

Approved: April 2, 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter, Jr. at
10:00 a.m. on February 7, 1991 in room 514-S of the Capitol.

All members were present.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:
Sister Therese Bangert, Kansas Council on Crime and Delinquency
Betty Johnson, Kansas Council on Crime and Delinquency
Judge Charles J. Sell, District Court, Parsons
Judge Keith Sanborn, District Court, Wichita
Steve Davies, Kansas Department of Corrections

Chairman Winter called the meeting to order by continuing the hearing on the Kansas Sentencing Commission (KSC) recommendations.

Sister Therese Banger, Kansas Council on Crime and Delinquency, testified in support of the KSC recommendations. (ATTACHMENT 1)

Betty Johnson, Kansas Council on Crime and Delinquency, testified in support of the KSC recommendations. (ATTACHMENT 2)

Charles J. Sell, District Court Judge, Parsons, testified in opposition of the KSC recommendations. (ATTACHMENT 3)

Keith Sanbord, District Court Judge, Wichita, testified in opposition to the KSC recommendations. (ATTACHMENT 4)

Steve Davies, Secretary of Kansas Department of Corrections, began his testimony in support of the KSC recommendations. (ATTACHMENT 5)

Due to the time, the hearing was continued and Secretary Davies will continue his presentation on Friday, February 8, 1991 at 9:30 a.m. in Room 514-S.

The meeting was adjourned.



KANSAS COUNCIL ON CRIME AND DELINQUENCY

118 NW Fillmore • Topeka, Kansas 66606 • (913) 234-2542

Senate Judiciary Committee
Sentencing Commission Proponent
February 6, 1991

I am a member of KCCD. It is an organization which has approximately 100 memberships across Kansas. The group focus is criminal justice issues.

We applaud the work of the commission and are proud to say that we as a group started advocating Sentencing Guidelines in the 1988 Session. We applaud, too, the careful study of racial and geographical disparity.

We support the use of the Sentencing Commission as a way to keep a cap on the prison population - the commission's being used as a vehicle to promote responsible choices in policy making.

Can this commission not be a first step in making decisions about our criminal justice system? (Can we look toward a day when the legislature decides to cut 200 beds from the prison system - giving the Sentencing Commission that charge? This could be patterned on the Mental Health Reform Act which is cutting beds from State institutions, putting people in the least restrictive environments where they will not be a danger to themselves or others.

We do not agree with the Mission Statement's assumption that the primary purpose of a prison sentence is punishment. It is troubling to me that leaders of our state say punishment is the main reason for incarceration. Perhaps, we all might say, that is just stating what we all already know. I have never been one who feels that we coddle prisoners or for that matter the people we hire to work with them.

A man that has come regularly to Sunday service for a year and a half comes to my mind. He is a Viet Nam Vet - decorated with many honors for his tours with the Marines - honors which include the Bronze Star and Purple Heart. After the war he returned to the states and suffered Post Traumatic Stress Syndrome. In an argument with his friend he responded to perceived danger as he had been taught and shot and killed his friend. And then we've incarcerated him for 15 years! Protect others and him from himself, yes, but punish him?

And I think of all the abused and neglected Kansas kids I've worked with in the last 18 years. They are so self-punishing.

I want to remind us of one of our star Kansans who challenged all of us regularly about the "crime of punishment". The Chanute Tribune said of Dr. Karl at the time of his death -

Kansans

who believe that the criminal justice system affects us all - victim and offender!

"He was no idle bleeding heart. He was all business. He was for love instead of hate for one simple, scientific reason. LOVE WORKS."

Sister Therese Bangert

*Senate Judiciary Committee
Attachment 1
2-7-91*

1-1/1



KANSAS COUNCIL ON CRIME AND DELINQUENCY

118 NW Fillmore • Topeka, Kansas 66606 • (913) 234-2542

February 6, 1991

Betty Johnson
Kansas Council on Crime and Delinquency

TESTIMONY BEFORE THE STATE SENATE REGARDING THE SENTENCING GUIDELINES.

