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House Committee on Judiciary
February 15, 2024
House Bill 2782
Testimony of Sean D. O'Brien
OPPONENT

Dear Committee Members,

Thank you for this opportunity to address you in opposition to HB 2782 which would adopt nitrogen hypoxia as the method of executing Kansas prisoners under sentence of death.

I am a professor at UMKC School of Law, where I teach courses in criminal law and procedure, mental health, investigation, wrongful convictions and the death penalty. I also taught a course on Problems and Issues in the Death Penalty and a Death Penalty Clinic at Washburn University School of Law in Topeka until I joined the UMKC Law faculty in 2006. I was a faculty colleague of Attorney General Kris Kobach, although neither of us represent the views of UMKC Law School on this issue.

I was appointed to represent my first capital client in Missouri in 1983; I have been appointed by State and Federal courts to represent clients under sentence of death in six states; I have testified as an expert on issues affecting the administration of capital punishment before courts, legislative bodies and administrative decision makers in seventeen states, including Kansas, and in the U.S. Court of Military Justice. I am the primary author of the national Supplementary Guidelines on the Mitigation Function of Defense Teams in Death Penalty Cases. In 2014, I was invited by the Japan Federation Bar Association to train death penalty defense lawyers in Osaka and Tokyo, Japan, our only close ally that still uses capital punishment. In the last forty-one years I have represented and counseled many men, women and children under sentence of death. In all of my travels and testimony, I have never encountered a decision-maker who aspired to make their system of capital punishment look more like Alabama's.

I was asked to provide my perspective on the proposed legislation to adopt nitrogen hypoxia as the method of execution in Kansas. I understand you will hear from people more qualified than I to address what medical science understands to be the effect of death by this method. I do know that it is not used to euthanize livestock or pets, and death by suffocation would be considered animal abuse in most states. Only once has it been used intentionally to end a human life in the State of Alabama, with disturbing results. I watched my father die of COPD, and the accounts of Kenneth Smith's execution are reminiscent of that horrible experience—tremors, convulsions, gasping for breath and writing in distress for twenty-two minutes. It was not the painless death that was advertised that it would be. It was a human experiment that failed, just as every subsequent attempt to execute a human being by suffocation will be.

When I first began representing people under sentence of death in Missouri, the gas chamber was the only authorized method of execution. Reports of deaths by lethal gas are plentiful, and descriptions of such executions are similar to those provided by media witnesses to the death of Kenneth Smith --a prolonged death that involved gasping for breath, writhing, and convulsing. I have witnessed my clients' trauma that is inherent in being housed in death row conditions while awaiting the execution. In those discussions in the early 1980s, I remember distinctly the added fear and distress that came from my clients' anticipation of a painful death by lethal gas.

Even worse, four of my clients sentenced to death in that era were eventually exonerated of the murders for which they were condemned to die by lethal gas; the two who are still living, Joe Amrine and Reggie Griffin, continue to suffer disabling Post Trauma Stress Disorder from that horrifying experience. Please accept my word for this; a decision was made not to ask them to relive their experience for the benefit of this committee. I don't want to mislead you; would they have developed PTSD symptoms regardless of the method of execution? Of course they would have. But was the experience that much more horrifying because they anticipated a painful, lingering death? I have no doubt this is also true.

I respectfully suggest that death by lethal gas is the wrong conversation for this distinguished body to be having at this moment in history. The United States has always taken pride in being a beacon of freedom and human rights in the world, but that status is diminished by this very discussion. Already our closest

allies in Europe, North and South America, Australia, and parts of Africa and Asia consider it a violation of International Law to extradite a prisoner to face capital charges in the United States not because we practice capital punishment, but because of the way in which we administer the death penalty.

Kansas is better than this. It has always been out front on issues of human rights, no matter how controversial at the time. Before the Civil War, Kansas ratified the Wyandotte Constitution, which prohibited slavery and earned its proud identity as The Free State. In 1903, Kansas became one of the first States to make mob lynching a felony offense. Kansas never adopted Jim Crow laws, and in 1925, Kansas outlawed the Ku Klux Klan. These institutions have a close historical correlation to the death penalty; it is no accident that States in the Deep South are known as the Death Belt in modern times. In the Supreme Court case of *Kansas v. Marsh*, I co-authored a brief on behalf of Kansas Law Professors defending the Kansas Supreme Court's interpretation of the Kansas capital punishment statute, and the right of Kansans to make their own decisions about what modern standards of decency demand in a capital sentencing trial.

In the modern era of the death penalty, Kansas has been the voice of moderation. When it revived the death penalty in 1994, Kansas exempted persons with intellectual disability from the death penalty, eight years before the Supreme Court declared the practice unconstitutional. I testified before this body ten years ago, with the support of the Kansas Attorney General, in support of legislation that increased the protection for intellectually disabled people facing prosecution for possibly capital crimes. I would like to see this body discuss similar protections for people with severe mental illness, which other states have begun to consider. We are The Free State. HB 2782 is the wrong discussion for Kansas to be having.

Don't be like Alabama.

Respectfully submitted,



Sean D. O'Brien