Approved: April 28, 2010
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:35 a.m. on March 8, 2010, in Room 548-S of the Capitol.

All members were present except:
Senator Derek Schmidt- excused
Senator Jean Schodorf- excused

Committee staff present:
Doug Taylor, 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
Karen Clowers, Committee Assistant

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Conferees appearing before the Committee:
Judge John W. White, Kansas Criminal Code Recodification Commission
Jason Hart, Assistant Attorney General

Others attending:
See attached list.

The Chairman opened the hearing on **HB 2668 - Recodification of the criminal code**.

Judge John White provided the committee with a review of **HB 2668**, the result of the Kansas Criminal Code Recodification Commission's work in recodifying the Kansas Criminal Code. The proposed legislation is the first comprehensive recodification in nearly 40 years, it contains no substantive changes and no changes in sentencing guidelines. The entire criminal code was reviewed and changes include revisions to statutory language to add clarity, reorganization of the statutes in a more user-friendly order, and combined statutes to reduce their number. Testimony also includes recommendations on repeal of statutory language no longer in use and recommendations regarding sentencing proportionality but these are not included in the bill. (Attachment 1)

There being no further conferees, the hearing on **HB 2668** was closed.

The hearing on **SB 549 - Creating a private cause of action for victims of child pornography** was opened. Jason Thompson, staff revisor, reviewed the bill.

Jason Hart appeared in support, stating victims of child pornography are re-victimized each time their image is distributed and viewed on the internet . The Attorney General's Office supports the underlying concept of the bill but had concerns regarding the current language. As written, **SB 549** would expose investigators and law enforcement officials to civil liability when analyzing evidence in pursuit of a criminal prosecution. The bill does not provide liability exception for plaintiff's counsel or defendant's counsel to view the evidence involved or for child advocacy organizations. (Attachment 2)

Written testimony in support of **SB 549** was submitted by:
Kyle Smith, Legislative Chair, Kansas Peace Officers (Attachment 3)
Judy Smith, Concerned Women for America of Kansas (Attachment 4)

There being no further conferees, the hearing on **SB 549** was closed.

The Chairman opened the hearing on **HB 2440 - Requiring the secretary of corrections to receive and give victim notification upon certain events while inmate is in the custody of the secretary of social and rehabilitation services.** Jason Thompson, staff revisor, reviewed the bill.

Dorthy Stuckey Halley appeared in support, stating **HB 2440** will provide notification to victims whose perpetrators are under the care and treatment of Social and Rehabilitative Services. The change will provide the opportunity for victims to take necessary safety precautions when their risks increase upon the release.

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Often these victims are shocked when they learn that, despite the existence of laws designed to protect victims' rights, they are likely to receive no notification of release, and no opportunity to participate in the processes and decisions that impact their safety. A victim who does not know when their perpetrator is going to be released or put in a less restrictive setting can never feel safe. (Attachment 5)

Jennie Marsh spoke in favor, indicating the Department of Corrections supports the provisions of **HB 2440** but had concern regarding the House amendment requiring notification to a defendant's family who are not crime victims. The impact of this amendment involves more than merely sending a letter advising a change in status of the defendant. The DOC provides services to people who have victimized by crime, is provided in conjunction with the notification sent to crime victims as required by existing law. The addition of non-victims into the pool of persons receiving notification would necessitate separate record keeping and tracking, create confusion and false expectations as the services available, and jeopardize grant funding that prohibit this practice. Ms. Marsh urged favorable passage of **HB 2440** in its original form and provided an balloon amendment for the Committee's consideration. (Attachment 6)

Written testimony in support of **HB 2440** was submitted by:
Ray Dalton, Deputy Secretary, SRS (Attachment 7)

There being no other conferees, the hearing on **HB 2440** was closed.

The next meeting is scheduled for March 9, 2010.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 8, 2010

NAME	REPRESENTING
Ed Kumpf	KACP/KPOA/KSA/KCCRC
Mark Gleeson	Judicial Branch
Tom Stacy	KCCRC
John White	"
~~Dorothy Kelly~~	Attorney General Office
Dan Gibb	KSAG
Jason Hart	KSAG
Patrick Vogelsberg	Kearney and Associates
Sean Miller	Capitol Strategies
Jeannine White	
Stephanie Wilson	
Rick Sutton	SP
Jennie Marsh	KDOC
Sandy Barnett	KCSDV
Jeremy Barclay	KDOC
Carla Wozniak	KDOC
Lori Henry	Saulsbury Cryp LLC

Kansas Criminal Code
Recodification Commission

TO: Kansas Senate Judiciary Committee

FROM: Kansas Criminal Code Recodification Commission

APPEARING: Prof. Tom Stacy, Chairman
Ed Klumpp, Co-Chairman
Hon. John W. White, Reporter

We appear on behalf of the Kansas Criminal Code Recodification Commission to speak in support of House Bill 2668. House Bill 2668 represents the Commission's work in recodifying the Kansas Criminal Code.

The proposed criminal code in HB 2668 is the first comprehensive recodification of the Kansas criminal code in nearly 40 years. The present criminal code became effective July 1, 1970. The 1970 code enactment was the last major recodification of the Kansas criminal laws.

The 2007 Legislature created the Kansas Criminal Code Recodification Commission and assigned to it the mission of recodifying the Kansas criminal code (K.S.A. 21-4801). The Kansas Criminal Code Recodification Commission has submitted interim reports to the 2008 and 2009 legislatures and a final report to the 2010 legislature.

The first meeting of the Kansas Criminal Code Recodification Commission (KCCRC) was held July 6, 2007. With the guidance of the legislative members of the Commission, the Commission concluded that its mandate required a comprehensive recodification and that it should approach its work within the following framework:

1. reorganize the statutes to place them in a more user-friendly order, revise the statutory language to add clarity, and combine statutes to reduce their number;
2. make recommendations for amending , deleting or adding statutory provisions that change the substantive law of the code; the Commission should recodify the criminal code without making

changes to the substantive law which involve policy decisions, but, where appropriate, in a separate document recommendations should be made to the legislature for policy changes, and

KCCRC's Work Process

The Kansas criminal code is comprised of seventeen articles, Articles 31-47, in Chapter 21 of the Kansas statutes. There are more than 400 statutes in the seventeen articles. The Commission has considered and discussed each of those statutes section by section.

The Commission's work process has been to preserve the existing Kansas statutes wherever the Commission considers that the statutes are serving well the citizens of Kansas.

The drafting process originated with the Reporter, who examined each section of the existing law together with relevant judicial opinions. Also, similar statutes in other states were reviewed, particularly those of neighboring states and those states who have recently revised their codes. Model Penal Code provisions were considered. The Reporter drafted a suggested revision of each section, supported by comments and materials from cases, statutes and other authorities.

For the first few months of the Commission's work, the Reporter's suggestions were submitted to the Commission that closely examined and evaluated each proposal. In many instances the drafting process was repeated several times before final approval.

In April 2008 Chairman Stacy appointed a six-member subcommittee from the membership of the Commission. After the Recodification Subcommittee was appointed the drafting process involved the additional step of examination of the proposal by the subcommittee. The proposal was submitted first to the subcommittee and was not forwarded to the full Commission until it had been approved by the subcommittee. Again, the sections were exposed to careful examination. Often one or more additional re-drafts were required before the subcommittee approved, or disapproved, a proposal.

Thus, each recommended section included in HB 2668 has been considered by the Reporter, the KCCRC Recodification Subcommittee, and finally the Recodification Commission. This process necessarily has involved compromise. No section is a product of the thinking of any single individual.

Additionally, we have had the advice and counsel of the Revisor's office in the bill drafting process for which we are appreciative.

The Kansas Criminal Code Recodification Commission divided its work into:

(1) recodification, without substantive changes to the criminal code, and

(2) recommendations for policy changes to existing law. In reviewing the entire criminal code the Commission discovered several areas where some revision to the substantive law would improve the description of the offense or the code as a whole.

HB 2668 includes the proposed code where no changes are made to the substantive law. Proposed statutes that recommend revision of the substantive provisions of the statutes are not included in this bill.

The objectives of the proposed criminal code statutes in HB 2668 are to:

1. Revise the statutory language to add clarity,
2. reorganize the statutes to place them in a more user-friendly order,
3. combine statutes to reduce their number, and
4. suggest repeal of statutory language no longer in use.

Revise the statutory language to add clarity-

In many instances we have revised the statutory language to state in clear, simple and understandable terms the elements of the prohibited acts. An attempt has been made to define each crime in language sufficiently specific that the individual who reads the statute can readily understand the conduct that is prohibited.

Instances were found where the statutory language prohibited innocent conduct. In those instances we added language that we felt would make clear the legislative intent. (Throwing rocks onto a roadway may be innocent; throwing rocks onto a roadway that creates a hazard to motorists is prohibited.)

Certain statutes are modified to include language from court opinions interpreting various statutes. (Kansas case law requires that a judge, when ordering a departure sentence, must state the judge's findings on the record. We added that language to the sentencing guidelines statutes.)

Perhaps the most significant modification is to the criminal intent (culpability) statute. We have provided a handout explaining our proposed changes to the culpability statute and its effect on other statutes.

Reorganize statutes-

Statutes regarding similar conduct are placed together in one section of each article. In the present code all of the 1970 statutes are in the first part of each article. As statutes were enacted they were given the next number available. As a result, statutes addressing a particular crime are not always located in close proximity to others addressing similar behavior. For example, in Article 34 Crimes Against Persons, the homicide statutes enacted in 1970 are in the first sections of the Article. First-degree murder is found at KSA 21-3401 while the capital murder statute, enacted in 1994, is found many pages later in KSA 21-3439. (Homicides, New Section 36-New Section 42)

Sentencing statutes other than sentencing guidelines statutes have been reorganized. All statutes applicable to crimes committed prior to July 1, 1993 are included in one article. (New Section 273-New

Section 283) Statutes that are in use, but are not sentencing guidelines statutes, such as the "hard 40" and "hard 50" are placed in a separate article. (New Section 245-New Section 272)

A few statutes, in addition to defining a crime, also included administrative language. In those few instances we have suggested moving the administrative language to an appropriate chapter of the statutes. (Theft of motor fuel/driver's license; Gambling/bingo)

Combine statutes-

Statutes are merged wherever it is practical to do so. Offenses involving a crime and aggravated crime have been merged into one statute although the crime/aggravated crime terminology is retained. (Ex. Kidnapping/Aggravated kidnapping, New Section 43; Felony murder/inherently dangerous felonies, New Section 37)

Repeal of statutes no longer in use-

Statutes no longer in use have been suggested for repeal. The sentencing guidelines have made certain statutes obsolete. A few statutes passed at the time the sentencing guidelines were enacted required that certain action be taken by a specific date. Those dates have passed and the statutes are no longer applicable. We also have suggested repeal of "Refusal to yield a telephone party line".

What HB2668 does not do-

No changes are made to the substantive law as it now exists. No changes are made to the sentencing statutes or the sentencing guidelines statutes except to meet the objectives of reorganizing them and to add clarity to the statutory language. The sentence for any crime committed under the present code is not changed in the proposed code.

The Commission spent much time considering sentencing proportionality and the sentences for specific crimes. Recommendations regarding sentencing proportionality and change of sentences for specific crimes are not included in HB 2668.

Conclusion

The objectives of the proposed statutory changes in HB 2668 are to (1) revise the statutory language to add clarity, (2) reorganize the statutes to place them in a more user-friendly order, (3) combine statutes to reduce their number, and (4) suggest repeal of statutory language no longer in use. The proposed statutes in HB2668 are not intended to change the present substantive law. All crimes in the present code are retained except for those that no longer have application and are suggested for repeal.

