

**House Committee on Judiciary**  
**February 15, 2024**  
**House Bill 2782**  
**Testimony of Kelson Bohnet, private citizen**  
**OPPONENT**

Chairperson Humphries and Members of the House Committee on Judiciary:

I am a Capital Public Defender in the Kansas Death Penalty Defense Unit. I have been a public defender for my entire legal career, and my practice is solely devoted to the trial-level representation of those facing the death penalty in our state. Today, I bring my grave concerns about H.B. 2872. I strongly urge you to reject this legislation because its horrific terms cannot fix Kansas' already-broken death penalty system.

*The Creation of a Legal Quagmire*

Death is different. This is a maxim repeated over and over by the United States Supreme Court. "Death is . . . unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering."<sup>1</sup> "From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."<sup>2</sup> "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."<sup>3</sup>

Because death is different, capital defense counsel has special ethical and constitutional duties to those facing a state-sponsored killing. Our clients are on trial for their lives. No objection can go unmade. No motion can go unfiled. We must exhaustively investigate and litigate every single aspect of the government's case.<sup>4</sup> If we do not, we fail not only our clients, but everyone who believes in the Constitution.

If H.B. 2782 was meant to introduce swiftness and certainty, and to foreclose protracted death penalty litigation, it is a miserable failure. This legislation will only increase uncertainty and prolong the legal process that accompanies these cases. A brief, non-exhaustive list of the bill's problems in this vein are as follows:

- The bill's use of the word "hypoxia," which itself is a misapplied term, evokes the recent execution of Kenny Smith in Alabama by nitrogen gas. As other testimony before this committee demonstrates, that execution was an affront to dignity and justice. Kansas courts will have to receive copious amounts of evidence regarding the sheer horror that suffocation can bring, and that litigation will come in every case because of the Department of Corrections' potentially unchecked power, as discussed below.

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<sup>1</sup> *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J. concurring).

<sup>2</sup> *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

<sup>3</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

<sup>4</sup> See generally *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008).

- While paving the way for suffocation as an execution method, H.B. 2782 provides no scientific or practical guidance whatsoever on how to achieve an execution by suffocation. There are horrific ways almost beyond imagination to suffocate someone, and this bill prohibits precisely none of them. This cruelty and vagueness is ripe for constitutional attack;
- By excising the Department of Health and Environment, H.B. 2782 removes scientific oversight and inappropriately vests the Secretary of Corrections with nearly all decision-making power in the execution process. The Department of Corrections contracts with outside vendors for nearly all medical care, and has no known in-house medical experts. Worse yet, Corrections' power would not be checked or balanced in any real way, leaving the door wide open to the possibility of wanton change and discriminatory application. That is an unconstitutional and overly-vague delegation of power that should be in the hands of the legislative branch, courts, or multiple collaborating executive agencies;
- The bill also tries to redefine "swift and humane" and change execution warrant procedures in a way that purports to hasten executions. This is an attempted end-run around well-established rights and review under state and federal law. Not only will the Attorney General fail to achieve what he seeks, but he and his subordinates will spend *more* time and resources in a fruitless defense of this bill before state and federal judges.

The capital defense community will have a constitutional and ethical obligation to lay siege to the terms of H.B. 2782. Because of this, and because the bill is so poorly conceived and written, its passage would only bring more uncertainty, delay, and conflict to the capital legal process. This will only increase judicial resource strain and amplify the pain of victim family members and all others involved. Ultimately, this bill will ironically frustrate the Attorney General's stated goals.

### *The Consequences of Rejecting Human Dignity*

In 2014, the elected District Attorney of Johnson County, Kansas asked the Legislature to retain the death penalty because of its supposed effectiveness as a plea bargain tool.<sup>5</sup> This is offensive on two dimensions. First, extorting a waiver of constitutional trial rights through the threat of execution threatens basic decency and fairness; in fact, our federal justice system specifically bans prosecutors from this behavior.<sup>6</sup> Second, this statement is ignorant of the realities of capital representation and criminal case resolution.

When capital defense clients come to their attorneys, they are uniformly in a state of mental and emotional crisis. They nearly all suffer from some combination of severe mental illness, cognitive disability, substance abuse-related health issues, and acute trauma. They are often suicidal and partially or fully non-communicative. Stabilizing the client and developing trust and rapport is an enormously difficult task even in the best of circumstances. Without this meticulous relationship-building over months or years, it is impossible to learn the dark life secrets that may lead to the development of mitigating evidence and resolution with the prosecution.

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<sup>5</sup> Written Testimony of Stephen M. Howe, S.B. 126, Senate Judiciary Committee (Jan. 21, 2014).

<sup>6</sup> United States Dept. of Justice, Justice Manual 9-10.120, *available at* <https://www.justice.gov/jm/jm-9-10000-capital-crimes>.

As someone who has brought clients the news that their government is seeking to kill them, I know the reaction this news brings. It does not bring careful cost-benefit analysis. It does not bring reasoned weighing. It hastens nothing. It simplifies nothing. Instead, I see the pressure of that ultimate condemnation weigh upon a human being. Anxiety and depression increase because the ultimate government action is challenging that person's very humanity. So often, crisis for the client begins anew and communication, openness, and case progression all suffer.

I now think of that conversation under the shadow of H.B. 2782. Now, not only must a client learn that he could be poisoned to death, but he must learn that there is no practical check or backstop on what Kansas can put into his veins. I must then tell him that he can also be gassed to death, based upon an idea that originated in a 1995 idea from a screenwriter who had no medical training.<sup>7</sup> Worse yet, he could be suffocated by some means that I cannot even conceive of yet. It is hard to imagine any human being not retreating into defiance or despondency in that situation, and that is especially true when considering the starting point of most capital clients. When viewed through the reality of resolving cases steeped in human tragedy, H.B. 2782 is only likely to prolong the agony of everyone involved in a capital case.

*A Public Policy Failure*

The failures of H.B. 2782 are obvious because, over the nearly 50 years of the modern era of the death penalty, the broader failures of capital punishment have become obvious as well. That is because the death penalty never falls on the 'worst of the worst.' It falls on broken and sick people. It is impossible to devise a fair and non-arbitrary system for the imposition of state-sanctioned killing. It will never be swift and certain. Even the threat of this bill's terms will do nothing to end these cases. When considering those issues alongside the lack of deterrence, the risk of executing the innocent, its exorbitant cost, and other systemic failings, it is clear that the death penalty is a massive failure of government and policy. H.B. 2782 cannot fix what is already broken beyond repair.

Please oppose H.B. 2782. Thank you for your time and consideration.



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<sup>7</sup> Scott Christianson, *How Oklahoma Came to Embrace the Gas Chamber*, The New Yorker, <https://www.newyorker.com/news/news-desk/how-oklahoma-came-to-embrace-the-gas-chamber> (Jun. 24, 2015).