Recommendation: That the legislature pass the sentencing guidelines.

Racial Disparity - The Sentencing Commission has presented to you empirical data which clearly states what many of us have known regarding racial disparity in sentencing. Therefore, the responsibility and challenge before you is to fine tune the recommendation of the Commission so that all Kansans entering the Criminal Justice System have a better chance of being treated equally. A system which gives minorities entering it a 42% chance of going to prison should not exist. The study conducted by the Commission staff indicated that minorities get longer sentences and serve more time. Whites get a 120 day call back for sentence modification 10% more often than non-whites. Also, whites receive more recommendations for probation from their SRDC evaluation. Probation violations and the granting of parole are both linked to the use of subjective criteria which almost always work to the disadvantage of blacks. Defendants are sentenced by the court, and based upon who they are, can have their time extended through totally subjective criteria. The sentencing guidelines are by no means an absolute solution to the problem of disparity in sentencing. Yet, the guidelines do provide a first step in the process of identifying that disparity does exist and then taking action to reduce the inequitable sentencing of offenders.

Retroactivity - Although the Commission spoke very briefly to the issue of retroactivity at the end of their report, I believe it deserves immediate attention and implementation at the time the guidelines become effective. Yes, retroactivity will be costly and yes, it will require manpower to complete. Yet, the bottom line is that we have a moral obligation to do what is right. As you look at the cost of making the guidelines retroactive, you should also look at the savings to the State. In FY90 the system wide per capita inmate cost was \$18,229. Having 100 inmates released under the new guidelines would be an immediate savings to the State of almost 2 million dollars. Another factor is that without retroactivity the disparity will move away from the courtroom directly into the penal institutions, where you will be housing persons with the same offense and criminal history, yet they will be serving different lengths of sentences. This would become a significant management problem for the DOC.

Minority Representation on the Sentencing Commission - I believe the Sentencing Commission should continue to function after the implementation of the sentencing guidelines. Their purpose would be to monitor disparity and other problems which arise from the guidelines. They would also work to make appropriate changes where necessary to ensure that the guidelines are operating effectively and equitably. The Commission which comprises one black member issued a report that disparity exists in our present sentencing structure. Taking into account the one black member on the Commission, it is fair to state that blacks have no representation on the Commission. We must be very careful not to speak out of both sides of our mouths by

*Kansans
who believe that the criminal justice system
affects us all - victim and offender!*

*Senate Judiciary Committee
Attachment 2
2-7-91*

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agreeing that disparity exists and must be remedied, while at the same time neglecting to ensure proper diversity among the Commission itself. Without drawing from the expertise and perspective of blacks, how can we expect to begin to look realistically at the issue of disparity?

Speaking personally, and not on behalf of KCCD, I have the following comments:

1. I recommend that the departure factors be incorporated into the grid rather than returning to the judges the same discretion which has helped create our present situation. Judges have discretion within the range of months in each box on the grid. Judges will depart if given the chance, and they will depart upward. The largest group to become the victim of these upward departures are blacks. There should be no departure factor which lends itself to the judges' subjective view of the offender.
2. The use of consecutive sentencing is another area which will greatly impact the black offender. This will be used to manipulate the sentences. Judges are not required to explain their use of consecutive sentencing, and the sentence can be as much as twice the maximum. This will be abused by judges.

TESTIMONY PRESENTED TO
SENATE JUDICIARY COMMITTEE
ON
SENTENCING GUIDELINES
FEBRUARY 7, 1991

by

JUDGE CHARLES J. SELL
LABETTE COUNTY JUDICIAL CENTER
201 SOUTH CENTRAL
PARSONS, KANSAS
TELEPHONE (316) 421-1410

*Senate Judiciary Committee
Attachment 3*

2-7-91

3-1/31

Members of the Committee:

Thank you for giving me this opportunity to address you. I would prefer to be here neither as a proponent nor as an opponent of the recommendations of the Sentencing Commission. However, I understand that you do want interested parties to state a position. In that respect, I favor and highly recommend retaining the present sentencing system in Kansas with certain modifications that I will present to you.