EXECUTIVE SUMMARY

The Kansas Criminal Code Recodification Commission has completed its assigned task to recodify the Kansas criminal code and in this final report to the 2010 legislature submits its proposed criminal code. This Final Report is submitted in two volumes. Volume I, entitled Recodification, includes the proposed code where no changes are made to the substantive law. Volume II, entitled Policy Recommendations, includes proposed statutes that recommend revision of the substantive provisions of various statutes.

In K.S.A. 21-4801 the 2007 legislature created the Kansas Criminal Code Recodification Commission and provided the Commission with the mission and directive to recodify the Kansas criminal code. The Commission is composed of sixteen members appointed by the legislative, executive and judicial branches. The Commission members represent a broad spectrum of experience and interest in the criminal law. Professor Tom Stacy of the University of Kansas School of Law is chairman of the Commission and Ed Klumpp is vice chairman.

In 2004, the Legislature enacted K.S.A. 22-5101 establishing the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project. Included in the work the legislature assigned to the 3R's committee was the task of recodifying the Kansas criminal code. The 3R's recodification could not be completed before the provisions of K.S.A. 22-5101 expired March 31, 2007.

The 2007 Legislature created the Kansas Criminal Code Recodification Commission and assigned to it the mission of recodifying the Kansas criminal code (K.S.A. 21-4801). The 2007 legislative mandate to recodify the criminal code passed on to the Kansas Criminal Code Recodification Commission the task formerly undertaken by the Recodification Subcommittee of the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project.

The first meeting of the Kansas Criminal Code Recodification Commission (KCCRC), an organizational meeting, was held July 6, 2007. In its initial meeting, and in meetings thereafter, the KCCRC spent much time discussing the scope of its work and its mission to recodify the criminal code as described in the legislative mandate. With the guidance of the legislative members of the Commission, the Commission concluded that its mandate required a comprehensive recodification.

The Kansas criminal code is comprised of seventeen articles in Chapter 21 of the Kansas statutes that include more than 400 statutes. The Commission has considered and discussed each of those statutes section by section. Each proposed statute included with this report has been considered by the Reporter, the Commission's Recodification Subcommittee, and finally the Recodification Commission. This process necessarily has involved compromise. No section is a product of the thinking of any single individual.

The present criminal law of Kansas consists basically of statutes enacted by the 1969 Legislature made effective July 1, 1970. Many additions and amendments have been made since 1970, but often without regard for the relationship to or consistency with prior provisions.

In general, the substance of the Commission's work is divided into two proposals: (1) proposals regarding recodification of existing statutes, and (2) proposed recommendations for policy changes—a change to the substantive law. Some of the objectives in the proposed revisions are to state in clear, simple and understandable terms the elements of the prohibited acts; to organize the code provisions in a more user-friendly manner; to avoid drafting statutes in a manner that a question could be raised regarding the specific offense and general offense issue; to confine the provisions of the criminal code to those matters of substantive law which properly belong there; and to recommend repeal of statutes that no longer have applicability. Recommendations for policy changes to existing statutes include revisions to the substantive provisions of specific statutes, recommendations for repeal of statutes that no longer have application, and proposals for new statutes.

Many statutes which provide penal sanctions are found outside of the Chapter 21 criminal code. The Commission concluded that its work should not attempt to incorporate those statutes into the code as to do so would unduly burden the task of re-drafting the code. The Commission has recognized the existence of such statutes and has sought to avoid conflicts with the proposed code.

During the September, October, and November 2007 meetings much of the Commission's time was devoted to discussion of drug crimes. The Commission's work proposed that the legislature make the changes to present drug crimes statutes that included moving drug crimes from Chapter 65 to Chapter 21 of the Kansas Statutes, and grouping existing statutes into the core offenses of manufacture, distribution, and possession without revising existing Kansas law. The Commission's proposals were included in House Bill 2236 enacted in the 2009 legislature.

The Commission and Subcommittee devoted much time to an effort to clarify the Kansas culpability statute. The present code lacks standardized, consistent, culpability concepts. Culpability, or "criminal intent", is an element in virtually every crime although the intent required differs according to the specific crime. The required intent may involve purpose, intention, knowledge, recklessness, negligence, or other levels of culpability.

The Commission proposes adopting uniform culpability terms that will add clarity to the criminal code, will avoid unnecessary judicial interpretation of culpability terms, and will provide a guide or framework for the legislature in enacting future additions to the code.

Culpability Recodification

The Commission and Subcommittee devoted much time to an effort that it believes will clarify the Kansas culpability statute. The proposed culpability statutes are included in Appendix A. Because of its importance to the proposed code and the Commission's work, it is discussed in this section.

As noted in the interim reports, the present code lacks standardized, consistent, culpability concepts. Culpability, or "criminal intent", is an element in virtually every crime although the intent required differs according to the specific crime. The required intent may involve purpose, intention, knowledge, recklessness, negligence, or other levels of culpability.

The Kansas criminal intent statute, K.S.A. 21-3201, establishes and defines two levels of culpability, "intentional" conduct and "reckless" conduct. In various statutes other terms, which are undefined and not included in K.S.A. 21-3201, are used to describe criminal intent—or culpability. As examples: K.S.A. 21-3608 ("intentionally and unreasonably'); 21-3608a (intentionally and recklessly"); 21-3727 ("willfully and maliciously"; 21-3761 ("maliciously or wantonly"); 21-3832 (knowingly and maliciously"); 21-3848 ("negligently failing"); 21-3902 ("maliciously cause harm"); 21-4005 ("maliciously circulating"); 21-4005 ("for the purpose of"); 21-4006 ("maliciously exposing"); 21-4102 ("for the purpose of"); 21-4219 ("malicious, intentional, and unauthorized"). Many of these terms lack meaningful definition and the specific crimes compound confusion by conjoining undefined terms.

K.S.A. 21-3201 was enacted in the 1970 code. As previously discussed Kansas patterned some of its statutes after similar Model Penal Code provisions. The Model Penal Code (MPC) describes four levels of culpable conduct-"purposeful," "knowing," "reckless," and "negligent". As noted above, in the Kansas code myriad terms have been used: intentional, willful, malicious, knowing, criminally negligent, wanton, reckless, depraved, etc. Culpability is central to the definition of criminal offenses. A code becomes simpler, more accessible, and more coherent when it uses a limited number of culpability terms whose meaning is standardized. Over the last several decades, newly drafted state codes have moved in this direction.

The Commission believes that adopting uniform culpability terms will add clarity to the criminal code, will avoid unnecessary judicial interpretation of culpability terms, and will provide a guide or framework for the legislature in enacting future additions to the code.

The following statutes are proposed as amendments to the Kansas Criminal Code.

21-32-101. Requirement of Voluntary Act or Omission (New)

(a) A person commits an offense only if such person voluntarily engages in conduct, including an act, an omission, or possession.

(b) A person who omits to perform an act does not commit an offense unless a law provides that the omission is an offense or otherwise provides that such person has a duty to perform the act.

This new section defines a crime as an act or an omission. The proposed statute is added to clarify that both acts and omissions maybe be punishable. The section codifies Kansas case law by requiring a voluntary act or omission.

Kansas statutes are silent as to the nature of the act required for criminal liability except as to the definition of a crime in K.S.A. 21-3105 where crime is defined as "an act or omission defined by law" and in K.S.A. 21-3110 where "act" is defined as including "a failure or omission to take action." PIK 54.01 the Kansas Judicial Council's PIK Advisory Committee cites the following part of the instruction as a rule of evidence. "Ordinarily, a person intends all of the usual consequences of (his)(her) voluntary acts." The Model Penal Code and codes of many states include a description that the act or omission must be voluntary.

The proposed statute is patterned after the voluntary acts and omissions provision of the Texas Penal Code.

21-32-102. Culpability requirement; definitions; application .

(a) Except as otherwise provided, a culpable mental state is an essential element of every crime defined by this code. A culpable mental state may be established by proof that the conduct of the accused person was committed "intentionally," "knowingly," or "recklessly."

(b) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

(1) intentionally;

(2) knowingly;

(3) recklessly.

(c) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

(d) If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(e) If the definition of a crime does not prescribe a culpable mental state, but one is nevertheless required under subsection (d), "intent," "knowledge," or "recklessness" suffices to establish criminal responsibility.

(f) If the definition of a crime prescribes a culpable mental state that is sufficient for the commission of a crime, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the crime, unless a contrary purpose plainly appears.

(g) **If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided.**

(h) **A person acts "intentionally", or "with intent," with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are specific intent crimes. A crime may provide that any other culpability requirement is a specific intent.**

(i) **A person acts "knowingly", or "with knowledge," with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts "knowingly," or "with knowledge," with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "knowingly," "known," or "with knowledge" are general intent crimes.**

(j) **A person "acts recklessly" or is reckless when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.**

In addition to the number of terms used to define the levels of culpability the MPC, and states following it, discuss the application of those terms to the (1) nature of the conduct and (2) the result. In K.S.A. 21 -3201 Kansas refers simply to the conduct.

As discussed above the present culpability statute in the Kansas criminal code, K.S.A. 21-3201, defines two levels of culpability, "intentional" and "reckless". In the proposed statute the culpability term "intentionally" is retained. "IntentionallY" is found in virtually every criminal code as a term describing a level of culpability regardless of whether the state is an MPC state. The exception are those states where the MPC term "purposely" is used and in those instances the words "purposely" and "intentionally" are synonymous.

21-32-102 proposes use of the term "knowingly" as a culpability term separate from the term "intentional". In K.S.A. 21-3201 "knowingly" is included in "intentionally" although the two words are not synonymous. "Knowingly" is a word that is easily understood and a forms of the word "know" are a part of everyday language.

"Knowingly", or a form of the word "know", appears in approximately 80 statutes of the current criminal code. "Knowing" or "knowingly" is frequently found in phrases such as "knowingly and willfully," "knowingly and intentionally," "knowingly and with intent," "knowingly and maliciously,"

"knowingly, willfully, and with the intent," "knowingly and purposely," and is often found standing alone as a term of culpability, "knowingly". There are the statutes that seem to provide a choice of culpability--"knowingly or intentionally" "knowingly or recklessly."

Because of the extensive use of the culpability term "knowing", or "knowingly", the Commission decided it should be included in code's culpability terms with an appropriate definition.

An added feature of the proposed statute is included in subsections (h) and (i) where the statute provides that use of the culpability term "intentional", or a form thereof denotes a specific intent crime and use of the term "knowing", or one of its forms, indicates that the crime is one of general intent. Kansas appellate decisions include many cases where the courts have been required to interpret the crime's definition as to whether it is a general intent or specific intent crime. The proposal is intended to avoid the necessity for such judicial interpretation.

"Reckless" is in K.S.A. 21-3201 and 21-32-102. "Reckless" conduct is defined in K.S.A. 21-3201(c) as "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger." In 21-32-102 a person's conduct is "reckless" with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

The Model Penal Code culpability term "criminally negligent" is not included in proposed 21-32-102. Of the four terms of culpability included in the MPC it has not been adopted as often as "intentionally," "knowingly," or "recklessly." Of the 34 or so states that have adopted a version of the MPC, "criminally negligent" behavior has been adopted as a culpability level in approximately 25 of those states.

Other than those statutes that refer to "reckless" conduct, the vehicular homicide statute appears to be the only statute in the Kansas criminal code that uses a negligence standard to describe culpability and the word "negligence" is not used in that statute. Except in K.S.A. 21-3201, the word "negligent", or one of its forms, does not appear in the code.

After much consideration, the Commission concluded that it did not want to criminalize a new area of conduct not previously defined as being criminal.

The Commission's proposal establishing three culpability terms—"intentional", "knowing", and "reckless" is intended to provide a framework for the legislature and Revisor's office in drafting of future legislation defining criminal offenses. Many of the statutes in the present code do not include a culpability term. The absence of such terms often leads to court cases requiring judicial interpretation of the statutory language to determine legislative intent.

