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ATTORNEY GENERAL OPINION NO. 2025-26

Justin Whitten
General Counsel
Kansas Governor Laura Kelly
Room 541-E
300 SW 10th Ave.
Topeka, KS 66612

Re: Criminal Procedure—Uniform Criminal Extradition Act—Fugitives from Justice; Duty of Governor

Synopsis: Kansas does not have discretion to refuse extraditions of fugitives under Article 4, Section 2 of the United States Constitution or the Uniform Criminal Extradition Act, K.S.A. 22-2701, *et seq*. The Governor may request that the demanding state enter into an executive agreement, conditioning extradition on the demanding state's agreement not seek the death penalty. But the demanding state may not be forced to enter into any executive agreements. Ultimately, the enforceability of such an agreement is questionable given Article IV, Section 2; the inherent roles of distinct elected officials; and the changes in the Kansas Governor over time. Additionally, Kansas may seek extradition of a capital defendant in the future, and limiting extradition of capital defendants from this State may present problems in those cases. Cited herein: U.S. Const. Art. IV, § 2; K.S.A. 22-2701 *et seq*.

Dear Mr. Whitten:

As Chief Counsel to Governor Laura Kelly, you ask: (1) Whether the Governor has the discretion to not extradite individuals to jurisdictions that would be seeking the death penalty? (2) What consequences, if any, exist for the failure to extradite death-eligible fugitives? (3) Alternatively, whether the Governor could condition extraditions pursuant to a voluntary agreement that the demanding state not seek the death penalty? and (4) Whether any other states condition extraditions upon the demanding state's agreement not to seek the death penalty?

The short answers to your questions are: (1) under Article IV, Section 2, of the United States Constitution, a governor does not have discretion in the extradition of fugitives; (2) any refusal to extradite would subject the State to suit and a court order compelling the extradition; (3) while the Governor may enter into executive agreements with other states, including a limitation on the punishment to be imposed, any such agreement's enforceability would be subject to challenge; and (4) no other states are currently inhibiting the extradition of capital fugitives from other states.

1. The Governor does not have discretion in the extradition of fugitives.

A state has no discretion to withhold a fugitive from extradition under Article IV, Section 2 of the United States Constitution or the Uniform Criminal Extradition Act, adopted by Kansas at K.S.A. 22-2701, *et seq*. Article IV, Section 2 of the United States Constitution is mandatory: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Accordingly, a state cannot withhold an otherwise lawfully demanded extradition.[1] *Puerto Rico v. Branstad* involved an extradition from a territory to a state.[2] The Supreme Court of the United States affirmed that the Extradition Clause, Article IV, Section 2, was mandatory—that executive officers of the asylum state lack discretion in the extraditions of fugitives.

The *Branstad* court also examined the extradition act, finding that it does not provide discretion when a state is presented with an extradition demand for a fugitive.[3] Similarly, K.S.A. 22-2702 imposes a duty on the Governor to deliver the fugitive to the demanding state: "[I]t is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state." Therefore, under both the United

[1] *Puerto Rico v. Branstad*, 483 U.S. 219, 224–29 (1987).
[2] 483 U.S. at 227.
[3] *Id.* at 229–30.

States Constitution and Kansas's legislative adoption of the UCEA, the Governor has no discretion in the extradition of fugitives when faced with a lawful demand.

The Governor does, consistent with the United States Constitution and Kansas statutes, retain discretion in the extradition of a non-fugitive. A non-fugitive is an individual who, without ever being physically located in the demanding state, commits an act that intentionally results in a crime in the demanding state.[4] K.S.A. 22-2706 uses discretionary language: "The governor of this state may also surrender [a non-fugitive charged with a crime in the demanding state]." A common example of these types of defendants are those who commit internet crimes against children—the place where the victim reports to law enforcement becomes the place where the crime results. On its face, capital murder is not a non-fugitive crime, but, even if it were, it would have to be charged and the application would have to divulge the fact that the case is a non-fugitive case.

2. Any refusal to extradite would subject the State to suit and a court order compelling the extradition.

The practical consequences for the State of Kansas of a refusal to extradite a fugitive are two-fold. First, the demanding state would likely sue Kansas to compel the extradition, and Kansas would lose under *Branstad*. Second, while extradition is constitutionally required, other states might respond to Kansas's unconstitutional refusal by delaying any extradition requested by Kansas until such time as Kansas complies. In short, it would set a dangerous precedent for Kansas to refuse extradition based on the type of punishment available in a capital case.

3. While the Governor may enter into executive agreements with other states, including a limitation on the punishment to be imposed, the enforceability of any such agreement would be limited.

As explained above, the United States Constitution requires an asylum state to extradite a fugitive.[5] Given the constitutional mandate and the UCEA's mandatory language set forth in K.S.A. 22-2702, there is no authority allowing Kansas to withhold a properly demanded fugitive. Thus, it is our opinion that any conditioned extraditions are unlawful. Even if, as discussed below, two states entered into an executive agreement, it is not clear that such an agreement would be enforceable as Kansas cannot, consistent with Article 4, Section 2, condition extradition upon a limitation of the punishment. Accordingly, even attempting to negotiate such an executive agreement would be a hollow gesture, if the state demanding extradition does not agree.

[4] K.S.A. 22-2706.
[5] U.S. Constitution, Article IV, Section 2.

It is true that the governors of the various states may enter into executive agreements. Theoretically, an executive agreement might allow a governor to condition an extradition on a limitation of the punishment. But two concerns arise: (1) the demanding governor's ability to limit the local prosecutor's authority to seek the death penalty and (2) the necessary difference in time between the agreement and the eventual trial/appeal from the conviction. It strikes us as a state-by-state issue as to whether the governor of the demanding state may agree to something that falls within the local prosecutor's discretion. Also, the passage of time between the extradition of a capital defendant and any conviction and sentence could be years. Consequently, there could be a change in the occupant of either state's governor's office before the agreement's effect could be litigated, raising further doubts about the enforceability of such an agreement.

4. No other states are currently inhibiting the extradition of capital fugitives.

In addition to the fact that Article IV, Section 2, precludes any limitations on extraditions of capital fugitives, we are not aware of similar attempts to restrict inter-state extraditions. Missouri is an active capital litigator that makes extradition requests. They do not report any resistance to extraditions in capital cases from other states.

In conclusion, the governor does not have the authority to refuse a lawfully demanded extradition of a fugitive—even when the other state is seeking the death penalty. Neither the United States Constitution nor Kansas law authorize the governor to refuse the extradition of a fugitive, even though the governor has discretion in extraditions of non-fugitives. Furthermore, conditioning extradition on an agreement not to seek the death penalty is legally questionable.

Sincerely,

/s/ Kris W. Kobach
Kris W. Kobach
Attorney General

/s/ Tyler W. Winslow
Tyler W. Winslow
Assistant Solicitor General