I am very impressed with the apparent quality of the Sentencing Commission's work. At the same time, speaking as a judge with 20 years' experience, I have grave reservations concerning the shift of emphasis which virtually eliminates judicial discretion. Please remember that we are dealing with people's lives. Not numbers. Not statistics. Each human being, whether the offender or the victim, is a unique, complex personality that is not identical to any other. And we do not yet have computers that can equal the mental processes of a skilled judge who applies his or her experience and dedication to the individual characteristics and complexities of each particular case on an individual basis.

What I want to present to you is simply some additional information that you may or may not be aware of and that you may or may not want to consider as you continue your work on sentencing in Kansas. I have spoken briefly with some of you individually about this over the past year or so.

If reducing, or virtually eliminating, disparity in sentencing is a major goal; if reducing, or virtually eliminating, both geographic and racial bias is a major goal; if reducing the number of sentence appeals to the appellate courts is desirable; and if retaining or preserving judicial discretion is desirable, then the information I have distributed to you will be of a great deal of interest.

The State of New Hampshire has developed and had in use for approximately the past 15 years a system for sentence review that is contained within their state trial court system. Their objective was to reduce disparity in sentencing; reduce racial and geographic bias; and reduce sentence appeals to the appellate courts. From personal contacts I have had with some of the New Hampshire state trial judges and a former Chief Justice of the New Hampshire Supreme Court through the National Judicial College, I can tell you that they feel that the system works well. It is also an extremely low cost and cost

effective method for achieving the goals just mentioned because it utilizes sitting judges as the Sentence Review Boards. The New Hampshire budget for FY1990 was \$34,351.00 and for FY1991 is \$32,152.00.

A very brief description of the New Hampshire system is as follows: The legislature, by statute, established a Sentence Review Division of the state trial court to be composed of three trial judges appointed by the Chief Justice, one of whom is designated as chairman. Members are appointed for terms of three years. Concurrence of two members is sufficient to determine any matter before the Review Division. Any person sentenced for a term of one year or more in a state prison may file an application for review of the sentence by the Review Division. Notice of this right, together with the application form, is given to the defendant at the time of sentencing.

If application for review is filed, notice is given to the sentencing judge, the clerk of sentencing court, the prosecutor, and defense counsel. Upon review the Sentence Review Board may (a) increase the original sentence; (b) decrease the original sentence; (c) impose any different sentence authorized by law; or (d) let the original sentence stand.

If a different sentence is ordered, the Review Board or one of its members then resentsences the defendant

according to the order.

The Review Division may consider an appeal for review with or without a hearing. The defendant does have the right to appear and to be represented by counsel. Counsel should be defense counsel at the trial court. The state may be represented by the County Attorney or Attorney General. No sentence may be increased without the personal appearance of the defendant and his attorney. The trial judge imposing the original sentence may transmit to the Review Division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven days if requested by the Review Division.

Statutory provisions and procedures are supplemented by court rule to establish forms and regulations of procedure. Proceedings are tape recorded and transcribed at the discretion of the Board. Decisions are by written opinion.

Information and statistics are: The New Hampshire Sentence Review Board meets monthly and usually hears 4 to 7 cases.

There are 25 judges of the New Hampshire state trial court compared to 148 in Kansas, although not all Kansas judges sentence felony offenders. In 1990 New Hampshire filed 6,243 felony cases compared to 12,197 in Kansas.

For the period 1975 to May 1989 New Hampshire had a total of 736 applications for sentence review filed approximating an average of 50 applications per year.

New Hampshire's annual budget for the Sentence Review Division is about \$33,000. Based on the number of felony cases filed in each state in 1990, I believe that a similar sentence review system could be implemented in Kansas at an estimated total annual cost of less than \$100,000 and that such a system could readily handle up to 400 applications for review each year.