By limiting the number of culpability terms and providing a definition for them the legislature will have a guide that may be used in drafting future legislation whereby the legislature will determine the level of culpability required rather than leaving it to judicial determination. It should be noted that while

the proposal includes three culpability terms there is no prohibition against use of another culpability term where the legislature chooses to do so.

21-32-103. Guilt without culpable mental state, when.

A person may be guilty of an offense without having a culpable mental state if the crime is:

(a) A misdemeanor, cigarette or tobacco infraction or traffic infraction and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described;

(b) a felony and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described;

(c) a violation of K.S.A. 8-1567 or 8-1567a and amendments thereto; or

(d) a violation of K.S.A. 22-4901 et. seq. and amendments thereto.

Proposed 21-32-103 is K.S.A. 21-3204 with revisions in terminology from "criminal intent" to "culpable mental state". This statute defines those instances where strict liability is imposed for the conduct described—i.e., that no culpable mental state is required for a person to be guilty of a crime.

21-32-104. Culpability; exclusions.

Proof of a culpable mental state does not require:

(a) proof of knowledge of the existence or constitutionality of the statute under which the accused is prosecuted, or the scope or meaning of the terms used in that statute.

(b) proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which he is charged.

This section incorporates K.S.A. 21-3202. The terminology is revised to be consistent with the proposed culpability statute. The term "criminal intent" is replaced with "culpable mental state."

As a final note to this section, the Commission has reviewed all statutes in the code that include a definition of a crime. The Commission revised the statutes to address the following issues:

(1) In some statutes of the present code more than one culpability term is used, such as "knowingly and intentionally". In those instances the Commission selected the single term that it felt was consistent with legislative intent. Where "knowingly and intentionally" were used, the Commission looked to case law to determine whether the crime defined was a general intent or specific intent crime.

(2) In statutes where no culpability term is used, the Commission inserted the culpability term that it felt was consistent with legislative intent except in those instances where it believed that the legislature intended for the crime to be a strict liability crime.

Maintaining the Criminal Code

In our work in proposing a comprehensive recodification of Chapter 21, we have identified the following guidelines as useful in promoting the clarity and coherence of our criminal code. We pass these guidelines onto the Kansas Legislature. Our hope is that as our Legislature establishes new criminal offenses some of the problems we have identified in our current criminal code can be avoided. These guidelines should prove useful whether or not our proposed recodification is enacted into law.

Culpability

A. Use culpability terms defined in the general provisions. In our current code, offenses sometimes use culpability terms that are not defined in the general provisions. Our proposed recodification uses the terms "intentional", "knowing", and "reckless" and defines them. Use of undefined culpability terms leads to uncertainty and litigation. Use of a few culpability terms whose meaning is defined promotes simplicity and clarity.

B. Specify the culpability required respecting each offense element. In our current code, offenses often do not specify the required culpability respecting any element or do not make clear to which element(s) a specified culpability term applies. This produces uncertainty and litigation. It is ideal that the text of the offense explicitly prescribe the culpability required respecting each element. In the absence of such text, the general provisions in our proposed recodification prescribe the culpability required respecting each element by default. It should be ascertained whether these default prescriptions reflect the intent of the Legislature. If not, the text of the offense must so provide to make the departure from default prescriptions clear and effective.

C. Do not specify that the offense requires no culpability respecting the age of a minor. The general provisions provide that no culpability is required respecting the age of a minor when that is an element of the offense. Doing so may lead to courts interpreting other statutes without an internal statement of intent to not include the general no culpability rule.

Coherence of Particular Offenses with the Code's General Provisions

A. Culpability. Part I outlines several guidelines for maintaining coherence between particular offenses and the code's general culpability provisions.

B. Attempts. Generally avoid including an attempt in the definition of an offense. The general provisions operate to criminalize an attempt to commit an offense. There are, however, two reasons to depart from this general guideline and to include an attempt in the definition of an offense. First, the Legislature may wish to punish an attempt at a different level than the general provisions provide. Second, the Legislature may wish to be more specific about the overt acts sufficient to constitute an attempt.

C. Act/Omission. The definition of an offense generally should not include an omission. The general provisions in our proposed recodification defines an act to include an omission to act in the face of a legal duty to act. It is dangerous for an offense to include omissions when the Legislature's intent is to capture only omissions in face of a duty of action imposed by other sources of law such as contracts, special relationship, creation of danger, or other statutes. This raises an inference that other offenses that do not explicitly criminalize such omissions are meant to exclude them from their ambit. The definition of an offense should include an omission only when the Legislature intends to create a duty to act that is not already imposed by other sources of law.

D. Definitions. When an offense uses a term that is defined in a general definitions provision generally the offense should not contain a definition. Such a special definition is necessary only if the Legislature intends for a different definition to apply. In such circumstances, the offense should state explicitly that the general definition does not apply.

Relationship Between Offenses

An offense should specify its relationship with other overlapping offenses. Is the offense intended to be a more "specific" offense such that the Legislature intends for that offense to be used *instead of* another "general" offense? Does the Legislature intend to allow a choice between offenses so that a defendant may be convicted of and punished for *either but not for both*? Or does the Legislature intend to permit both offenses to be used so that a defendant may be convicted of and punished *for both*? In our current code, the text of offenses rarely addresses these issues. The result is uncertainty and often confusing judicial decisions. It is better that the Legislature address these questions and that the offense's text reflect the Legislature's intent.

Sentencing Proportionality

The sentence prescribed by the statute should be proportional to other crimes of similar harm and designed to enhance public safety through deterrence of future criminal action, to rehabilitate the offender, and to appropriately punish for committing the offense. Sentencing severity should not be ruled by the emotions of the "crime of the year" nor, when possible, by bed impact. To determine the appropriateness of sentencing, the legislature should consider what types of crimes are also sentenced at the level being considered and examples of offenses currently sentenced at slightly higher and slightly lower severity levels.

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Senate Judiciary Committee
SB 549
Assistant Attorney General Jason Hart
March 8, 2010

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony on behalf of Attorney General Steve Six regarding Senate Bill 549. I am an Assistant Attorney General in the Criminal Prosecution Division of the office of Attorney General Six.

SB 549 would create a private cause of action for victims of child pornography. Specifically, the bill would allow for victims of child pornography to bring a civil suit against a producer, promoter or possessor of such child pornography for damages of at least $150,000. Unlike other victims of crimes, victims of child pornography are re-victimized each time their image is distributed and viewed on the internet. Our office is actively engaged in the prosecution of the sexual exploitation of children and AG Six believes that we need all the tools available to deter these crimes from happening, including civil penalties. Attorney General Six supports the underlying concept of the bill but believes there are amendments necessary to improve the legislation.

Perhaps most importantly is that as written, SB 549 would expose investigators and law enforcement officials to civil liability simply for doing their job. Law enforcement personnel possess child pornography when analyzing evidence in pursuit of a criminal prosecution. The bill must be amended to allow law enforcement to possess child pornography in the course of their official business.

Second, it is the intent of the bill to allow for plaintiffs counsel to bring suit on behalf of victims. There is no liability exception for plaintiff's counsel or defendant's counsel to view the evidence involved. Nor is there an exception for child advocacy organizations like the National Center for Missing and Exploited Children, who operate a database of child pornography for purposes of tracking and identifying victims.

Senate Judiciary
3-8-10
Attachment 2

Kansas Peace Officers' Association

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Testimony in Support of SB 549
Kyle Smith, Legislative Chair
Senate Judiciary Committee
March 8th, 2010

Chairman Owens and Members of the Committee,

I appear today on behalf of the men and women of the Kansas Peace Officers Association in support of passage of SB 549. This bill addresses an old problem with an innovative and possibly more effective answer. The bill would create a cause of action for Kansas victims of various sex crimes against persons who create, promote or possess child pornography created during those offenses.

The degradation and harm from child pornography is only surpassed by the exponential increase in the amount and transmission. Digital photography and the internet have transformed this once rare perversion into an international and pervasive industry. Law enforcement efforts have resulted in increased enforcement and frequent convictions, but are totally unable to keep up with this expanding crime. SB 549 could produce deterrence and punishment far beyond the criminal sanctions, as well as provide some level of compensation to these child victims.

Civil suits for exploitation of child victims by possessing and promoting such pornography have been brought in other jurisdictions. One of the biggest challenges to such suits however is proving the dollar value of the damages that arise from defendants looking at and trading the images. SB 549 utilizes a 'minimum liquidated damages' approach to eliminate this stumbling block. While it is doubtful that many of the defendants will have the resources to pay the judgments in full, anything collected hurts the criminal and helps the victim. Further, the liquidated damage approach would provide a means for restitution which would otherwise be difficult to determine in a criminal case, or to collect.

For purveyors of child pornography who profit financially from this despicable trade, this legislation provides a means to attack the very underlying motivation. For those who engage in the trade out of sexual gratification, the prospect of paying large judgments might provide strong deterrence for those tempted to collect these images. And finally, there is some justice in providing some compensation to the children who had so much stolen from them.

Senate Judiciary
3-8-10
Attachment 3

Courts Weigh Criminal Restitution for Victims in Child Porn Cases

Wednesday, February 10, 2010

Associated Press

MINNEAPOLIS —

It's been more than a decade since "Amy," as she's known in court papers, was first sexually abused by her uncle. The abuse ended long ago and he's in prison, but the pictures he made when she was 8 or 9 are among the most widely circulated child pornography images online.

Now the 20-year-old woman is taking aim at anyone who would view those images and asking for restitution in hundreds of criminal cases around the country.

Her requests and those filed by other victims of child pornography are forcing federal judges nationwide to grapple with tough legal questions: Is someone who possesses an abusive image responsible for the harm suffered by a particular child? And how much should that person have to pay?

"It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It's like I am being abused over and over again," Amy wrote in court papers.

"I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle," she wrote.

The issue of criminal restitution in child pornography possession cases emerged last February in Connecticut when a federal judge said he would order a man convicted of possessing and distributing child pornography to pay about $200,000 to Amy. The judge said it was the first criminal case in which someone convicted of possessing illegal images — but not creating them — would be required to pay restitution. (The case settled for $130,000 before the judge issued his final order.)

Since then, requests for restitution have picked up as more victims are identified — and as a couple of victims, including Amy, have hired attorneys, said Meg Garvin, executive director of the National Crime Victim Law Institute in Portland, Ore.

Hundreds of requests have been filed nationwide, most of them by Amy's attorney, James Marsh of New York. Marsh said that as recently as five years ago, restitution would have been impossible because victims wouldn't have known when someone was caught with an image of them. The Crime Victims Rights Act of 2004 set up a system for notifying the victims. Now, Marsh gets several notices a day on behalf of Amy.

Marsh, who declined to make Amy available for an interview, is seeking restitution for Amy in 350 cases nationwide. Each request is about $3.4 million. She won't get that amount in every case. But any sum collected would go toward that total to cover Amy's counseling, medical costs, future lost earnings and lawyer fees.

Courts have been divided on how to handle the requests. At least two courts in Florida ordered restitution of more than $3.2 million, but some others ordered nominal amounts. Several others denied it.

"Everyone is really grappling with this in good faith," said Marsh. "It's all over the place."

In Minnesota last month, a federal judge ordered prosecutors to explain why they didn't ask for restitution in a case involving images of Amy.

The court "will no longer accept silence from the government," wrote U.S. District Judge Patrick Schiltz.

In a response brief, Assistant U.S. Attorney Erika Mozangue wrote that prosecutors didn't get a restitution request until after

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a plea deal had been worked out, and added, "The determination of restitution in possession cases is an unsettled issue."

Some defense attorneys have argued that children are not victimized by mere possession of pornography or that their client had no direct connection to the victims. Others have argued it's impossible to fairly calculate how much harm one offender caused the victim.

After a federal judge in Florida found Arthur Weston Staples III, of Manassas, Va., jointly liable for $3.5 million in restitution for having an image of Amy, Staples' attorney, Jonathan Shapiro, argued on appeal that there was no connection between the two "other than the fact that he possessed her image on his computer approximately 10 years after that image had been manufactured by her uncle ... who caused her extreme damage."

