Approved: 12-18-2010
Date

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Pat Colloton at 1:30 p.m. on February 4, 2010, in Room 144-S of the Capitol.

All members were present.

Committee staff present:
Sean Ostrow, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jackie Lunn, Committee Assistant

Conferees appearing before the Committee:
Marc Bennett, Deputy District Attorney, Eighteenth Judicial District
Steve Howe, District Attorney, Tenth Judicial District
Ed Brancart, Deputy District Attorney, Twenty-Ninth Judicial District
State Representative Lance Kinzer
Jennifer Roth, Attorney
Tom Stanton, Deputy Reno County , District Attorney
Judge Daniel Dale Crietz, Thirty-First Judicial District

Others attending:
See attached list.

Marc Bennett, Deputy District Attorney, Eighteenth Judicial District
Steve Howe, District Attorney, Tenth Judicial District
Ed Brancart, Deputy District Attorney, Twenty-Ninth Judicial District
State Representative Lance Kinzer,
Jennifer Roth, Attorney
Tom Stanton, Deputy Reno County , District Attorney
Judge Daniel Dale Crietz, Thirty-First Judicial District

HB 2518 - Proportionality of sentencing; merging the drug and nondrug sentencing grids.

Chairperson Colloton called the meeting to order and opened the continued hearing on **HB 2518** and introduced Tom Stanton, Kansas County and District Attorneys Association (KCDAA), to give his testimony as an opponent of the bill. Mr. Stanton presented written copy of his testimony. (Attachment 1) He stated that the KCDAA does not support the bill in its current form. They believe the purpose of this legislation is to combine the drug and non-drug grids of the sentencing guidelines act. He went on to voice all their concerns with this legislation stating this legislation does not provide prosecutors the tool they need. In closing, he stated there should be two grids; or the drug crimes should be subject to the exact same grid as non-grid crimes.

A discussion followed.

Chairperson Colloton called the Committee's attention to the "written only" opponent testimony of Steve Howe, District Attorney, Tenth Judicial District, (Attachment 2) and Marc Bennett, Deputy District Attorney, Eighteenth Judicial District, on behalf of Nola Tesesco Fauston, District Attorney, Eighteenth Judicial District of Kansas and representing the Kansas County and District Association. (Attachment 3).

Chairperson Colloton recognized Ed Brancart, Deputy District Attorney, Twenty-Ninth Judicial District, to give his testimony as an opponent of **HB 2518.** Mr. Bancart presented written copy of his testimony. (Attachment 4) He stated the bill does not make punishments proportionate to the crime and therefore, he is opposed to the bill the way it is written.

Questions and answers followed with Chairperson Colloton asking the KCDAA to get with Jason Thompson, Office of the Revisor of Statutes, to draft a balloon for the Committee's consideration.

Chairperson Colloton called for any others wishing to testify on **HB 2518**. Tom Drees requested to be recognized to gave his response to the testimony of the opponents. Mr. Drees explained presumption and stated the bill gives a rebutable presumption.

With no others to speak to the bill, Chairperson Colloton closed the hearing on **HB 2518** and opened the hearing on **HB 2435.**

HB 2435 - Certain crimes in which the penalty is an offgrid felony, attempt, conspiracy and criminal solicitation are also offgrid; aggravated habitual sex offender.

Chairperson Colloton called on State Representative Lance Kinzer to give his testimony as a proponent of **HB 2435.** Representative Kinzer presented written copy of his testimony (Attachment 5) He stated the bill responds to two recent Kansas Supreme Court decisions that had the effect of reducing criminal sentences for sex offenders in Kansas. These recent Court opinions have made it imperative that we join together to make sure that we have a law in place that protects Kansans, and especially children, by appropriately punishing those who prey upon them.

Chairperson Colloton introduced Marc Bennett, Deputy District Attorney, Eighteenth Judicial District of Kansas, on behalf of Nola Tesesco Fauston, District Attorney, Eighteenth Judicial District of Kansas and representing the Kansas County and District Association to give his testimony as an opponent of **HB 2435.** Mr. Bennett presented written copy of his testimony. (Attachment 6) He stated they believe the bill accurately reflects the specific intent of Jessica's Law when it went into effect on July 1, 2006, and further corrects the inconsistency found by the court in State v. Horn.

A discussion followed with Chairperson Colloton calling on Jason Thompson, Office of the Revisor of Statutes, to draft a balloon with the changes Mr. Bennett has submitted , for the Committee's consideration.

Chairperson Colloton introduced Stacey Donovan to give his testimony as an opponent of **HB 2435.** Mr. Donovan presented written copy of his testimony. (Attachment 7) Mr. Donovan stated that Jessica's Law casts too broad a net and many changes need to be made.

A short discussion session followed.

With no others to testify, Chairperson Colloton closed the hearing on **HB 2435** and opened the hearing on **HB 2468.**

HB 2468 - Requiring offenders guilty of attempt, conspiracy or solicitation to commit any crime requiring offender registration for life to register as an offender.

Chairperson Colloton called on Marc Bennett, Deputy DA, Eighteenth Judicial District, to give his testimony as a proponent on **HB 2468.** Deputy DA Bennett presented written copy of his testimony. (Attachment 8) He stated he Eighteenth Judicial District Attorney, Nola Tedesco Foulston, endorses this bill and feels that the proposed legislation appropriately corrects the inconsistency in the Sexual Offender Registration Act.

A short discussion followed.

With not others to testify, Chairperson Colloton closed the hearing on **HB 2468** and opened the hearing on **HB 2489.**

HB 2489 - Providing sentencing requirements and punishments for postrelease supervision violators.

Chairperson Colloton introduced Tom Stanton, Deputy Reno County DA, to give his testimony as a proponent of **HB 2489.** Deputy DA Stanton presented written copy of his testimony. (Attachment 9) He stated this legislation will divest the district court of the discretion to reduce sentences upon execution thereof, for a violation of community corrections or court services. He went on to explain that current law requires a defendant be sentenced within the presumptive grid box based on the crime of conviction and the defendant's

personal criminal history score. In closing, he stated there needs to be integrity in the court system and urged the Committee to favorably consider this legislation.

A question and answer session followed.

Chairperson Colloton called the Committee's attention to the "written only opponent" of Judge Daniel Dale Creitz, Thirty-First Judicial District. (Attachment 10)

With no others to speak or testify, Chairperson Colloton closed the hearing on **HB 2489** and opened the floor for the continuation of consideration of **HB 2413.**

HB 2413 - Sub for H 2413 by Committee on Corrections and Juvenile Justice - Increasing traffic fines to fund increases in alcohol and drug therapy program for DUI offenders.