This could be an extremely cost effective method of dealing with some of the major problems associated with sentencing in Kansas. The statutes and rules involved are very simple and could be put in place very quickly, all within the present structure of the existing system.

If sentencing guidelines are not enacted during this session of the legislature, I would urge you to consider enacting a sentence review procedure similar to that of New Hampshire while the guidelines continue to have further study and consideration.

Other concerns I have about the proposed change to sentencing guidelines is that I foresee under that system the entire Criminal Justice system will be driven by the prosecutor with very little or no room for the check and balance of the judge. With the judge's hands essentially

tied by the guidelines, sentencing determinations will actually be made behind the closed doors of the prosecutor's office during negotiation of plea agreements. Under the present system there is the check and balance of the prosecutor's discretion in charging the offense and the judge's discretion in sentencing which is done in open court and subject to public scrutiny.

I would also like to provide you with information on the impact of sentencing guidelines in Arizona. The State of Arizona enacted a revised Criminal Code in 1978 which included guidelines for sentencing. The impact on the Arizona Department of Corrections was immediate and profound.

The following is a summary of the annual numbers of admissions to prison for selected years from 1977 to 1988 which demonstrates the substantial increase in prison commitments:

	<u>1977</u>	<u>1980</u>	<u>1982</u>	<u>1985</u>	<u>1988</u>
Violent Crimes	502	684	951	1,032	1,313
% of total	30.5	38.5	33.1	25.8	22.7
Property Crimes	592	716	1,278	1,489	1,986
% of total	35.9	40.3	44.5	37.2	34.3
Other Crimes	553	375	646	1,480	2,486
% of total	33.6	21.1	22.5	37.0	43.0
Total Admissions	1,674	1,775	2,875	4,001	5,785

The real significance is that in the 10-year period following enactment of the revised criminal code, annual

prison admissions increased from 1,674 to 5,785.

Of importance is that the admission of non-violent offenders seemed to increase disproportionately, although the advocates of the criminal code revision maintained that the real purpose was to "get the violent offenders off the streets."

In summary I urge you to take the time necessary to study the real impact that adoption of sentencing guidelines can have and to insure that adequate long-range planning has been done as to the possible effect in Kansas if our experience should be similar to Arizona.

As an interim measure a sentence review procedure can be implementated within the judicial system easily, quickly, and at minimal cost. It is a proven method of reducing sentence disparity, geographic and racial bias in sentencing, and sentence appeals to the Appellate Courts. Thank you again for this opportunity to address you today.



THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

JAMES J. BARRY, JR.
ASSOCIATE JUSTICE

188 GINGRAS AVENUE
MANCHESTER, NEW HAMPSHIRE 03104
603-668-4023
XXXXX626-0000

September 13, 1990

Honorable Charles J. Sell
Labette County Judicial Center
201 South Central
Parsons, KS. 67357

9-17-90
RECEIVED

RE: Sentence Review Division

Dear Judge Sell:

As a follow-up to your request, I was finally able to obtain the enclosed, some of which may duplicate what you already have.

The photocopy of the letter to Kenneth Pankey outlines the contents. I know that you did not receive any information regarding the budget, statistics or sample decisions. I have also enclosed a revised sentence review application. The application is read, on the record and then delivered in hand by the clerk to the defendant (also on the record) immediately following the imposition of sentence.

If there is any additional information that you desire, kindly let me know.

Sincerely,

James J. Barry, Jr.

Enclosure

JJB/id

3-9/31

The State Of New Hampshire

HILLSBOROUGH, SS.

SUPERIOR COURT

State of New Hampshire

vs.