Prosecutors should have to prove that Amy was a victim of Staples' particular act, and that she would not have been harmed if Staples hadn't had the image, Shapiro argued. The appeal is pending.

A federal appeals court recently upheld a Texas judge's decision to deny restitution because prosecutors didn't show how much harm the specific defendant caused. The ruling in the 5th U.S. Circuit Court of Appeals drew a sharp dissent from Judge James Dennis.

"Her right to restitution is not barred merely because the precise amount she is owed (by this defendant) is difficult to determine," Dennis wrote.

Other defense lawyers have said restitution requests belong in civil court.

Bradford Colbert, a William Mitchell College of Law professor, agreed.

"It just isn't appropriate for criminal court to make those determinations," he said. "This is the type of thing that should be resolved in a civil lawsuit. You get convicted of a crime and you get sued by a victim, and there's a civil lawsuit where you pursue damages."

Marie Failinger, a Hamline Law School professor, said allowing restitution in criminal cases is important because many victims don't have the resources to pursue civil cases. She predicted it would take three to five years for courts to figure out a consistent way to handle requests for criminal restitution.

Meanwhile, victims' advocates see criminal restitution as one more tool for fighting child porn.

"The people who engage in this stuff need to be held accountable, even if they are not the person who is raping the child," said Ernie Allen, president of the National Center for Missing and Exploited Children. "People who are distributing this stuff, people who are downloading this stuff — when they do that, there's a victim, and there's a real harm."

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FindLaw Legal News and Commentary Writ

http://writ.news.findlaw.com/colb/20100217.html

Should Possession of Child Pornography Require Reparations to the Child?

By SHERRY F. COLB

Wednesday, February 17, 2010

At the age of eight, "Amy" (a pseudonym) suffered sexual assault at the hands of her uncle, a man who was subsequently convicted and sent to prison. Amy's ordeal is not entirely over, however. While molesting her, her uncle videotaped his crimes and distributed the pictures (both moving and still) to consumers of child pornography. As a result, images of Amy's molestation continue to circulate on the Internet, over a decade after the abuse took place, and the images regularly emerge when police arrest and search people who are in possession of child pornography.

Amy has sought restitution (a legal term for compensation) from people who have been found in possession of her images in 350 criminal cases nationwide. Because of the Crime Victims Rights Act, victims receive notification when child pornography containing their images comes to light, and that is how Amy learned about some of the people who have pleasured themselves by watching her being sexually abused.

In seeking restitution from those caught in possession of these materials, Amy claims that the defendants owe her money because they have contributed to her suffering through their possession of the videos. Some courts have been very receptive to her arguments and have awarded generous restitution, while others have refused to award anything at all.

In this column, I will evaluate Amy's claims against those who have been criminally charged with possession of child pornography in which she appears.

Why Some Courts Resist Amy's Claims

Before seeking to understand why Amy might be entitled to restitution, it is useful to consider some of the arguments that opponents mobilize against a monetary award.

First, they say, the possession of child pornography does not itself inflict any harm on Amy. Rather, they contend, the harm began and ended with the sexual assault committed by Amy's uncle, and he is therefore, properly, subject to criminal punishment and whatever restitution she is able to exact from him. In other words, this argument goes, we have a perpetrator here, and that perpetrator is Amy's uncle, not the people who downloaded images of his crime.

Second, some argue in the same vein that those in possession of child pornography have no relationship to Amy or to any of the other victims who appear in child pornography. Those who endorse this argument suggest that one cannot owe money to someone with whom one has no relationship at all. An individual's possession of the images of Amy, on this approach, does not alter Amy's life for the worse

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at all.

Third, some have claimed that even if one believes restitution is, in theory, appropriate, it is impossible to calculate how much to award. As a result, they say, there will be wildly varying assessments of the proper amount of restitution by different judges – as, in fact, there have been up until this point. Two Florida judges, for example, each ordered convicts to pay her over three million dollars, while a California judge ordered a payment of only $5000, and a Texas judge refused to award anything. Awards will depend entirely on the subjective reaction of the criminal court judge, rather than on any predictable or uniform method for determining compensation. Given this inherent arbitrariness, some conclude, it does not make sense for the law to be involved in dispensing restitution.

And fourth, there are those who contend that any compensation should occur in the context of a civil lawsuit, rather than in criminal court. Criminal courts, they reason, are best suited to address factual determinations and penalties, and are far less able to determine issues of compensation than civil courts are.

Why We Criminalize Possession of Child Pornography

To respond to these arguments opposing Amy's claims, it is useful first to consider the reasons our society has for criminalizing the possession of child pornography at all. That is, if we are to understand the role of compensation in a criminal prosecution for possession, then we must first examine the "wrong" that we believe takes place when people possess the material at issue.

One reason to punish the possession of such material is that market demand (as evidenced by possession) drives at least some portion of the misconduct itself. If there were no market for watching child pornography, then those who commit acts of sexual molestation for the camera might not do so anymore (or might do so much less frequently than they do). Those who want to view the materials, and who act on that desire by downloading them, thus motivate the conduct that gives rise to the product that they possess. Accordingly, to the extent that criminalizing possession deters some people from demanding child pornography, this deterrence helps to reduce the acts of abuse that feed the supply as well.

A second reason to punish possession of child pornography is the invasion of privacy that watching someone being molested represents. As Amy describes it, the knowledge that people are watching her being sexually assaulted feels like an additional assault to her.

To appreciate the way in which possession indeed invades a victim's privacy, consider the pedophile who uses binoculars to peer into a child's bedroom across the street, through a break in the blinds, so that he can masturbate as he watches the child undress every night. In this situation, no one is physically molesting the child, and there is therefore no more salient perpetrator to distract us – in the way that there is in the case of Amy's uncle. Rather, the only culprit in this scenario is the pedophile who watches the child undress. The same is true when a Peeping Tom targets an adult male or female to watch with binoculars in this way.

The person in possession of child pornography does not watch Amy in real time, of course, as the Peeping Tom would, but the harm is of the same kind. Someone who has no legitimate business or permission to be looking at her body is doing so. That he is watching her being violated, rather than just observing her living her life, does not mitigate the invasion. To be raped or sexually abused is both a violent and a degrading crime, and no victim wants a prurient audience to witness such an act.

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How Defenders of Restitution Might Respond to Its Detractors

Carrying over these ideas to the restitution area, we can identify how defenders of restitution might respond to its detractors.

First, proponents of restitution could point out that the consumer of child pornography is not innocent of the molestation that takes place to produce the product. As discussed above, the consumer motivates the producer to produce, and the production of child pornography generally involves the sexual violation of children. It was the large numbers of people already interested in possession of child pornography that assured Amy's uncle that he could make a profit by producing more. And consumers are surely aware that their consumption drives the creation of more images.

By analogy, as I have discussed elsewhere, people who consume animal products are participants in the suffering and death of the animals who are tortured and killed to make the products. By eating eggs, the consumer motivates the producer to breed more egg-layers and to kill the male chicks born of the egg-layers (and to kill the egg-layers themselves, once they are "spent"), all of which is part of how a supplier can meet demand. By eating dairy cheese, the consumer motivates the farmer to impregnate the cow (or sheep or goat) and then take her baby away from her and kill him for veal or another "delicacy." And the same is true for consumers of fish, chickens, turkeys, and other sentient creatures. By reducing and ultimately eliminating the demand for animal products – that is, by being vegan – we can eliminate the producers' incentive to commit this violence against animals in the first place.

In the case of child pornography, there is a second reason to require the consumer to pay restitution to the particular victim who appears in the film that he possesses (as opposed to paying some other victim of the same sort of offense). The consumer of child pornography has a direct relationship with the victim of molestation depicted in the film: He is her Peeping Tom. Quite apart from the causal connection between consumption and production (or, in economic terms, "demand" and "supply"), then, the relationship is specific to the child or children being watched: By watching Amy getting sexual abused, the viewer invades Amy's privacy (in addition to motivating other child pornographers to victimize and film her and other child victims). In that sense, it is appropriate to ask the possessor of child pornography to compensate Amy (and any other victims who might appear in his films), because he violated her particular privacy by watching her being molested.

How Much Restitution Should Victims Like Amy Receive?

Some of the above objections to restitution have more to do with practicality than they do with justice. Closely examined, such arguments are unpersuasive. They say, for instance, that it is difficult to calculate precisely how much money Amy should receive, and therefore, that we should simply get out of the business of awarding monetary restitution.

To the extent that we agree, however, that Amy and those like her are owed something rather than nothing, we replace uncertainty and some arbitrariness with certain injustice when we eliminate the option of recovering restitution altogether. In other areas of law, we have rightly settled for estimation when perfect calculation seems impossible, as discretionary awards for pain and suffering attest.

Another argument of those who oppose restitution for victims like Amy is in tension with the "impossible to estimate" point. This argument holds that Amy should bring a civil suit, rather than ask for restitution in criminal court. However, if it is indeed impossible to calculate the "right" number to assign to the harm committed by a possessor of child pornography, then in what sense could we expect a civil jury to do a "better" job of accomplishing the calculation than a criminal court judge would?

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Restitution Is a Win-Win Proposition

From the perspective of the victim of child pornography – the child and the adult that she later becomes, if she survives the assault – her assailant and every viewer have robbed her of something profound. They have all participated in her suffering and degradation, and they continue to do so as long as the material circulates. Because the Internet works as it does, this can mean the rest of a victim's life.

Though money cannot completely restore any victim to what she would have been in the absence of trauma, its award – whether through civil damages or restitution – represents a recognition of what has been unjustly taken from her. And that acknowledgement can, in and of itself, be a source of validation and comfort for a victim. The amounts will necessarily be indeterminate (as we have seen in the great disparities between awards granted in criminal courtrooms across the nation). Yet that indeterminacy does not negate the substantial benefits to victims of requiring perpetrators to pay them reparations.

In one sense, reparations also help to remind the perpetrator – in this case, the violator of a child's intimate privacy – that what he did harmed an individual – that his conduct was not simply a private, "victimless" transaction. In another sense, the availability of reparations expresses society's interest – as captured by the criminal court's involvement – in both protecting victims and redistributing wealth from those who have stolen what was never theirs to take, to those who represent the very real, individual victims of that theft.

Sherry F. Colb, a FindLaw columnist, is Professor of Law and Charles Evans Hughes Scholar at Cornell Law School. Her book, When Sex Counts: Making Babies and Making Law, is currently available on Amazon.

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RESTITUTION FOR VICTIMS OF CHILD PORNOGRAPHY

TESTIMONY IN FAVOR OF SB 549
Concerned Women for America of Kansas
Kansas Senate Judiciary Committee
March 8, 2010

Senator Owens and members of the Senate Judiciary Committee:
Concerned Women for America of Kansas is testifying in favor of SB 549, a bill that creates a private cause of action for victims of child pornography. One of our six core areas of concerns is pornography and the harm it does to the victims, the perpetrators and to society in general. The cost of pornography in terms of physical, emotional and mental harm not to mention the cost to society in terms of increased crime, sexually-transmitted diseases and its connection to human trafficking is staggering. It is our belief that the state policymakers should address this problem by attacking it not only by apprehending, prosecuting and incarcerating the perpetrators, but also by reducing the market demand by making consumers liable to the victims of the crime.

The punishment added by allowing the child victims of the crime private cause for action helps to deter the motivation for the market by making those who view these products liable. They should be liable for several reasons: First, they perpetuate the harm caused to a child in the original act by multiplying the harm even years later as the material is distributed. Second, the material is an invasion of the privacy of the child; even years later that harm is felt by the exposure of the criminal act to the Internet and other sources viewed by pedophiles and others. The violation in effect goes on and on as long as the material is available whether in real time or not. Third, the consumer of the material is not innocent of the molestation that took place to produce the material. He/she have a direct relationship with the victim in the sense they are participating in violating the child's privacy and natural modesty. Adding this "private cause for action" helps to remind the perpetrator and the consumer that the violation of a child is not without cost; that it is not a victimless business transaction.