Representative Spalding made a motion to amend the bill by adopting the substitute bill for HB 2413 and report it out favorably. Representative McCray-Miller seconded.

A discussion followed. The changes on page 9 of the bill were discussed in great length.

Chairperson Colloton called for a vote on the motion on the floor. **Motion carried.**

Next, Chairperson Colloton introduced Representative Bethell, chairman, of the sub-committee on offender registration issues on the drivers license. Representative Bethell reported the sub-committee has met and they found there is no requirement in the statute that the words offender be put on the drivers license. What is in the statute is the drivers license has to have, readily available, a code to designate the type of registered offender. To take the words "registered offender" off the drivers license it would cost $10,000. However, negotiations are underway at this time to have a new drivers license format and at the time they change to the new format they could take it off the back and could recommend an RO designation along with a number designating sexual, violent or drug offense. This could be located on the lower right corner on the front side of the drivers license.

HB 2640 - Kansas offender registration act; changing penalties for aiding a person required to register and failure to register by a person required to register

Chairperson Colloton called on Jason Thompson, Office of the Revisor of Statutes, to explain **HB 2640 .** Mr. Thompson stated the bill was in regards to the offender registration act. The bill would change the penalties for aiding a person required to register and failure to register by a person required to register. Aiding would change from a level 5 to a level 10 and failure to register from a level 5 to a 9. Chairperson Colloton informed the Committee the hearing on **HB 2640** would be next week and called their attention on **HB 2454** for consideration.

HB 2454 - Enhanced criminal penalty for felonies committed while wearing or using ballistic resistant material

Representative Roth made a motion to pass HB 2454 out favorably. Representative Pauls seconded. Motion carried.

Chairperson Colloton adjourned the meeting at 3:10 p.m. with the next meeting scheduled for February 5, 2010 at 1:30 p.m. in room 144 S.

CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 2-4-10

NAME	REPRESENTING
Chris Mechler	OJA
Ed Kumpf	KACP/KCPOA/KSA
Gail Bright	Office of the KS Securities Commissioner
Laurel Klein Searles	KCSDV
Helen Pedigo	KS Sentencing Commission

Kansas County & District Attorneys Association
1200 SW 10th Avenue
Topeka, KS 66604
(785) 232-5822 Fax: (785) 234-2433
www.kcdaa.org

House Corrections and Juvenile Justice Committee
February 4, 2010

Submitted by Thomas R. Stanton
Deputy Reno County District Attorney
Past-President, Kansas County and District Attorneys Association

Testimony in opposition of HB 2518

Chairman Colloton and Members of the Committee:

Thank you for giving me the opportunity to testify regarding House Bill 2518. This legislation is similar to House Bill 2332, which was introduced last year. I submitted testimony on that legislation, and I have been asked to submit testimony on HB 2518.

The KCDAA does not support this legislation in its current form. I am one of several conferees who will speak today regarding concerns prosecutors have with this legislation.

Last year we expressed a concern regarding the disparity in penalties between crimes involving heroin and crimes involving other drugs, primarily methamphetamine and cocaine. We continue to express our concern on this issue. Most Kansas jurisdictions do not have serious issues with heroin; we do have serious problems with methamphetamine and cocaine. It makes no sense to promulgate criminal sanctions which do not reflect the issues facing Kansas. The fact that methamphetamine and cocaine are the substances creating a scourge in our communities cannot be denied, and passing legislation which addresses heroin as if it is the major drug problem in our communities is not reflective of the reality of drug trafficking and usage in Kansas. Prosecutors need tools to crack down on the distribution of methamphetamine and cocaine, and this legislation fails to provide us with those tools.

We continue to have a great concern with the portion of the proposed legislation that purports to determine by legislative fiat how a jury will determine the issue of

presumptive amounts needed to suggest a presumption for possession of certain controlled substances with the intent to sell. Cocaine, and to a lesser extent methamphetamine, can be sold by either weight or dosage unit. Defining the presumptions for these drugs based on weight only ignores the realities of drug distribution. The amounts fixed by the legislation, which establish a presumption with intent to sell, do not reflect the realities of street sales. For example, marijuana sells for about $50 to $100 per ounce on the street, while methamphetamine sells for about $100 per gram. The presumption section within the proposed legislation (Section 13(e) on page 21 of the bill) would set the presumption for possession of marijuana with the intent to sell at 450 grams, or about $1,800 to $3,600 worth of the drug. However, the same statute sets the presumption for the sale of methamphetamine at 100 grams, or a street value of $10,000. Ecstasy sells for about $10 per pill, and the presumption for intent to sell is set at 100 dosage units, or about $1,000 street value. Finally, heroin sells for between $100 and $200 per gram in Kansas. This bill sets the presumption for possession of heroin with intent to sell at 3.5 grams, or a street value of between $350 and $700. The limited distribution of heroin in Kansas does not support the dramatically reduced cut-off amounts vis-à-vis methamphetamine and cocaine. The quantity breakdowns do not reflect the issues we face in Kansas.

Additionally, presumptions can work against prosecutors. Setting a presumptive amount to establish intent to sell leads to the ability of defense counsel to argue that any quantity under the presumptive amount should be considered to be possessed for personal use. In reality, marijuana may be sold in quarter-ounce (seven gram) increments, and the possession of an "eightball" (3.5.grams) of methamphetamine may easily support a distribution quantity depending on the other evidence available in a case. Setting presumptions may also be used by the courts in a manner that is unintended by this body. Currently, a person convicted of manufacture of a controlled substance (one of the most dangerous activities involving controlled substances) must register as a drug offender unless the court finds the manufacture was for personal use only. Trial courts could use the presumptions as determinative of this issue, finding that a person does not have to register unless the evidence shows the defendant could have produced at least 100 grams of methamphetamine using the materials possessed at the time of his or her arrest. We are suggesting the removal of the section that sets presumptive quantities as reputable distribution levels.

Finally, we have a concern over Sections 44(r) through 44(s) of the legislation. I do not recall this language being included in last year's legislation. Section 44(r) limits the length of all drug sentences to 204 months. This represents the longest term currently listed in the drug grid. There is no provision for increased time for a second or subsequent conviction for manufacturing methamphetamine as currently exists in K.S.A. 21-4705(e). There is also no exclusion in Section 44(s) of the 204 month limit for second or subsequent convictions for drug offenses.