.....
NOTICE OF RIGHT TO APPEAL

**For
SENTENCE REVIEW**

You are hereby notified that you have the right to apply for a review of the State Prison sentence imposed on you today (Insert the date, if not the same as date of this notice:
.....). The application may be filed within 30 days after the date of sentence, but not thereafter except for good cause shown. If you file such an application, your sentence will be reviewed by a Board of three members, who will be either Judicial Referees and/or Superior Court Judges. Review of the sentence may result in a decrease or increase of the minimum or maximum term within the limits fixed by law, or there may be no change in the sentence. A form for making application, if you wish to do so, is set forth below.

..... Clerk
Date

Note: The right to sentence review exists where the person has been sentenced to a term of one year or more in the State Prison, except in any case in which a different sentence could not have been imposed.

APPLICATION FOR SENTENCE REVIEW

I hereby apply for a review of the sentence imposed on me on
(Date)

I have read the above notice and understand it.

I also understand that the sentence review board may consider my appeal with or without a hearing.

I further understand that the sentence review board may make any disposition of my case that could have been made at the time of the imposition of the sentence from which I appeal.

In addition, I understand that the sentence review board has jurisdiction to review any other sentence imposed when the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence.

My lawyer has explained the sentence review procedure to me.

.....
Date

3-10/131

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

SENTENCE REVIEW DIVISION
Joseph A. DiClerico, Jr.
CHAIRMAN
Robert H. Temple
Walter L. Murphy
MEMBERS

SUPERIOR COURT CENTER
99 No. State Street
Concord, N.H. 03301
Telephone 271-2030

June 29, 1989

Mr. Kenneth Pankey
Staff Attorney
National Center for State Courts
300 Newport Avenue
Williamsburg VA 223187-8798

Dear Mr. Pankey:

In response to your telephone inquiry of June 19, 1989 relative to the operation and overall cost of the Sentence Review Division of the New Hampshire Superior Court, enclosed please find the following information:

1. Excerpt from the New Hampshire Superior Court Rules, Sentence Review Division. Throughout the rules there are numbers in red. Please refer to the typewritten page attached thereto for additional information relative to the operation of the Sentence Review Division.
2. Excerpt from New Hampshire Revised Statute Annotated 651:57, Sentence Review Division. Throughout the statutes there are numbers in red. Please refer to the typewritten pages attached thereto for additional information.
3. Attachments:

"A": Copy of Application for Sentence Review form.

"B through E": Copies of Decisions rendered by the Sentence Review Division. (Samples include an affirmation, modification, reduction, and increase of the sentence imposed).

"F": Proposed operational budget for Fiscal Year 1990-1991 (7/1/89-6/30/90, 7/1/90-6/30/91).

"G": Sentence Review Division statistics for period 1975 through May, 1989.

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Mr. Kenneth Pankey
June 29, 1989
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If there is any other information you think may be of assistance to you but has not been included in the foregoing, please feel free to contact me and I will be happy to assist you further.

Very truly yours,



Holly Agnizap
Secretary-Clerk

s
encs.

pc: Honorable Richard P. Dunfey
Honorable Joseph A. DiClerico, Jr.

SUPERIOR COURT RULES
SENTENCE REVIEW DIVISION RULES

RULES ADOPTED BY SUPERIOR COURT

1. After notice and within thirty days of sentencing, the defendant must apply to have his sentence reviewed if he intends to contest the sentence he was given by the Superior Court. It is the duty of trial counsel to protect the defendant's interest in this respect and to insure that the defendant understands the fact that he has a right to appeal the sentence imposed and that if such review is requested the sentence rendered may be increased, decreased or continued as entered by the trial Court.

Annotations

1. Cited

Cited in *State v. Goodrum* (1983) 123 NH 77, 455 A2d 1067.

2. The Clerk of the Superior Court shall give to any person sentenced to a term of one year or more in the State Prison, except in any case in which a different sentence could not have been imposed, an application for review of the sentence by the Review Division. The application shall state, and the Clerk shall so notify the defendant, that: there is a statutory right to appeal the sentence imposed by the Superior Court; and that, if the sentence is reviewed, the Review Division may increase, decrease or continue the sentence entered by the trial Court.