In addition, the production and use of these materials according to many studies clearly predict that the original seduction and molestation of a child for profit leads to actual molestation of other children. According to the United States Postal Inspection Service, at least 80 percent of purchaser s of child pornography are active abusers and nearly 40 percent of the child pornographers investigated over the past several years have sexually molested children in the past. [From a statement before the U.S. Senate on the Judiciary by Ernie Allen, Director of the National Center for Missing and exploited Children in 2002] A study by the Pennsylvania Internet Crimes against Children task force reported that 51 percent of individuals arrested for pornography-related offenses were also determined to be actively molesting children or to have molested in the past.

Predators often use child pornography to break down a child's resistance to molestation, using pornographic material that depicts children who are smiling, laughing and seemingly having fun, thus legitimizing the behavior in the child's eyes. Of 1,400 cases of reported child molestation in Louisville, Kentucky, between 1980 and 1984, pornography was connected with every incident and child pornography was connected in a majority of cases. [American Prosecutors Research Institute; "From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children"; Candice Kim Volume 1, Number 2, 2004]

In conclusion, both perpetrators of child pornography and those who utilize it should pay restitution to their victims...the children they violate. We support this legislation and urge you to protect children in Kansas.

Judy Smith

Judy Smith, State Director
Concerned Women for America of Kansas

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Senate Judiciary Committee
HB 2440
Victims Services Director Dorthy Stucky Halley
Office of Attorney General Steve Six
March 8, 2010

Chairman Owens and Members of the Committee:

Thank you for allowing me to speak today and submit this testimony in support of House Bill 2440. House Bill 2440 would provide notification to victims whose perpetrators are under the care and treatment of Social and Rehabilitative Services. This change would help victims feel safe while their perpetrator is being confined, as well as give them the opportunity to take necessary safety precautions when their risks increase.

While most persons who suffer from mental illness are no real danger to society, there is a small group that can be extremely dangerous. Additionally, it is most likely their victim is a family member, friend, or loved one. This increases the risk of future violence. Many of these victims are shocked when they learn that, despite the existence of laws designed to protect victims' rights, they are likely to receive no notification of release, and no opportunity to participate in the processes and decisions that impact their safety.

A victim who does not know when their perpetrator is going to be released or put in a less restrictive setting can never feel safe. I offer the following case study for illustration:

Case Study—Kansas Mennonite Family's Experience as
Victims of an Individual with Mental Illness*

** This time line has been produced to the best recollection of family members. Due to the length of time, actual dates and noted dates may vary slightly.*

- December 1967—Ernest assaulted and raped his fiance', Leona. He used a hunting knife and graphically described the way he would kill her. He also threatened to kill her family.
- 1967-1970—He beat and raped Leona repeatedly. She became pregnant after being raped, and married him in 1968 believing she had no other choice.
- 1969—He sexually abused one of Leona's sisters who provided child care one evening. The abuse started while she was sleeping.

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- April 1970—Leona left Ernest while they resided in Newton, KS. She and their child went into hiding.
- January 4, 1971—Ernest found Leona's apartment in Boston, MA, where she had fled. He forced entry with a loaded pistol. Police surrounded the apartment. A police officer posing as a priest was able to gain entry. Leona pressed charges but Ernest was not jailed.
- January 1971, less than two weeks later—He kidnapped Leona from a subway station in Somerville, MA at knifepoint, and forced her to walk to his apartment where he raped her. She escaped about 10 hours later. Leona pressed charges, and he was jailed, then transferred to Westboro State Hospital in MA.
- February 1971—Ernest escaped from Westboro's locked ward and was caught crawling in the window of Leona's apartment.
- Later, in 1971—He was declared incompetent to stand trial and was sent to Bridgewater Institute for the Criminally Insane; Bridgewater, MA.
- September 1972—He was released from Bridgewater, regardless of Leona's expressed concerns for her wellbeing as well as that of her family.
- September 1972 - Less than 1 week after his release from Bridgewater, Ernest abducted Leona's sister Ann at gunpoint from her bedroom in the middle of the night. He threatened to kill the whole family if she made a sound. He drove her to an isolated setting where he talked about raping her. She escaped when he ran out of gas. He got gas from a farmer, then returned to her parents' home and kept the police at bay for 6 hours with the gun pointed on himself. His mother spoke with the police and told them of his mental condition. He was not arrested at that time, but was later arrested and charged. Charges were then dropped when he agreed to counseling. Ernest received one 50 minute counseling session.
- 1972-74—He returned to Boston area searching for Leona. He was arrested in New Hampshire and spent time in a New Hampshire jail for bounced checks. The family received no notification of his release.
- 1974—After Leona's father died due to house fire, Ernest wrote letters claiming he was there. (This is not believed to be the case.)
- 1975—While Leona's mother was dying from multiple sclerosis, Ernest went to the nursing home she was residing in. He also attended her funeral against family's wishes. Leona was unable to attend her own mother's funeral due to his presence.
- 1977-1986—Ernest underwent psychiatric treatment for psychosis. He was noncompliant with treatment recommendations. He would go off his medication and go on trips to locate Leona's family members. He wrote many letters, with threats of increasing violence in them. Family members never knew when he might show up.
- 1984?—Ernest held up a radio/tv station in Colorado, demanding air time to contact Leona and sister Ann.
- April, 1985—Ann receives call from a cousin who stated Ernest was at her house that day and asked many questions about where Ann lived and where her young children went to school.
- April, 1985, two days later—Ann receives a call from her sister, LeAnn, who stated Ernest had called her and asked a lot of questions about Ann, including where her children went to school.
- April 23, 1985—Ann received a call in the early morning from her sister, LeAnn, who stated Ernest had been to her house and delivered a bizarre letter. He wanted her to give

it to Leona. LeAnn was fearful, thinking he was dangerous. She contacted the police, but nothing was done. She asked Ann for help. Ann told her she would drive there the next day and try to help LeAnn get the police to take the matter more seriously.

- April 23, 1985—Ann received a call at 4 pm from her sister Leona telling her that their sister LeAnn died that afternoon. (LeAnn did have serious health problems. An autopsy did not prove foul play.)
- April 23-April 26, 1985—Ann worked with law enforcement to obtain protection so Leona could attend LeAnn's funeral and burial safely. Burial was in neighboring county. The Sheriff's office left the procession at the county line. Ernest took a different route and went to the burial site.
- 1985—Ernest was sent to Topeka State Hospital for an unknown reason. The family received no notification.
- August 1986—Ann received recognition in her local paper. Two days later, her brother-in-law received a letter from Ernest that described Ann as dead.
- August 1986, a week later—Ernest tied up his mother, choked her until she thought she would die, killed their pet dog, and threatened to kill his mother. Police used tear gas. Had homemade gun. He was sent to Topeka State Hospital. The family received no notification.
- September 1986-1989—Ernest sent many letters to Leona's family members. Some were sent while he was in Topeka State Hospital. Others were sent at times when he was released. There was a general escalation in the threat of violence in the letters. The family never knew when he was in state hospital, or when out until he made some contact. There were times the family was promised notification when it did not occur. The county attorney was contacted repeatedly, to no avail. It was later confirmed by law enforcement that Ernest had been used as an informant. The family was repeatedly told there was nothing that could be done. As soon as he was medication compliant, he was not seen as a danger to himself or others, so the State Hospital would release him, unannounced. He would then go off his medication and the cycle would continue.
- September 1989—Leona and Ann both wrote chronological histories of events and provided them to his therapist, the county attorney, and Harvey County Judge Ice.
- August 1990—Ernest was released. Judge Ice sent Leona and Ann notification that the State Hospital discharged him without notifying anyone in Newton, so Ernest was no longer under any court order. The judge reported he wrote a letter of complaint to the hospital's medical director and advised law enforcement of situation.
- 1990-2007—There were continued episodes of attempted contact by Ernest, but they began to diminish. His son was grown and the family felt somewhat safer.
- December 2007—Law enforcement informed Ann that a few years ago, when President Clinton gave a speech in Tulsa, two FBI agents were sent to Newton to keep tabs on Ernest. Law enforcement also reported that Ernest was very crippled with gout. He was reported to have difficulty getting around at that time.
- 40 years have gone by.

As you can see, for forty years this family endured ongoing terror due to multiple hostage taking scenarios, multiple stand-offs with police, multiple violent acts and personal assaults, and threats on their lives and the lives of their children too numerous to count. But, worst of all, at times when they should have been able to feel some reprieve—those times when the perpetrator was

confined—they could not feel safe, since they were always unsure and unaware of when he would be released.

This case study is one I remember quite well. Leona is my sister, and I am "Ann" (Dorthy Ann). As a victim advocate, I am relieved that these cases are unusual, but they do happen more often than we think. I have worked with quite a few of their victims. The lack of notification is often a problem. When seeking assistance, these victims, more than any others, will be instructed to be patient while the medications and treatments reduce their risk. Sometimes, the risk remains. Services available tend to focus on the rights and needs of the hospitalized patient, which is very important. But we must stop turning a deaf ear toward their victims.

I am pleased that Victim Services in the Department of Corrections is the selected service provider for this notification. Their staff has the experience and protocol established to do so effectively. Christine Ladner, who handles the Sexually Violent Predator cases for our office asked me to emphasize "how collaborative DOC victim services can be with us and local prosecutors who have anything to do with these tortuous commitment cases. DOC victim services is already helping with SVP cases where the earliest victimization may have been a long, long time ago, but still is an issue."

Thank you for your time today. I would sincerely appreciate your support of House Bill 2440.

THEODORE B. ICE
District Court Judge
Harvey County Courthouse
Newton, Kansas 67114

TELEPHONE
(316) 283-6900

JUDGES OF THE NINTH JUDICIAL DISTRICT
Harvey and McPherson Counties
ADMINISTRATIVE JUDGE
CARL B ANDERSON, JR.
DISTRICT JUDGES
THEODORE B. ICE, Division I
RICHARD B. WALKER, Division II

August 9, 1990

Ms. Leona Abbott
Safehouse
Box 313
Pittsburg, KS 66762

PERSONAL & CONFIDENTIAL

Re: Ernest Gibbens
Case No. 86-CT-328

Dear Ms. Abbott:

I have spent the last two days on the telephone checking on the status of Ernest Gibbens.

Unfortunately, I must report to you that Topeka State Hospital discharged him without notifying anyone in Newton. The effect of this is that Mr. Gibbens is no longer under any court order.

I am extremely upset and agitated over this matter and am writing a letter of complaint to the medical director of the hospital. I have also held a meeting with the law enforcement people here to advise them of the situation.

The purpose of this letter is to advise you of what has happened.

Very truly yours,

Theodore B. Ice
District Judge

TBI/jr

cc: Dorthy Miller, Safehouse

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The Hutchinson News

Saturday, August 30, 1986, Hutchinson, Kansas, Year 115 No. 58

Police flush man from home

Newton ordeal ends peacefully

By Mark Enoch
The Hutchinson News

NEWTON — Police used tear gas Friday evening to force an enraged Newton man out of his home after he barricaded himself inside.

Earlier, he had handcuffed his mother to a chair.

The tense drama began Friday afternoon in a quiet neighborhood on South Walnut in Newton. The mother, Arlene Gibbens, was not injured after her son, Ernest "Buster" Gibbens, handcuffed her to a bedroom chair.

Mrs. Gibbens said Ernest also fought with his brother, Lewis "Barney" Gibbens. Lewis received a cut on his forehead, but was not seriously hurt.

Police chief Bill Smith said Ernest was taken to Newton's Prairie View Mental Health Center and later will be taken to the state mental hospital in Topeka.

There was one fatality. Ernest killed the family dog.