The purpose of this legislation was to combine the drug and non-drug grids of the sentencing guidelines act. If the current limitation in the drug grid of 204 months is optimum, there is no reason to combine the grids. There should either be two grids, or

the drug crimes should be subject to the exact same grid as non-drug crimes. An example of this is found in the proposed penalty for manufacture of methamphetamine in Section 12 of HB 2518. Manufacture is defined as a severity level three, person felony, unless the drug being manufactures is methamphetamine. If methamphetamine is being manufactured, it is a level one, person felony. The 204 month limitation means that a person with one, nonperson felony on his record (criminal history category G) will be treated about the same as a person with three person felony convictions on his record (criminal history category A). This is because the high end of the sentencing box for criminal history category G is 203 months. Thus, the defendant with a much greater, and clearly more violent, criminal history of A could only receive one month more than the possible sentence for the defendant with a criminal history category of G.

The issue presented in here may be applied to many situations within this legislation. For example, this legislation would prescribe a level 2, nonperson felony sentence for a person guilty of possessing more than 1 kilogram of methamphetamine or cocaine for sale. The *minimum* sentence for a defendant with no record convicted under that provision would be 109 months. A second conviction would be twice that sentence, or 218 months. However, the legislation limits the total sentence to 204 months. There is, then, no greater penalty for a third conviction. The threat of triple the sentence for a third conviction is meaningless.

Finally, the previous legislation made all drug felonies person felonies. This legislation reduces nearly all drug crimes to their current level of nonperson felonies. Much of the support garnered from prosecutors for this legislation last year was based on the fact convictions would move a defendant into higher criminal history categories. This was attractive because of the community safety benefits resulting from being able to incarcerate drug offenders for crimes related to their drug activity. This change in the current bill removes that community safety aspect of the legislation, making it more difficult for prosecutors to support the current bill.

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

STEPHEN M. HOWE, DISTRICT ATTORNEY
Peter R. Glasser, Assistant District Attorney

February 3, 2010

House Committee on Corrections and Juvenile Justice
Patricia Colloton, Chairperson

Re: Proportionality Bill, HB 2518

Ms. Chairperson and Members of the Committee:

The Johnson County District Attorney's Office has long taken a strong stance on drug crimes, especially drug sale or possession with intent to sell cases. Like many agencies across the State of Kansas, several law enforcement agencies within Johnson County have assigned officers and detectives solely to the investigation and prosecution of drug crimes within the county. These men and women are dedicated officers who work diligently to fight all drug crime with a focus on individuals involved in the sale and distribution of controlled substances. Over the years, our office has developed working relationships with these agencies that, in combination with the current sentencing guidelines for drug offenses, has led to consistent and effective prosecution of felony drug cases in Johnson County.

Our office has reviewed the proposed legislative changes related to drug crimes contained within HB 2518 and discovered several changes that are cause for concern. These changes may have a substantial impact on both the investigation and prosecution of felony drug offenses by limiting the techniques currently employed by law enforcement in the investigation of drug crimes, as well as the discretion available to prosecutors and the courts. Our concerns are as follows:

First, the quantities used to determine the Severity Level of the offenses contained in Section 13 of the bill (K.S.A. 21-36a05) are impractical because they are inconsistent with the quantities distributed by street and mid-level dealers, those who pose the biggest threat to our communities and make up the majority of our cases. These street and mid-level dealers generally deal in less than the proposed threshold amounts for enhancement from a Severity Level 7, to Severity Level 6 offense. Under the current grid, that places all but those offenders with criminal history "A" and "B" classifications in presumptive probation grid-boxes. This, in turn, will have potentially negative impacts on both investigations and prosecutions.

One of the most effective law enforcement tools utilized in narcotics investigations is the confidential informant, or CI. CI's are generally individuals who are recruited to assist in narcotics investigations after being arrested for possession or sales offenses themselves. They are often used to work "up the chain." A street –

JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051
PHONE NUMBER: (913) 715-3000

level dealer turned CI would help in the investigation of his supplier, often a mid-level dealer, who would then possibly assist in the investigation of his supplier, and so on. Under the current sentencing guidelines, the threat of prison time allows for easier cultivation of CIs, to take away that threat with impractical or unrealistic threshold quantities would serve as a substantial setback in narcotics investigations throughout the state as it will become much more burdensome to move "up the chain" and target the large suppliers for investigation.

The identities of confidential informants are protected by K.S.A. 60-436. Our office is conscious of the threats that face CIs on the street if their identity becomes known. When prosecuting cases involving a CI, our position is simple: If the defense requires us to disclose a CI's identity, there will be no plea negotiations. Under the current guidelines, this has been an effective means of protecting CIs. This position will become less effective if the threat of prison time is not present. Once the identities of a few CIs will become known, the chilling effect will be soon to follow and CI recruiting will become even more difficult, if not impossible.

Not all drug dealers are the same, some sell drugs to feed a habit, others deal simply out of greed. Border Boxes provide the courts with some discretion on how to sentence a defendant based upon whether the defendant is a user-dealer or a dealer-for-profit. The user-dealer is generally required to get treatment while on probation, while the dealer-for-profit may be sent to prison.

Second, the proposed legislation contains limited punishment for recidivists. Section 44(s) establishes enhanced sentences for repeat drug offenders. However, the enhancements exclude individuals who are charged with or have been convicted of Severity Level 7 drug sale offenses. This could create a class of drug dealer (most likely street to mid-level) who, like a career thief, is free to re-offend again and again without the fear of prison time unless he increases the quantity of drug that he sells. The proposed legislation should include all Severity Levels of drug sales both as primary offenses and as prior convictions used for enhancement. Prior convictions should be expanded to include convictions that occurred prior to the repeal of K.S.A. 65-4161 and K.S.A. 65-4163. The proportionality of the punishments will remain dependant upon the Severity Level of the new offense.

Third, like the lowest severity level of drug sales, Section 14 of the bill classifies violations of K.S.A. 21-36a06(a) and those addressed in (c)(2)(B), involving the possession of controlled substances as Severity Level 7 nonperson felonies. That means that an individual charged with the possession of .1 gram of cocaine could conceivably face the same punishment as an individual convicted of selling 3.4 grams of cocaine. This disparity is unjust and should be modified. If the threshold amounts for the lowest Severity Level sales offenses are not modified, perhaps Severity Level 6 should be the lowest Severity Level for sales offenses. The other alternative is to reduce the Severity Level for possession offenses from 7 to 8.