History

Amendments—1985. Rewrote the first sentence.

3. If application is not made for review of sentence until the defendant is incarcerated in the State Prison (or other institution to which he may be transferred), the application shall be in the following manner:

(a) The application form shall be completed and sent to the Secretary of the Sentence Review Division, Merrimack County Court House, Concord, New Hampshire.

(b) One copy of the completed application shall be retained by the defendant for personal use and as a record of application.

(c) The completed application shall indicate the date at which application is made.

SUPERIOR COURT RULES

4. When application for review of sentence is made directly to the Clerk of the Superior Court, such Clerk shall immediately notify the secretary of the Review Division, by mail, of the date such application was filed. When application is received by the Secretary of the Review Division, copies shall be prepared and mailed in accordance with rule 7(a) through (d) below.

5. The Secretary of the Review Division shall keep a Minute Book in which shall be recorded the date the completed application for review was received. Notice from the Clerk of an application filed directly in the Superior Court shall be recorded as being received at the date such application was filed in the court.

6. The Sentence Review Division Minute Book shall be open to inspection to attorneys representing defendants who have applied to have their sentences reviewed and the prosecuting attorney.

7. Copies of the application for review of sentence or notice of hearing shall be forwarded by the Secretary of the Review Division to the following persons:

- (a) The sentencing judge;
- (b) The County Attorney and/or Attorney General;
- (c) The defendant's attorney of record; and,
- (d) A copy of the application shall be mailed to the Chief Justice of the Superior Court.

8. An application, which is submitted after thirty days from the date of sentencing, shall be returned to the defendant, and notice shall be given to his attorney that the application is not timely to perfect review of the sentence imposed. There shall be no appeal from the failure to perfect the application for sentence review except that the Review Division may, for GOOD CAUSE SHOWN, consider any late request for review of sentence and may grant such request.

9. Hearings before the Review Division shall normally be in accordance with the order the applications are recorded in the Sentence Review Division Minute Book.

10. The judge, who imposed the sentence to be reviewed, may transmit to the Review Division a statement of reasons for imposing the sentence which is to be reviewed but shall transmit such

SUPERIOR COURT RULES

a statement of reasons for imposing the sentence within seven days if requested to do so by the Review Division.

11. The filing of application for review of sentence does not stay execution of the sentence.

12. Sentences may be reviewed that were imposed prior to the effective date of RSA 651:58 (August 5, 1975) and for those sentences the thirty day rule will not apply. Sentences may be reviewed even if the sentence to the State Prison has been suspended or deferred or if the time to be served is less than one year because of credit for pre-sentence confinement.

History

Amendments—1985. Substituted "or deferred" for "in part" following "suspended" in the second sentence.

13. Sentences may be reviewed that exceed one year in the State Prison whether as a result of finding of guilty following trial, entering of a plea of guilty, or a finding of guilty following a plea of *nolo contendere*. Sentences may also be reviewed following a re-sentencing if the original sentence has been set aside by judicial process other than this Review Division.

14. The Division can act in any of the following ways:

- (a) It may increase the penalty imposed by the judge;
- (b) It may decrease the penalty imposed by the judge;
- (c) It may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review; or,
- (d) It may decide that the sentence under review should stand as is.

Annotations

1. Cited

Cited in *State v. Cote* (1987) 129 NH 358, 530 A2d 775.

15. The Sentence Review Division will *only consider* matters which are a part of the record of sentencing and will require the production of the following material if it was used in the imposition of sentence:

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SUPERIOR COURT RULES

(a) Presentence reports;

(b) Any other records, documents or exhibits relevant to such review proceedings which were available to the sentencing judge in the imposition of the sentence under review.

16. The Sentence Review Division will not consider any matter or development subsequent to the imposition of the sentence. Matters not to be considered include:

(a) Institutional adjustment;

(b) New social information;

(c) Institutional disciplinary actions pending or had against the applicant;

(d) Work report; or

(e) Inmate release plans.