"He's been sick a long time," Mrs. Gibbens said after her ordeal. "I had him committed to Topeka (the same mental hospital) a year ago. He's not a drug addict. He's a paranoid schizophrenic. He's not a criminal because of his illness. He is not a violent person."

But the hospital released him. The staff claimed 37-year-old Ernest wasn't violent, Mrs. Gibbens said.

"He's so intelligent and he can fool you," she said.

Mrs. Gibbens said she was out of the house Friday, but returned about 2:30 or 3 p.m. and planned to rest. But Ernest was acting strange. She said he yelled at her and shoved her, so she tried to slap him, but missed.

That apparently provoked Ernest into a fit of rage. Mrs. Gibbens said her son shoved her across the kitchen and choked her.

"I thought, 'This is it.'"

She doesn't know how she got into the bedroom, but that is where Ernest handcuffed her to a chair and again yelled at her. She said Ernest also showed her what appeared to be two homemade guns.

"I was saying my prayers. I prayed a lot to save him. I was praying that nobody would come. I actually think he could have killed me anytime he wanted to. I was trying to be calm because I tend to get very hyper and very hysterical. I was praying. I was praying a lot — for his safety as well as mine."

Mrs. Gibbens didn't want anyone else to come inside the house and get hurt. But she said Ernest appeared to be getting calmer and even brought her a sandwich.

Then her 23-year-old son, Lewis, arrived. She said the brothers fought on the bed, while she slipped out of the handcuffs. She tried to call the police, but Ernest had disconnected the telephone, so she ran to her next-door neighbor's house.

That neighbor, Bob Swatek, said it was about 5 p.m. when Mrs. Gibbens ran to his house. He doesn't have a telephone, but his wife, Roxanna, ran to a neighbor's home to call police.

Swatek said one Newton police officer arrived, and soon was met by two other officers and a Kansas Highway Patrol trooper.

"It was pretty quiet," Swatek said. "He had barricaded himself in the house."

Shortly before 7 p.m., police fired one canister of tear gas into the house. Ernest was alone inside. Chief Smith said Ernest soon removed the barricade and gave himself up. He was strapped to a stretcher and taken to an ambulance.

Mrs. Gibbens, 58, is not in good health. She has heart trouble and said she has been sick with pneumonia all summer. She became hysterical for a few minutes when she learned that Ernest killed the dog.

Mrs. Gibbens works as the animal abuse officer for Harvey County.

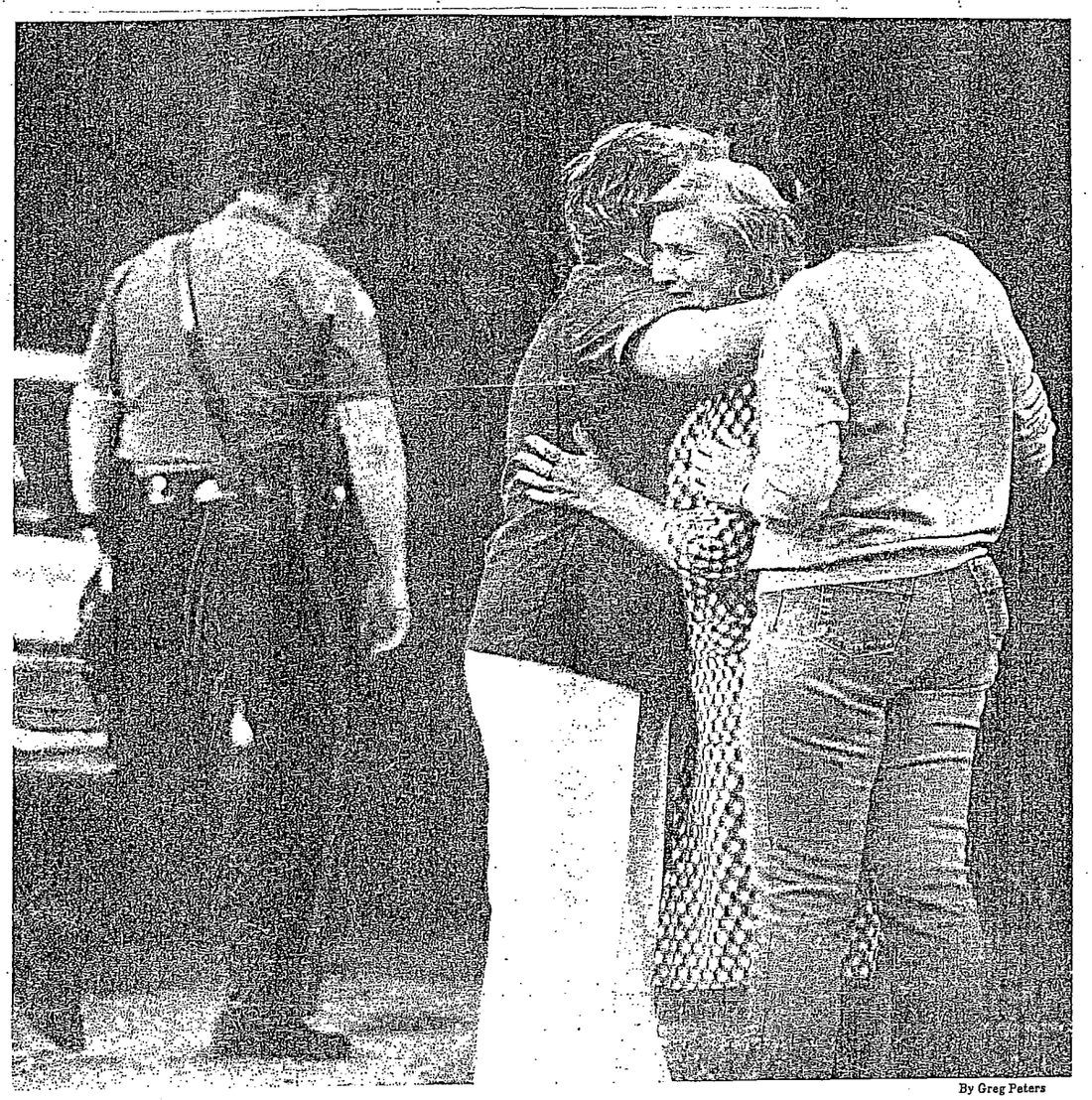
"He had to kill somebody so he killed the dog," she said. "He hated the dog, poor little thing."

Mrs. Gibbens said she thought Ernest's problems began in high school.

"He hasn't worked for several years. He sells his blood to live on."

Mrs. Gibbens said Ernest married after graduating from high school, but his wife left him about four years later. Since then, he has not seen his son. She said that is when Ernest started to go downhill.

"It's just gradually [illegible] worse in the last five to [illegible] years," she said.



By Greg Peters

Arlene Gibbens is comforted by a friend and her daughter, Rhonda Hudson, in gray shirt, as she watches her son, Ernest, being taken away in an ambulance from the family home in Newton Friday evening. Earlier, Gibbens had held his mother hostage and attacked his brother.

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KANSAS
DEPARTMENT OF CORRECTIONS

Mark Parkinson, Governor
Roger Werholtz, Secretary

www.doc.ks.gov

Testimony on HB 2440
to
The Senate Judiciary Committee

By Jennie Marsh
Director of Victim Services
Kansas Department of Corrections
March 8, 2010

The Department of Corrections supports the provisions of HB 2440 relative to the Department of Corrections providing status notifications to crime victims on behalf of the Department of Social and Rehabilitation Services. However, the Department of Corrections has concerns regarding the House amendment of HB 2440 which also requires providing notification to a defendant's family who are not crime victims. HB 2440 was passed by the House by a vote of 118-0.

HB 2440, as amended by the House to require notification to a defendant's family who are not crime victims, constitutes a substantial departure from the current crime victim statutes applicable to notifications provided by the Department of Corrections to the crime victims of convicted offenders and provisions of the Crime Victim Bill of Rights regarding notification of hearings and providing information of available services. (K.S.A. 74-7335 and 74-7333 respectively). After consulting with Juliene Maska with the Governor's Grants Office, it was verified that the funding for providing this notification prohibits providing services to populations other than crime victims. To adopt this addition would put that funding in jeopardy.

The impact of the inclusion of a defendant's family members who are not crime victims involves more than merely sending a letter advising of a change in the status of the defendant. The Department of Corrections Victim Services Division provides services to people who have been victimized by crime. Information regarding the services provided by the Department and other crime victim assistance groups is provided in conjunction with the notifications sent to crime victims as required by existing law and as proposed by HB 2440 as originally introduced. The addition of non victims into the pool of persons receiving notifications from the Department would necessitate separate record keeping and tracking for those non victims as well as create confusion and false expectations as to the services available.

Consultation with Sandy Barnett, Executive Director of the Kansas Coalition Against Sexual and Domestic Violence, and Juliene Maska of Governor's Grants Office verified that both are supportive of limiting these notification services to victims of crime, in addition to continuing the grant funding that would prohibit this practice. Therefore, the Department urges that HB 2440 be passed as it was originally introduced.

HB 2440, as introduced, provides for notifications to crime victims regarding the status of a defendant when the defendant is diverted from the criminal justice system for an evaluation of his or her competency to stand trial or for involuntary commitment pursuant to the Care and Treatment Act for Mentally Ill Persons. Notification would be provided by the Department of Corrections. In addition to HB 2440 addressing notification to crime victims, this bill also amends K.S.A. 22-3428 at page 6, line 22 to extend from 30 to 45 days the time period for the Secretary of Social and Rehabilitation Services to prepare recommendations to the court regarding a suitable reentry program for a patient who is to be conditionally released from a treatment facility.

Current law provides for notification to crime victims regarding the status of the perpetrator after a criminal conviction, particularly when the convicted defendant is remanded to the custody of the Department of Corrections. However, current law does not address notification to crime victims regarding the status of those criminal defendants who are placed in the custody of the Department of Social and Rehabilitation Services or other mental health treatment facilities for an evaluation as to whether the defendant is competent to stand trial or is acquitted due to the defendant's lack of mental capacity and subsequently committed pursuant to the Care and Treatment Act for Mentally Ill Persons.

While, criminal defendants whose status is to be reported to victims pursuant to HB 2440 are not in the custody of the Department of Corrections, the Department of Corrections currently provides notifications to crime victims regarding offenders in its custody. Therefore, the Department has established a confidential data base regarding crime victims or their surviving family members and is well suited to being a statewide entity to provide notifications to crime victims regarding the status of offenders. The efficiency and effectiveness of the Department of Corrections serving as a central point for disseminating crime victim notifications is exemplified by a Memorandum of Agreement between KDOC and SRS whereby KDOC has for the last several years provided victim notification services on behalf of the Department of Social and Rehabilitation Services regarding persons civilly committed for treatment as Sexually Violent Predators.

The KDOC Victim Services unit expects that providing notifications to crime victims as provided by HB 2440, as originally introduced, would result in an increase of at most 400 new notification letters per year in the out years, and that increase can be absorbed within existing resources. The impact of the additional of non victim notification requirements that would be necessary pursuant to HB 2440 as amended by the House is unknown.

The Department urges favorable consideration of HB 2440 as it was originally introduced. A balloon that would delete the amendments made by the House is attached for the Committee's consideration.

As Amended by House Committee

Session of 2010

HOUSE BILL No. 2440

By Committee on Corrections and Juvenile Justice

1-13

AN ACT concerning crimes, criminal procedure and punishment; relating to ~~the~~ notification of **family and** victims of persons committed to the custody of the secretary of social and rehabilitation services; amending K.S.A. 22-3303, 22-3305, 22-3428, 22-3428a, 22-3430, 22-3431 and 22-3727 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) The secretary of corrections shall**, as soon as practicable,** provide notification as provided in K.S.A. 22-3303, 22-3305, 22-3428 ~~and~~**,** 22-3428a**, 22-3430, 22-3431 and 22-3727,** and amendments thereto, and upon the escape or death of a committed defendant or inmate while in the custody of the secretary of social and rehabilitation services, to any victim of the defendant or inmate's crime ~~who is alive and~~ whose address is known to the secretary of corrections ~~or, if the victim is deceased, to the victim's family if~~**, and the victim's family, if so requested and** the family's ~~address is~~ **addresses are** known to the secretary of corrections. ~~**The secretary shall also provide such notice to the family of the defendant if requested and such addresses are known to the secretary.**~~ Such notice shall be required to be given ~~to the victim or the victim's family~~ only if the defendant was charged with, or the inmate was convicted of, any crime in article 33, 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.