Fourth, with the repeal of the drug grid, the new legislation eliminates the sentence enhancement which was just enacted last July for the possession of a firearm during the commission of a drug felony. The firearm provision that was enacted was a much needed amendment serving to incarcerate those who dangerously combine drugs and firearms. To eliminate this would be a disservice to

.nmunity safety.

Finally, while other areas of the state may not be facing the threat of heroin, its synthetic form oxycodone, or other opiates in their communities, Johnson County has not only seen an increase in case filings for these drugs, but also in an alarming number of overdoses and overdose deaths related to their abuse. Between 2005 and 2009, case filings involving oxycodone increased by 78% in Johnson County. During the same time frame, heroin case filings increased by 85%, an almost direct correlation. This correlation is due in large part to the similarity in the effects of opiates and synthetic opiates on a person's body. Many users begin their path to addiction by using oxycodone because they perceive it to be safer. Once they are addicted and their addiction to oxycodone becomes too expensive, users often turn to the less expensive heroin. Most concerning is the age of the average opiate abuser, which falls between 14 and 30. This has forced our office and law enforcement to implement an education initiative in our communities and its schools. Compared to methamphetamine and cocaine, which also have devastating long term effects, opiate overdose, regardless of whether the drug ingested is heroin or oxycodone, is significantly more deadly.

Section 13 should be changed to include an "opiate subsection." This subsection should include synthetic and pharmaceutical based opiates such as oxycodone and hydrocodone in addition to traditional opiates such as heroin and morphine. The threshold amounts used to differentiate between the Severity Level of opiate sales should be based in weight, not dosage unit. Some pharmaceutical preparations of opiates such as oxycodone are manufactured with varying narcotic content, ranging from 10-80 mg pills. Under the current proposed legislation, an individual selling ten 10 mg pills would be treated the same as an individual selling ten 80 mg pills, despite the fact that the 80 mg pills contain eight times the amount of oxycodone as the 10 mg pills do.

Thank you for the opportunity to discuss our concerns regarding the proportionality bill. Our office would be happy to provide you with additional information or answer any questions you may have regarding the above listed issues.

Respectfully,

Stephen M. Howe
District Attorney

Peter R. Glasser
Assistant District Attorney

JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051
PHONE NUMBER: (913) 715-3000
FAX NUMBER: (913) 715-3050

Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

February 4, 2010

Testimony Regarding HB 2518
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of Nola Tedesco Foulston, District Attorney
Eighteenth Judicial District
And the Kansas County and District Attorneys Association

Honorable Chairwoman Colloton and Members of the House Committee on Corrections and Juvenile Justice:

Thank you for the opportunity to address you regarding of House Bill 2518. On behalf of Nola Tedesco Foulston, District Attorney, Eighteenth Judicial District, and the Kansas County and District Attorneys Association, I would like to bring to your attention issues specifically related to "Sec. 10" (pages 12 & 13) wherein certain changes are proposed to K.S.A. 21-21-3427 Mistreatment of a Dependant Adult.

During the 2009 legislative session, the KCDAA supported SB 67 which increased the penalty for Mistreatment of a Dependant Adult from a severity level 6 **person** felony to a severity level 5 **person** felony. We remain committed to that increase. HB 2518 proposes a hierarchy of classifications beginning at class B **non-person** misdemeanor status when the loss is less than $500.00 and moving up incrementally—reserving the severity level 5 **non-person** felony designation only for those rarest of cases when the total loss to the victimized dependant adult is $100,000.00 or more. For reasons set forth below, we oppose this section of HB 2518.

First, the classifications do not take into account the relative impact that the loss of resources has to the individual victim. A victim of means may be able to weather the loss of $25,000.00 or even $100,000.00, whereas a dependant elder

on a fixed income may be literally undone by the loss of $500.00. Indeed, dependant adults of limited means are often the most vulnerable when they have no one regularly looking in on them. The charlatan salesman, or neighbor promising friendship can step into this void undetected whereas he would have no access to the victim in a secured (expensive) care home. In one case from Wichita this past year, a man approached an elderly victim at her home under the guise of selling lightning rods. Before he was caught, he had taken over $90,000.00 from the victim, draining her entire life savings and leaving her destitute—she literally had a negative account balance and was unable to pay the insurance on her home. This defendant would receive a severity level 6 **non-person** presumptive probation felony under the current proposal.

Second, the difficulty inherent in proving the amount of loss makes the hierarchy set forth in the current proposal particularly difficult to bring to effect. Dependant adults can be poor historians. When cash or personal property is taken, the dependant adult is often the only source of information regarding the amount of the loss. Without a paper trial – something those who prey on the vulnerable members of our society do their best to avoid – establishing exactly how much was taken often proves extremely difficult and places an undue burden on the victim to prove the extent of their victimization.

Third, and finally, the goal of criminalizing the victimization of dependant adults is simply to protect the vulnerable members of our society. What makes these acts so troubling is not the amount of the loss but rather than someone could stoop so low as to victimize someone in the condition of a dependant adult. Does it matter how much was taken from someone "who is unable to protect their own interest" and lives in a care home, or is boarded in a medical care facility or lives with "mental retardation or a developmental disability" and receives services as a result?

The shame of these crimes rests not in the amount of the loss but in the **fact** of the loss. Any attempt to attach monetary distinctions to a hierarchical system places an unnecessary burden on the victim and, ultimately, undermines the goal of the K.S.A. 21-3427: to hold accountable those who would prey on our vulnerable citizens regardless of the extent of the monetary loss.

For the above stated reasons, we oppose section 10 of HB 2518, regarding K.S.A. 21-3518.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District

(4)

Office of The
DISTRICT ATTORNEY
JEROME A. GORMAN
Twenty-Ninth Judicial District of Kansas
Wyandotte County Criminal Justice Complex
710 North 7th Street, Suite 10 - Kansas City, Kansas 66101-3051
Telephone: 913-573-2851

Fax:
913-573-2948
913-573-2860
913-573-8151

February 4, 2010

Representative Pat Colloton, Chair
House Corrections and Juvenile Justice Committee
Statehouse
Topeka, KS

RE: Opposition to HB2518

Dear Chairperson Colloton & Committee Members:

At the outset, permit me to make a point that I will then support in the text below.

> The statutory presumptions with respect to certain quantities of illegal drugs and the possessor's 'intent to distribute' are ill-advised and should be deleted from this bill.

