Amendment since three members of the majority limited their opinions to statutes which allowed sentencing authorities uncontrolled discretion in capital cases. Thus, the decision did not preclude Congress and the state legislatures from attempting to enact constitutionally acceptable death penalty laws.

The *Furman* opinions suggest that "uncontrolled discretion" in the sentencing authority was the reason for striking down the disputed statutes. However, the nine separate opinions provide little in terms of concrete guidelines for drafting a procedure which can meet constitutional standards. An examination of the plurality opinions in *Furman* reveals that although the approaches of the Justices differed, they all objected to the presence of discretion in the sentencing authority and the arbitrary imposition of death sentences. Under the limited opinions of Justices Douglas, Stewart and White, a legislature must remove from the sentencing authority the ability to impose the death sentence in a purely arbitrary manner.

Senate Bill No. 740 allows no discretion in the sentencing authority inasmuch as death is the mandatory sentence every defendant convicted of premeditated first degree murder must receive. It is therefore my opinion that this bill would satisfy constitutional standards under the reasoning of *Furman v. Georgia* since discretion in the sentencing procedure is eliminated.

The *Furman* decision, however, did not necessarily define the limits of the Eighth Amendment's guarantees. The Court has not spoken to the presentencing or post conviction discretionary powers of the prosecution, jury or the governor, nor has it determined whether capital punishment is unconstitutional for all crimes and under all circumstances. Under the present ruling of the Court, however, this bill mandating that the sentence upon conviction of murder in the first degree shall be death, appears to meet the present requirements of the Constitution.

Very truly yours,

  
CURT T. SCHNEIDER  
Attorney General

CTS:DLW:en