(b) As used in this section, "~~victim's~~ family" means a spouse, surviving spouse, children, parents, legal guardian, siblings, stepparent or grandparents.

Sec. 2. K.S.A. 22-3303 is hereby amended to read as follows: 22-3303. (1) A defendant who is charged with a felony and is found to be incompetent to stand trial shall be committed for evaluation and treatment to the state security hospital or any appropriate county or private institution. A defendant who is charged with a misdemeanor and is found to be incompetent to stand trial shall be committed for evaluation and treatment to any appropriate state, county or private institution. *At the time of such commitment the institution of commitment shall notify the secretary of corrections for the purpose of providing victim* **and family**

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notification. Any such commitment shall be for a period of not to exceed 90 days. Within 90 days after the defendant's commitment to such institution, the chief medical officer of such institution shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If such probability does exist, the court shall order the defendant to remain in an appropriate state, county or private institution until the defendant attains competency to stand trial or for a period of six months from the date of the original commitment, whichever occurs first. If such probability does not exist, the court shall order the secretary of social and rehabilitation services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto. When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21-3504, 21-3511, 21-3518, 21-3603 or 21-3719, and amendments thereto, and commitment proceedings have commenced, for such proceeding, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e) of K.S.A. 59-2946, and amendments thereto, who is likely to cause harm to self and others, as defined in subsection (f)(3) of K.S.A. 59-2946, and amendments thereto. The other provisions of subsection (f) of K.S.A. 59-2946, and amendments thereto, shall not apply.

(2) If a defendant who was found to have had a substantial probability of attaining competency to stand trial, as provided in subsection (1), has not attained competency to stand trial within six months from the date of the original commitment, the court shall order the secretary of social and rehabilitation services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto. When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21-3504, 21-3511, 21-3518, 21-3603 or 21-3719, and amendments thereto, and commitment proceedings have commenced, for such proceeding, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e) of K.S.A. 59-2946, and amendments thereto, who is likely to cause harm to self and others, as defined in subsection (f)(3) of K.S.A. 59-2946, and amendments thereto. The other provisions of subsection (f) of K.S.A. 59-2946, and amendments thereto, shall not apply.

(3) When reasonable grounds exist to believe that a defendant who has been adjudged incompetent to stand trial is competent, the court in which the criminal case is pending shall conduct a hearing in accordance with K.S.A. 22-3302, and amendments thereto, to determine the person's present mental condition. *Such court shall give* reasonable notice of such

hearings ~~shall be given~~ to the prosecuting attorney, the defendant ~~and~~, the defendant's attorney of record, if any, *and the secretary of corrections for the purpose of providing victim* ~~and family~~ *notification*. If the court, following such hearing, finds the defendant to be competent, the proceedings pending against the defendant shall be resumed.

(4) A defendant committed to a public institution under the provisions of this section who is thereafter sentenced for the crime charged at the time of commitment may be credited with all or any part of the time during which the defendant was committed and confined in such public institution.

Sec. 3. K.S.A. 22-3305 is hereby amended to read as follows: 22-3305. (1) Whenever involuntary commitment proceedings have been commenced by the secretary of social and rehabilitation services as required by K.S.A. 22-3303, and amendments thereto, and the defendant is not committed to a treatment facility as a patient, the defendant shall remain in the institution where committed pursuant to K.S.A. 22-3303, and amendments thereto~~, and~~. The secretary *of social and rehabilitation services* shall promptly notify the court ~~and~~, the county or district attorney of the county in which the criminal proceedings are pending *and the secretary of corrections for the purpose of providing victim* ~~and family~~ *notification*, of the result of the involuntary commitment proceeding.

(2) Whenever involuntary commitment proceedings have been commenced by the secretary of social and rehabilitation services as required by K.S.A. 22-3303, and amendments thereto, and the defendant is committed to a treatment facility as a patient but thereafter is to be discharged pursuant to the care and treatment act for mentally ill persons, the defendant shall remain in the institution where committed pursuant to K.S.A. 22-3303, and amendments thereto, and the head of the treatment facility shall promptly notify the court ~~and~~, the county or district attorney of the county in which the criminal proceedings are pending *and the secretary of corrections for the purpose of providing victim* ~~and family~~ *notification*, that the defendant is to be discharged.

When giving notification to the court ~~and~~, the county or district attorney *and the secretary of corrections* pursuant to subsection (1) or (2), the treatment facility shall include in such notification an opinion from the head of the treatment facility as to whether or not the defendant is now competent to stand trial. Upon request of the county or district attorney, the court may set a hearing on the issue of whether or not the defendant has been restored to competency. *If such hearing request is granted, the court shall notify the secretary of corrections of the hearing date for the purpose of victim* ~~and family~~ *notification.* If no such request is made within 10 days after receipt of notice pursuant to subsection (1) or (2), the court shall order the defendant to be discharged from commitment

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and shall dismiss without prejudice the charges against the defendant, and the period of limitation for the prosecution for the crime charged shall not continue to run until the defendant has been determined to have attained competency in accordance with K.S.A. 22-3302, and amendments thereto. *The court shall notify the secretary of corrections of the discharge order for the purpose of providing victim notification.*

Sec. 4. K.S.A. 22-3428 is hereby amended to read as follows: 22-3428. (1) (a) When a defendant is acquitted and the jury answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221, and amendments thereto, the defendant shall be committed to the state security hospital for safekeeping and treatment *and the court shall notify the secretary of corrections for the purpose of providing victim* ~~and family~~ *notification.* A finding of not guilty and the jury answering in the affirmative to the special question asked pursuant to K.S.A. 22-3221, and amendments thereto, shall be prima facie evidence that the acquitted defendant is presently likely to cause harm to self or others.

(b) Within 90 days of the defendant's admission, the chief medical officer of the state security hospital shall send to the court a written evaluation report. Upon receipt of the report, the court shall set a hearing to determine whether or not the defendant is currently a mentally ill person. The hearing shall be held within 30 days after the receipt by the court of the chief medical officer's report.

(c) The court shall give notice of the hearing to the chief medical officer of the state security hospital, the district or county attorney, the defendant ~~and~~, the defendant's attorney *and the secretary of corrections for the purpose of providing victim* ~~and family~~ *notification.* The court shall inform the defendant that such defendant is entitled to counsel and that counsel will be appointed to represent the defendant if the defendant is not financially able to employ an attorney as provided in K.S.A. 22-4503 et seq., and amendments thereto. The defendant shall remain at the state security hospital pending the hearing.

(d) At the hearing, the defendant shall have the right to present evidence and cross-examine witnesses. At the conclusion of the hearing, if the court finds by clear and convincing evidence that the defendant is not currently a mentally ill person, the court shall dismiss the criminal proceeding and discharge the defendant, otherwise the court may commit the defendant to the state security hospital for treatment or may place the defendant on conditional release pursuant to subsection (4). *The court shall notify the secretary of corrections of the outcome of the hearing for the purpose of providing victim* ~~and family~~ *notification.*

(2) Subject to the provisions of subsection (3):

(a) Whenever it appears to the chief medical officer of the state security hospital that a person committed under subsection (1)(d) is not

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likely to cause harm to other persons in a less restrictive hospital environment, the officer may transfer the person to any state hospital, subject to the provisions of subsection (3). At any time subsequent thereto during which such person is still committed to a state hospital, if the chief medical officer of that hospital finds that the person may be likely to cause harm or has caused harm, to others, such officer may transfer the person back to the state security hospital.

(b) Any person committed under subsection (1)(d) may be granted conditional release or discharge as an involuntary patient.

(3) Before transfer of a person from the state security hospital pursuant to subsection (2)(a) or conditional release or discharge of a person pursuant to subsection (2)(b), the chief medical officer of the state security hospital or the state hospital where the patient is under commitment shall give notice to the district court of the county from which the person was committed that transfer of the patient is proposed or that the patient is ready for proposed conditional release or discharge. Such notice shall include, but not be limited to: (a) Identification of the patient; (b) the course of treatment; (c) a current assessment of the defendant's mental illness; (d) recommendations for future treatment, if any; and (e) recommendations regarding conditional release or discharge, if any. Upon receiving notice, the district court shall order that a hearing be held on the proposed transfer, conditional release or discharge. The court shall give notice of the hearing to the state hospital or state security hospital where the patient is under commitment ~~and~~, to the district or county attorney of the county from which the person was originally ordered committed and *the secretary of corrections for the purpose of providing victim* ~~**and family**~~ *notification. The court* shall order the involuntary patient to undergo a mental evaluation by a person designated by the court. A copy of all orders of the court shall be sent to the involuntary patient and the patient's attorney. The report of the court ordered mental evaluation shall be given to the district or county attorney, the involuntary patient and the patient's attorney at least five days prior to the hearing. The hearing shall be held within 30 days after the receipt by the court of the chief medical officer's notice. The involuntary patient shall remain in the state hospital or state security hospital where the patient is under commitment until the hearing on the proposed transfer, conditional release or discharge is to be held. At the hearing, the court shall receive all relevant evidence, including the written findings and recommendations of the chief medical officer of the state security hospital or the state hospital where the patient is under commitment, and shall determine whether the patient shall be transferred to a less restrictive hospital environment or whether the patient shall be conditionally released or discharged. The patient shall have the right to present evidence at such hearing and to

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cross-examine any witnesses called by the district or county attorney. At the conclusion of the hearing, if the court finds by clear and convincing evidence that the patient will not be likely to cause harm to self or others if transferred to a less restrictive hospital environment, the court shall order the patient transferred. If the court finds by clear and convincing evidence that the patient is not currently a mentally ill person, the court shall order the patient discharged or conditionally released; otherwise, the court shall order the patient to remain in the state security hospital or state hospital where the patient is under commitment. If the court orders the conditional release of the patient in accordance with subsection (4), the court may order as an additional condition to the release that the patient continue to take prescribed medication and report as directed to a person licensed to practice medicine and surgery to determine whether or not the patient is taking the medication or that the patient continue to receive periodic psychiatric or psychological treatment. *The court shall notify the secretary of corrections of the outcome of the hearing for the purpose of providing victim* ~~**and family**~~ *notification.*

(4) In order to ensure the safety and welfare of a patient who is to be conditionally released and the citizenry of the state, the court may allow the patient to remain in custody at a facility under the supervision of the secretary of social and rehabilitation services for a period of time not to exceed ~~30~~ *45* days in order to permit sufficient time for the secretary to prepare recommendations to the court for a suitable reentry program for the patient *and allow adequate time for the secretary of corrections to provide victim* ~~**and family**~~ *notification.* The reentry program shall be specifically designed to facilitate the return of the patient to the community as a functioning, self-supporting citizen, and may include appropriate supportive provisions for assistance in establishing residency, securing gainful employment, undergoing needed vocational rehabilitation, receiving marital and family counseling, and such other outpatient services that appear beneficial. If a patient who is to be conditionally released will be residing in a county other than the county where the district court that ordered the conditional release is located, the court shall transfer venue of the case to the district court of the other county and send a copy of all of the court's records of the proceedings to the other court. In all cases of conditional release the court shall: (a) Order that the patient be placed under the temporary supervision of district court probation and parole services, community treatment facility or any appropriate private agency; and (b) require as a condition precedent to the release that the patient agree in writing to waive extradition in the event a warrant is issued pursuant to K.S.A. 22-3428b, and amendments thereto.