HB2518 is a proportionality bill. If I understand correctly, it is supposed to merely reorganize criminal penalties. Our objection is to the substantive policy initiatives planted in and around the penalty provisions.

For example, in Section 13, beginning on page 19 of the bill, an amendment is proposed to K.S.A. 21-36a05 at paragraph (e) found near the bottom of page 21. The bill creates certain presumptions that various quantities of illegal drugs are possessed with an intent to distribute. These presumptions are ill-advised, they will result in bad unintended consequences, and they should be deleted from the bill.

The four presumptions to which I direct your attention are inconsistent in dollar value, inconsistent in weight, inconsistent in size/measurement, and they are inconsistent with actual experience in the enforcement of drug laws. They are apparently arbitrarily recommended, and they are out of touch with real world, or real Kansas drug enforcement. They absolutely do not fit in the scheme of drug enforcement in the disparate drug cultures throughout our 105 varied counties.

The illegal drug trade is much like commerce involving any other legitimate commodity where market conditions regulate actual practice. In a densely populated area with many

Corrections and Juvenile Justice
Date: 2-4-10
Attachment # 4

customers, a merchant might keep more inventory on stock than one trading in the same commodity where the volume of gross sales is less. The amount of inventory possessed for distribution in a small market would be less than the same in a large market. Both would be considered merchandise held for sale or distribution. Kansas has a varied geography, and ranges of sizes of population centers, and drug markets. One arbitrary amount, or weight, does not translate equally in those disparate marketplaces.

These presumptions are perhaps well intentioned, but these presumptions will result in problems.

Codifying these presumptions amounts to fixing something that is not broken. Indeed, the case law already interprets the evaluation of the weight of illegal drugs in connection with its being possessed for the purpose of distribution. Weight is a factor for jury consideration, not a legal presumption. For good reason, weight alone is not determinative of intent.

A person can possess a pound of marijuana without it being for sale. If a person were to recognize the inherent risks associated with purchasing marijuana, and then decide that buying one pound on one occasion would be less personally risky than buying one ounce of marijuana sixteen consecutive times, then having a pound of marijuana does not amount to proof of intent to distribute. This will become the defense argument if you include the presumption that 450 grams of marijuana establishes an intent to distribute. The defense argument will mold to the law and there will be no enhancement in proving intent to distribute.

Conversely, consider the example of a person who by all reliable intelligence is an upper level drug dealer in a given town. He is caught by police with other indicators of distribution but he has already sold the greater weight he once held before the police arrested him. Upon being caught he holds only 10 grams of marijuana, but it is pre-rolled into 15 joints. He has cash, a ledger of sales, a small set of scales, and extra unused baggies – all tools of the trade of a drug dealer. He even has another of the tools of a drug dealer – a gun. In such a case the statutory presumption would work against proving the dealer guilty of possession with intent – even though he would clearly be in possession of marijuana with intent to distribute.

A similar scenario is imaginable for cocaine or methamphetamine or LSD or any illegal drug.

Almost certainly, drug dealers would simply make sure that they keep with them no more than the statutory presumption amounts as a way of returning prosecutors to the regular old way of proving intent – by marshalling all the factors drawn from the evidence in the case. Drug dealers can adapt much more quickly than can the legislature.

Indeed, some circumstances require drug dealers to hold only small quantities from which to retail their merchandise. A young adult cannot easily conceal a pound or more of marijuana while standing in a school parking lot selling joints, or quarter grams, or microdots to

minors. In these circumstances you would expect the dealer to have less than a pound, or an 8-ball in his possession.

Prosecuting attorneys advance and argue factors in order to inform and persuade jurors. Jurors have the exclusive province of deciding whether a burden of proof has been met. Legislatures should avoid trying to define factors that apply differently across the broad spectrum of human experience. Presently, weight is a factor that applies across the board. When you define something like weight one way, the inference is that the definition excludes the use of weight in another way.

But, you might say, the presumption is rebuttable. Let me dispel that myth. In the real world what you write and enact ends up becoming the standard. For example, the sentencing guidelines include all sorts of presumptions – and the state and federal courts of appeal have essentially turned them into bright line rules.

By creating the presumptions you hand over to defense attorneys and liberal judges a reason to find that some amount less than the statutory amount is not capable of being possessed with intent to distribute. The unintended consequences of the presumptions could be many. For example, at K.S.A. 22-4902(a)(11) you require certain drug offenders to register, unless the court makes a finding on the record that the possession of drugs like ephedrine was intended for personal use. If you write statutory presumptions on the quantities possessed, then quantities below that amount will be treated as 'personal use' amounts.

If you will, there is also no need to codify the obvious. Prosecutors already have very little difficulty in proving a theory that one in possession of a pound or more of marijuana does so with intent to distribute it to others. If a marijuana cigarette weighs about a gram, then the pound represents about 450 marijuana cigarettes. If a user smokes one joint a day, the pound represents well over a year's worth of 'personal consumption' quantity. Regular tobacco becomes dry and harsh when it goes stale, and it becomes undesirable to the smoker. The same experience is replicated with marijuana. Most jurors grasp intuitively the concept that one is not going to keep and smoke a pound or more of marijuana. They are going to share it, somehow.

Moreover, creating presumptions as to intent is out of step with other areas of the criminal law. Consider the law of murder, where the defendant's intent is key to ascribing responsibility for a particular level of murder. For premeditation, there is no legal presumption that one who used a deadly weapon did so with premeditation. A case could be made for it – when one chooses to employ a weapon designed to bring about death when assailing another human being, then the assailant must have thought over beforehand his intended result...the death of another.

Instead, murder jurisprudence recognizes various factors that prosecutors can argue as evidence and that jurors can consider in finding that a defendant premeditated his act of murder. Use of a deadly weapon; statements made before or during the homicidal acts of intent to kill;

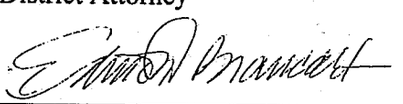
number of blows delivered after a victim is rendered incapable of flight or self defense; and so on.

Weight of an illegal drug is but one factor in reaching a conclusion that the drug was possessed with intent to distribute. It should remain a factor – like the presence of ledgers, scales, and other tools of the trade of drug dealers – and not be forced into existence as a legal presumption. Let prosecuting attorneys do what they do – marshal evidence, argue factors, and persuade reasonable jurors of a defendant's guilt. Deny those the opportunity who would pervert the absence of a presumptive amount into an obstacle to conviction or appropriate penalty.

Keep a proportionality bill on task...making punishments proportionate to crime.

Respectfully submitted,

Jerome A. Gorman
District Attorney

By: 

Ed Brancart
Deputy District Attorney
Past President, Kansas County and District Attorneys Association

STATE OF KANSAS

LANCE KINZER
REPRESENTATIVE, 14TH DISTRICT
12549 S. BROUGHAM DRIVE
OLATHE, KS 66062 165-W
STATE CAPITOL, ROOM ~~121-W~~
TOPEKA, KANSAS 66612-1504
785-296-7692
Lance.Kinzer@house.ks.gov

HOUSE OF REPRESENTATIVES

COMMITTEE ASSIGNMENTS

CHAIR: JUDICIARY

MEMBER: CORRECTIONS & JUVENILE JUSTICE

February 4, 2010

TESTIMONY REGARDING HB 2435

HB 2435 responds to two recent Kansas Supreme Court decisions that had the effect of reducing criminal sentences for sex offenders in Kansas. In May, 2009 in the case of State v. Horn the Kansas Supreme invalidated the imposition of enhanced sentences for individuals convicted of attempting to commit a sexually violent crime against a child. This decision was followed by an October 2009 opinion in the case of State v. Trautloff in which the Court ruled that the Kansas habitual sex offender statute does not apply to individuals who were convicted of multiple sex offenses on the same day.

Horn was convicted of attempted aggravated criminal sodomy of a child under the age of 14 and was sentenced to a minimum 25 years under Jessica's law. The Kansas Supreme Court invalidated this sentence and required that Horn be re-sentenced under a more lenient general attempts statute. The Court reached this conclusion despite the fact that K.S.A. 21-4643 clearly and unambiguously provides that Jessica's law applies to "an attempt, conspiracy or criminal solicitation…" HB 2435 would restore the clear intent of the legislature to impose significant mandatory minimum sentences for attempted child sex offenders. In understanding the type of behavior at issue here it is helpful to recognize that pursuant to K.S.A. 21-3301 attempt is defined as "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." The legislature has been clear in the past, and should be clear again now, that mandatory minimum sentencing for adults who attempt to commit sex crimes against children under the age of 14 is justified.

As to the second case dealt with in HB 2435, in 1996 Melvin Trautloff was convicted of rape of an 8 year old, aggravated indecent liberties with another 8 year old, and a further count of aggravated indecent liberties with a 9 year old. (One of the aggravated indecent liberties convictions was subsequently overturned). More than a decade latter Trautloff was convicted of rape, aggravated sodomy, aggravated indecent liberties with a child and sexual exploitation of a child all resulting from a scheme in which Trautloff paid for sex with a seven year old girl. He was sentenced to life in prison without the possibility of parole under the Kansas habitual sex offender statute (K.S.A. 21-4642). Under this law a person who is convicted of three sexually violent crimes receives a mandatory life sentence. The Kansas Supreme Court invalidated this sentence because Trautloff's 1996 convictions had been adjudicated on the same day and as such, in the view of the Court, were not separate conviction events. HB 2435 will make it clear that this any person convicted of two or more sexually violent crimes is a habitual sex offender.

Corrections and Juvenile Justice
Date: 2-4-10
Attachment # 3

As I said at the time I introduced this bill, I think it is extremely unfortunate that this bill is even necessary. The legislature, with the support of the people of Kansas, has said clearly, unequivocally and repeatedly that the days of lenient sentencing for child sex offenders is over. Recent Court opinions have made it imperative that we again join together to make sure that we have a law in place that protects Kansans, and especially children, by appropriately punishing those who prey upon them.

Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

February 4, 2010

Testimony Regarding HB 2435
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of Nola Tedesco Foulston, District Attorney
Eighteenth Judicial District
And the Kansas County and District Attorneys Association

Honorable Chairwoman Colloton and Members of the House Committee on Corrections and Juvenile Justice:

Thank you for the opportunity to address you regarding House Bill 2435. On behalf of Nola Tedesco Foulston, District Attorney, Eighteenth Judicial District, and the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to K.S.A. 21-4643, generally known as "Jessica's Law," and the effect of the decision in State v. Horn, ____Kan. ___, 206 P.3d 526 (May 8, 2009) on anticipatory (attempts, conspiracies and solicitations) sexual crimes committed against children under the age of 14.

When "Jessica's Law" went into effect in Kansas on July 1, 2006, K.S.A. 21-4643 explicitly stated that sex crimes enumerated in the statue would be off-grid offenses when committed against children under the age of 14, and would therefore carry a penalty of life in prison with parole eligibility after 25 years. The statute took deliberate pains to state that the inmate would not be eligible for good time credit (K.S.A. 21-4643[c]), and that attempts, conspiracies and solicitations of off-grid offenses would, likewise, remain off-grid offenses, see 21-4643(a)(1)(G).

In State v. Horn, the Kansas Supreme Court recognized the language in 21-4643(a)(1)(G), but found that a conflict existed between 21-4643(a)(1)(G) and K.S.A. 21-3301, 3302 and 3303 which state, respectively, that an attempt,

conspiracy or solicitation of an off-grid offense is either a severity level 1 offense (attempts) or severity level 2 offense (conspiracies and solicitations).

Given this conflict, the Horn court held that a defendant could not be subject to 21-4643, and "Jessica's Law" Off-grid penalties if he was convicted or plead to one of the three delineated anticipatory crimes. A collateral consequence is that, because the sentence in such cases is imposed pursuant to 21-3301, 3302 or 3303 and NOT 21-4643, these defendants are subject to lifetime post-release NOT lifetime parole or lifetime EMD, see K.S.A. 22-3717(d)(1)(G) & (u).

Because the Horn decision so clearly runs counter to the intent of the legislature – i.e., that all sexual crimes committed against children under the age of 14 should be off-grid offenses, whether the acts were attempted, completed, acted-out in isolation or carried out with others in a conspiracy or solicitation – the Kansas County and District Attorney's Association supports HB 2435.

HB 2435 clarifies in a near-plenary manner, every statute required to be either included or excised from the scope of K.S.A. 21-3301, 3302 and 3003, so as to eliminate any conflict thereafter.