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(5) At any time during the conditional release period, a conditionally

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released patient, through the patient's attorney, or the county or district attorney of the county in which the district court having venue is located may file a motion for modification of the conditions of release, and the court shall hold an evidentiary hearing on the motion within 15 days of its filing. The court shall give notice of the time for the hearing to the patient and the county or district attorney. If the court finds from the evidence at the hearing that the conditional provisions of release should be modified or vacated, it shall so order. If at any time during the transitional period the designated medical officer or supervisory personnel or the treatment facility informs the court that the patient is not satisfactorily complying with the provisions of the conditional release, the court, after a hearing for which notice has been given to the county or district attorney and the patient, may make orders: (a) For additional conditions of release designed to effect the ends of the reentry program, (b) requiring the county or district attorney to file a petition to determine whether the patient is a mentally ill person as provided in K.S.A. 59-2957, and amendments thereto, or (c) requiring that the patient be committed to the state security hospital or any state hospital. In cases where ~~an application~~ *a petition* is ordered to be filed, the court shall proceed to hear and determine the ~~application~~ *petition* pursuant to the care and treatment act for mentally ill persons and that act shall apply to all subsequent proceedings. *If a patient is committed to any state hospital pursuant to this act the secretary of social and rehabilitation services shall notify the secretary of corrections for the purpose of providing victim* ~~and family~~ *notification.* The costs of all proceedings, the mental evaluation and the reentry program authorized by this section shall be paid by the county from which the person was committed.

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(6) In any case in which the defense that the defendant lacked the required mental state pursuant to K.S.A. 22-3220, and amendments thereto, is relied on, the court shall instruct the jury on the substance of this section.

(7) As used in this section and K.S.A. 22-3428a, and amendments thereto:

(a) "Likely to cause harm to self or others" means that the person is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, or evidenced by behavior causing, attempting or threatening such injury, abuse or neglect.

(b) "Mentally ill person" means any person who:

(A) Is suffering from a severe mental disorder to the extent that such person is in need of treatment; and

(B) is likely to cause harm to self or others.

(c) "Treatment facility" means any mental health center or clinic,

psychiatric unit of a medical care facility, psychologist, physician or other institution or individual authorized or licensed by law to provide either inpatient or outpatient treatment to any patient.

Sec. 5. K.S.A. 22-3428a is hereby amended to read as follows: 22-3428a. (1) Any person found not guilty, pursuant to K.S.A. 22-3220 and 22-3221, *and amendments thereto*, who remains in the state security hospital or a state hospital for over one year pursuant to a commitment under K.S.A. 22-3428, and amendments thereto, shall be entitled annually to request a hearing to determine whether or not the person continues to be a mentally ill person. The request shall be made in writing to the district court of the county where the person is hospitalized and shall be signed by the committed person or the person's counsel. When the request is filed, the court shall give notice of the request to: (a) The county or district attorney of the county in which the person was originally ordered committed, and (b) the chief medical officer of the state security hospital or state hospital where the person is committed. The chief medical officer receiving the notice, or the officer's designee, shall conduct a mental examination of the person and shall send to the district court of the county where the person is hospitalized and to the county or district attorney of the county in which the person was originally ordered committed a report of the examination within 20 days from the date when notice from the court was received. Within 10 days after receiving the report of the examination, the county or district attorney receiving it may file a motion with the district court that gave the notice, requesting the court to change the venue of the hearing to the district court of the county in which the person was originally committed, or the court that gave the notice on its own motion may change the venue of the hearing to the district court of the county in which the person was originally committed. Upon receipt of that motion and the report of the mental examination or upon the court's own motion, the court shall transfer the hearing to the district court specified in the motion and send a copy of the court's records of the proceedings to that court.

(2) After the time in which a change of venue may be requested has elapsed, the court having venue shall set a date for the hearing, giving notice thereof to the county or district attorney of the county, the committed person ~~and~~, the person's counsel *and the secretary of corrections for the purpose of providing victim* ~~**and family**~~ *notification*. If there is no counsel of record, the court shall appoint a counsel for the committed person. The committed person shall have the right to procure, at the person's own expense, a mental examination by a physician or licensed psychologist of the person's own choosing. If a committed person is financially unable to procure such an examination, the aid to indigent defendants provisions of article 45 of chapter 22 of the Kansas Statutes

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Annotated shall be applicable to that person. A committed person requesting a mental examination pursuant to K.S.A. 22-4508, and amendments thereto, may request a physician or licensed psychologist of the person's own choosing and the court shall request the physician or licensed psychologist to provide an estimate of the cost of the examination. If the physician or licensed psychologist agrees to accept compensation in an amount in accordance with the compensation standards set by the board of supervisors of panels to aid indigent defendants, the judge shall appoint the requested physician or licensed psychologist; otherwise, the court shall designate a physician or licensed psychologist to conduct the examination. Copies of each mental examination of the committed person shall be filed with the court at least five days prior to the hearing and shall be supplied to the county or district attorney receiving notice pursuant to this section and the committed person's counsel.

(3) At the hearing the committed person shall have the right to present evidence and cross-examine the witnesses. The court shall receive all relevant evidence, including the written findings and recommendations of the chief medical officer of the state security hospital or state hospital where the person is under commitment, and shall determine whether the committed person continues to be a mentally ill person. At the hearing the court may make any order that a court is empowered to make pursuant to subsections (3), (4) and (5) of K.S.A. 22-3428, and amendments thereto. If the court finds by clear and convincing evidence the committed person is not a mentally ill person, the court shall order the person discharged; otherwise, the person shall remain committed or be conditionally released. *The court shall notify the secretary of corrections of the outcome of the hearing for the purpose of providing victim* ~~**and family**~~ *notification.*

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(4) Costs of a hearing held pursuant to this section shall be assessed against and paid by the county in which the person was originally ordered committed.

Sec. 6. K.S.A. 22-3430 is hereby amended to read as follows: 22-3430. (a) If the report of the examination authorized by K.S.A. 22-3429 and amendments thereto shows that the defendant is in need of psychiatric care and treatment, that such treatment may materially aid in the defendant's rehabilitation and that the defendant and society are not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to: (1) The state security hospital or any county institution provided for the reception, care, treatment and maintenance of mentally ill persons, if the defendant is convicted of a felony; or (2) any state or county institution provided for the reception, care, treatment and maintenance of mentally ill persons,

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if the defendant is convicted of a misdemeanor. The court may direct that the defendant be detained in such hospital or institution until further order of the court or until the defendant is discharged under K.S.A. 22-3431, and amendments thereto. *The court shall notify the secretary of corrections of the outcome of the hearing for the purpose of providing victim* ~~and family~~ *notification.* No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted. The cost of care and treatment provided by a state institution shall be assessed in accordance with K.S.A. 59-2006, and amendments thereto.

(b) No defendant committed to the state security hospital pursuant to this section upon conviction of a felony shall be transferred or released from such hospital except on recommendation of the staff of such hospital.

(c) The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentence to a jail, or to the custody of the secretary of corrections had been imposed.

Sec. 7. K.S.A. 22-3431 is hereby amended to read as follows: 22-3431. (a) Whenever it appears to the chief medical officer of the institution to which a defendant has been committed under K.S.A. 22-3430 and amendments thereto, that the defendant will not be improved by further detention in such institution, the chief medical officer shall give written notice thereof to the district court where the defendant was convicted. Such notice shall include, but not be limited to: (1) Identification of the patient; (2) the course of treatment; (3) a current assessment of the defendant's psychiatric condition; (4) recommendations for future treatment, if any; and (5) recommendations regarding discharge, if any.

(b) Upon receiving such notice, the district court shall order that a hearing be held. The court shall give notice of the hearing to: (1) The state hospital or state security hospital where the defendant is under commitment; (2) the district or county attorney of the county from which the defendant was originally committed; (3) the defendant; ~~and~~ (4) the defendant's attorney; *and (5) the secretary of corrections for the purpose of providing victim* ~~and family~~ *notification*. The court shall inform the defendant that such defendant is entitled to counsel and that counsel will be appointed to represent the defendant if the defendant is not financially able to employ an attorney as provided in K.S.A. 22-4503 et seq., and amendments thereto. The hearing shall be held within 30 days after the receipt by the court of the chief medical officer's notice.

(c) At the hearing, the defendant shall be sentenced, committed, granted probation, assigned to a community correctional services program, as provided by K.S.A. 75-5291, and amendments thereto, or dis-

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charged as the court deems best under the circumstance. *The court shall notify the secretary of corrections of the outcome of the hearing for the purpose of providing victim* ~~and family~~ *notification.* The time spent in a state or local institution pursuant to a commitment under K.S.A. 22-3430, and amendments thereto shall be credited against any sentence, confinement or imprisonment imposed on the defendant.

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Sec. 8. K.S.A. 22-3727 is hereby amended to read as follows: 22-3727. *(a)* Prior to the release of any inmate on parole, conditional release, expiration of sentence or postrelease supervision, if an inmate is released into the community under a program under the supervision of the secretary of corrections, or after the escape of an inmate or death of an inmate while in the secretary of corrections' custody, the secretary of corrections shall give written notice of such release, escape or death to any victim of the inmate's crime who is alive and whose address is known to the secretary or, if the victim is deceased, to the victim's family if the family's address is known to the secretary. Such notice shall be required to be given to the victim or the victim's family only if the inmate was convicted of any crime in article 33, 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, *and amendments thereto*. Failure to notify the victim or the victim's family as provided in this section shall not be a reason for postponement of parole, conditional release or other forms of release.

(b) As used in this section, "victim's family" means a spouse, surviving spouse, children, parents, legal guardian, siblings, stepparent or grandparents.

Sec. 9. K.S.A. 22-3303, 22-3305, 22-3428, 22-3428a, 22-3430, 22-3431 and 22-3727 are hereby repealed.

Sec. 10. This act shall take effect and be in force from and after its publication in the statute book.

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KANSAS

DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES

Don Jordan, Secretary

Senate Judiciary Committee

March 8, 2010

HB 2440 – Victim Notification

Disability & Behavioral Health Services

Deputy Secretary Ray Dalton

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Senate Judiciary
3-8-10
Attachment 7

KANSAS
DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES

HB 2440 – Victim Notification

Senate Judiciary Committee

March 8, 2010

Chairman Owens, and members of the Committee, the Department of Social and Rehabilitation Services (SRS), would like to provide the following written testimony in regards to House Bill 2440. House Bill 2440 would require the State Mental Health Hospitals to report to the Department of Corrections, Victim Services Division, admissions, discharges, movements of patients between facilities, and hearings, for the purpose of victim notification.

These changes to the forensic statutes will allow for the notification of victims who are not currently being notified of a change in status of a person who has victimized them, because the offender is no longer "in the criminal justice system." This occurs when an individual is being evaluated or treated for competency, found not guilty for lack of mental state, or involuntarily committed. Under these proposed changes notification will start when an offender enters the custody of the state hospital, either at a §3302 competency evaluation or a §3303 treatment order.

Notification to the victim will be provided by the Department of Corrections Office of Victims Services, with status information provided by the state hospitals, and victim information provided by the District Attorney.

The SRS Forensics Coordinator, representatives from the State Mental Health Hospitals, and the Deputy Secretary for Disability and Behavioral Health Services participated in a workgroup which looked at the issues and gaps around the notification of victims of persons who were committed to the state hospitals under the forensic commitment statutes. These new notification requirements will have a minimal impact on the State Hospitals.

SRS provided testimony in support of the original bill, but since that testimony the bill has been amended to include the notification of a defendant's family who are not crime victims. We do not feel this is in keeping with the intent of the original bill, and is not consistent with the mission of the Department of Corrections' Victims Services Division.

Therefore, the Department of Social and Rehabilitation Services urges that HB 2440 be passed as it was originally introduced.

Thank you for the opportunity to provide information to the Committee on HB 2440.