Two final issues: First, HB 2435 contains a proposed change to 21-4642(c)(1) & (c)(2) (page 20) that is unnecessary to effectuate the change to Horn. This language seeks to impose a life without parole sentence for anyone with two prior convictions for enumerated sex crimes, rather than two prior "conviction events." The KCDAA does not oppose this change but does want to make clear it is collateral to the Horn fix. Secondly, when K.S.A. 21-4719 (capping departures at 50% of the mid number on sex crimes) went into effect on July 1, 2008, no change was made to 21-4643(d) (lines 18 to 21), which is arguably a conflict. Because HB 2435 is being proposed to rid Jessica's Law of conflicts, the following change may need to be made: (at line 18 and 19) ". . . and no sentence of a mandatory minimum term of imprisonment shall be imposed hereunder, ***except as set forth in K.S.A. 21-4719.*** As used in this subsection . . ."

We believe the proposed legislation accurately reflects the specific intent of the Kansas Legislature when Jessica's Law went into effect on July 1, 2006 and, further, corrects the inconsistency found by the court in State v. Horn.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District

House Corrections and Juvenile Justice Committee
House Bill 2435
Opponents
February 4, 2010

Chairwoman Colloton and Members of the Committee:

Almost four years ago to the day, we stood before the House Judiciary Committee and pleaded for changes to the proposed Jessica's Law (HB 2576), only a few of which were adopted. Now we have spent four years watching Jessica's Law unfold and have seen many of our fears come true.

Since we were there, we know it was the Legislature's intent to punish attempts, conspiracies and solicitations the same as completed offenses. We know that this bill is "fixing" an issue resulting from *State v. Horn*, 288 Kan. 690 (2009). However, this bill presents an opportunity to revisit Jessica's Law, specifically as it relates to treating completed offenses the same as attempted ones. We maintain, as we did four years ago, that taking offenses that were severity levels 1-6 (or 1-8 if you take into account that attempt/conspiracy/solicitation drops it two levels) and grouping them together as offgrid offenses is unwise public policy and grossly disproportionate. Would the Legislature consider taking all killings and attempted killings (currently ranging from offgrid to severity level 7) and making them all offgrids?

While there are certainly many sex offenders who belong in prison for life, we have seen in real human terms that Jessica's Law casts too broad a net. One example among many: a man convicted of electronic solicitation for contact he had with an adult pretending to be a 13-year-old girl in an internet sting. That conviction is a severity level 1 felony (also part of Jessica's Law) but he was also convicted of attempted rape, the overt act being driving to the fictional girl's house and knocking on the door. That is an offgrid offense.

The number of inmates serving offgrid sentences on 6/30/2009 was 891; the projected number for 2019 is 1,675. (Kansas Sentencing Commission, FY 2010 Adult Inmate Prison Population Projections, p. 20). There is no question most of these are Jessica's Law sentences. Imagine if there was a 25-year projection (the minimum offgrid sentence in Jessica's Law)? If attempts, solicitations and conspiracies were not included, it would reduce that number, as well as other costs.

All of this said, we do not expect change to occur this session. The lack of political will around this issue crushes us, personally and professionally. We can only put this testimony into the record and hope that one day this Committee, and the Legislature as a whole, will revisit Jessica's Law sentences and proportionality.

Respectfully submitted,

Stacey Donovan
stacey@sunflower.com

Jennifer Roth
rothjennifer@yahoo.com

Corrections and Juvenile Justice
Date: 2-4-10
Attachment # 7

Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

February 4, 2010

Testimony Regarding HB 2468
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of Nola Tedesco Foulston, District Attorney
Eighteenth Judicial District
And the Kansas County and District Attorneys Association

Honorable Chairwoman Colloton and Members of the House Committee on Corrections and Juvenile Justice:

Thank you for the opportunity to address you regarding House Bill 2468. On behalf of Nola Tedesco Foulston, District Attorney, Eighteenth Judicial District, and the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to the Kansas Sexual Offender Registration Act and the likely inadvertent omission of attempts, conspiracies and solicitations of certain crimes enumerated in a list of aggravated crimes requiring lifetime registration under K.S.A. 22-4906(d) upon conviction.

As K.S.A. 22-4906 currently reads, anyone convicted of the following aggravated crimes is required to register as a sex offender for the remainder of the offender's life: Aggravated Trafficking in violation of K.S.A. 21-3447; Rape, in violation of K.S.A. 21-3402(a)(2); Aggravated Indecent Liberties, in violation of K.S.A. 21-3504(a)(3); Aggravated Criminal Sodomy, in violation of 3506(a)(2); Promoting Prostitution, in violation of 21-3513 (when the prostitute is under 14 years of age); or Sexual Exploitation of a Child, in violation of 21-3516(a)(5) or (a)(6) (distribution of child pornography of children under 14 years of age). K.S.A. 22-4906 currently does NOT include attempts, conspiracies or solicitations of the crimes set forth above. HB 2468 simply seeks to correct this omission.

If left as is, an individual convicted of Attempted Aggravated Criminal Sodomy, for instance, could argue that he is only obligated to register for 10 years under the general catch-all that he or she committed a "sexually violent crime" as set forth in K.S.A. 22-4902(c), because, the definition of "sexually violent crimes" set forth in K.S.A. 21-4902(c) does include attempts, conspiracies and solicitations at §(13). However, K.S.A. 22-4906(c) would arguably obligate the same defendant to lifetime registration under the definition of "aggravated offenses" set forth in 22-4902(h).

We believe the proposed legislation appropriately corrects this inconsistency in the Sexual Offender Registration Act.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District

Kansas County & District Attorneys Association
1200 SW 10th Avenue
Topeka, KS 66604
(785) 232-5822 Fax: (785) 234-2433
www.kcdaa.org

House Corrections and Juvenile Justice Committee
February 4, 2010

Submitted by Thomas R. Stanton
Deputy Reno County District Attorney
Past-President, Kansas County and District Attorneys Association

TESTIMONY IN SUPPORT OF HB 2489

Chairman Colloton and Members of the Committee,

Thank you for the opportunity to testify regarding House Bill 2489. This legislation will limit the power of district court judges to modify sentences after a probation revocation.

This legislation will divest the district court of the discretion to reduce sentences upon execution thereof for a violation of community corrections or court services. The ability of the trial court to reduce a sentence as a reward for failure on probation allows a reduction of sentence which would otherwise require proof of substantial and compelling reasons. The current law offends the concepts of finality and certainty in sentencing. It also allows for a reduced sentence when the sentence received was a sentence for which the parties bargained. Finally, such a reduction acts as an award for failing at probation.

Current law requires that a defendant be sentenced within the presumptive grid box based on the crime of conviction and the defendant's personal criminal history score. I refer to it as "personal" because it is a score the defendant has earned. If the score is low, it signifies a life lived without the violation of person crimes or felonies. If, on the other hand, the score is high, it signifies the defendant is violent, and has accumulated a significant number of convictions for person crimes or felonies. The trial court cannot sentence the defendant to a sentence less than indicated by the appropriate grid box unless a motion to depart is filed, and all parties have the opportunity to address the merits of the motion. Victims are able to comment on the crime, how the commission of the crime has affected their lives, and what they consider appropriate sentences for the crime committed. A denial of a motion to depart is not an appealable issue. The sentence is designed to be final.

Many of the boxes in the sentencing grids are presumptive probation boxes. Thus, nearly every defendant sentenced in those instances receive an assignment either to Court

Services or Community Corrections. There are also often situations where defendants are given downward dispositional departures, wherein they receive the full length of sentences as indicated by the appropriate grid box, but are allowed to serve probation rather than the presumptive prison sanction. The assignments to Court Services and Community Corrections are designed to give a defendant the opportunity to follow rules that you and I follow every day, such as not violating the law, working to pay what we owe, and not abusing drugs or alcohol. The conditions of probation are carefully explained to the probationers to insure there are no misunderstandings regarding those conditions.

Defendants sometimes follow the requirements of probation, pay their costs, stay out of trouble, and complete the assignment. They then are released from probation, free to live their lives without supervision or the threat of a prison sentence hanging over their heads. However, most probationers have problems. They do not follow the conditions of probation, and they find themselves back in front of the court, charged with a probation violation. They receive a sanction, and are returned to supervision.

Some defendants have repeated violations, and the trial court finally has no choice but to order the sentence executed. The defendant has utterly failed on probation. K.S.A. 22-3716 currently allows a judge to reduce the defendant's sentence at the time of the probation revocation. No motion is required. The court does not have to entertain arguments from the State, or comments from victims. There is no standard by which to measure the judge's decision. Thus, what a trial court cannot do at the time of sentencing without a showing of substantial and compelling reasons, that is give the defendant a reduced sentence, the judge can now do by judicial fiat.

Prosecutors often enter into agreements which supply a benefit to a defendant, such as dismissal of other criminal charges or a recommendation for probation, in exchange for a certain agreed-upon sentence. The agreement is perfected when the court accepts the bargain, and enforces its terms at sentencing. The ability of a trial judge to subsequently reduce the sentence after a failure on probation destroys the agreement entered into on an individual case.

Victims leave the courtroom after sentencing believing the sentence imposed by the trial court is final. They believe, for example, that if a defendant refuses to pay restitution when able to do so, the defendant will serve the sentence imposed. Reduction of sentence after failure on probation undermines the confidence our citizens have in our system of justice.

Finally, reduction of sentence after a revocation of probation rewards a defendant for failing at probation. We send the wrong message to probationers when we reward them for failing on probation by reducing their prison sentences.

The Kansas Sentencing Guidelines were promulgated to "apply equally to all offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous criminal record of the defendant." K.S.A. 21-4702. Allowing the reduction of a sentence at the sole discretion of the trial court violates this principle. Once the sentence is imposed, it should not be reduced because the defendant failed on probation. Please favorably consider this legislation.

HOUSE COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE

Hon. Pat Colloton, Chairman
Hon. Bob Bethell, Vice Chairman
Hon. Melody McCray-Miller, R.M. Member

February 4, 2010
1:30 p.m.
Room 144-S

Judge Daniel Dale Creitz
Thirty-First Judicial District
1 North Washington, Room B
Iola, Kansas 66749
dancreitz@acdc.kscoxmail.com

TESTIMONY ON BEHALF OF THE KANSAS DISTRICT JUDGE'S ASSOCIATION AGAINST HB 2489

I wish to thank this honorable committee for the opportunity to present this written testimony against HB 2489. I am Daniel Dale Creitz, Legislative Co-Chair of the Kansas District Judge's Association and a District Judge in the Thirty-First Judicial District. I have court scheduled on February 4th in Allen County District Court in Iola, so regretfully I am unable to appear in person.

HB 2489 would amend K.S.A. 22-3716 and eliminate the discretion that a district judge currently has of imposing a lesser sentence for probation violators. If enacted HB 2489 would require the court to impose the original sentence, not a lesser sentence. The Kansas District Judge's Association contends that eliminating this judicial discretion would be costly and not in the best interests of justice.

Passage of this bill would not result in any additional prison admissions, but after probation revocation HB 2489 would require the court to impose a term that is "not any lesser" than the original sentence. As a result, additional prison beds would be needed. In 2009 about 151 probation condition violators were ordered to serve the modified sentences which were lesser than the original sentences imposed. I understand that the Kansas Sentencing Commission has done an impact study for HB 2489, and I further understand that

after passage of HB 2489 additional prison beds would need to be added in 2011 and in future years. Thus, the cost of HB 2489 must be carefully examined.

Further, the court, county attorney, and probation officer are actively involved in probation revocations. All have the history of the particular case in front of them. In certain circumstances a defendant's probation must be revoked, but that history for a variety of reasons may show that a lesser sentence is justified and needed. In some cases it is where a defendant has substantially complied with probation, or urgent circumstances justify a lesser sentence. An example is a case of mine involving a terminally ill defendant whose death was imminent when probation was revoked. The medical costs were astronomical. Those costs would have been paid by taxpayers if his original sentence was ordered. The defendant had an original sentence of more than three years. His sentence was shortened to time served. He died at home several weeks after court. This is just one of many possible examples where judicial discretion is appropriate and needed.

This State's financial crisis has also had substantial effects on the resources available to the Courts. Two of those effects were the closings of the Labette County Women's and Men's Conservation Camps. In appropriate circumstances these camps were useful tools to give a defendant one last chance to avoid serving a prison term. These are no longer options in Kansas.

Further, the discretion provided by K.S.A. 22-3716 is used in appropriate circumstances when a lesser sentence is justified and needed. In many of those circumstances a lesser sentence may be recommended by the probation officer or the prosecutor.

In summary, it is our position that eliminating judicial discretion provided in K.S.A. 22-3716 for probation violators is ill advised, unnecessary, and could prove quite costly to our citizens. K.S.A. 22-3716 currently provides a useful tool that saves money and is justified in certain cases.

Thank you for this opportunity to present our position.

Respectfully submitted,

Daniel Dale Creitz
Co-Legislative Chair, Kansas District Judge's Association
District Judge, Thirty-First Judicial District