17. The applicant shall have the right to appear and be represented by counsel. Counsel should be trial counsel below and for all indigents the court appointed counsel shall be reimbursed as

[Page 69 follows]

SUPERIOR COURT RULES

provided by law. No sentence may be increased, however, without the personal appearance by the defendant and his attorney. The State may be represented by the County Attorney of the county wherein the sentence and judgment were imposed or by the Attorney General.

18. If the Sentence Review Division orders a different sentence, the Division or a member thereof shall resentence the defendant as ordered by the Sentence Review Division.

19. The time served on any sentence reviewed shall be deemed to have been served on the sentence substituted if such substitution is made by the Sentence Review Division.

20. The decision of the Sentence Review Division will be final and the reasons for any change of sentence will be stated therein in a written opinion. In its decision, the Sentence Review Division will give consideration, but is not limited to, the following objectives of the New Hampshire Criminal Code sanctions:

(a) Isolation of the offender from society to prevent criminal conduct during the period of confinement;

(b) Rehabilitation of the convicted offender into a non-criminal member of society;

(c) Deterrence of other members of the community who might have tendencies toward criminal conduct similar to those of the offender;

(d) Deterrence of the defendant, himself;

(e) Reaffirmation of social norms for the purpose of maintaining respect for the norms themselves;

(f) The individual characteristics of the defendant prior to the imposition of the sentence, except that information, which does not affirmatively appear on the record or in the judge's statement of reasons for the sentence, shall be excluded;

(g) The facts and circumstances of the crime or crimes which affirmatively appear in the record of the proceedings; and

(h) Statistical information concerning the sentences imposed for the same crime committed by other individuals in the State of New Hampshire.

New Hampshire Practice

2 N.H.P. Criminal § 852

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SUPERIOR COURT RULES

21. The original of each decision or order shall be sent to the Clerk for the county wherein judgment was rendered and a copy sent to the Judge who imposed the sentence reviewed. Copies shall also be sent to the person sentenced, the principal officer of the institution wherein such person is confined, the applicant's attorney of record, the County Attorney and the Attorney General's office.

22. The scope of review of the Division shall be:

(a) The excessiveness or lightness of the sentence having regard to the nature of the offense, the protection of the public interest and safety, and the character of the offender;

(b) The manner in which the sentence was imposed, including the sufficiency and accuracy of the information before the sentencing court.

23. Unless at least two members of the Review Division panel reviewing a given case concur in amending a sentence, the sentence below shall stand.

from 1973, 370:41; 1979, 319:1, 407:1, 4; and 1982, 36:7, related to credits for good conduct. See now RSA 651-A:22.

Former RSA 651:55-c, which was derived from 1973, 370:41 and 1976, 32:2, related to credit for confinement prior to sentencing. See now RSA 651-A:23.

Out-of-State Parolee Supervision

651:56 Execution of Compact Authorized.

[Repealed 1983, 461:33, eff. July 1, 1983.]

Former RSA 651:56, which was derived from 1971, 518:1, related to an interstate compact permitting prisoners on probation or parole to reside in another state. See now RSA 651-A:25.

Review of State Prison Sentences

CROSS REFERENCES

Habeas corpus, see RSA 534.

Review of transfer to secure psychiatric unit, see RSA 622:45.

Rules, see Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

ANNOTATIONS

1. Construction with other laws

Enactment of this subdivision in no way suspended or repealed RSA 651:20, 21, providing for suspension of sentence. *State v. Lemire* (1976) 116 NH 395, 359 A2d 644.

2. Cited

Cited in *State v. McMillan* (1976) 116 NH 126, 352 A2d 702; *State v. Fraser* (1980) 120 NH 117, 411 A2d 1125.

LIBRARY REFERENCES

New Hampshire Practice

2 N.H.P. Criminal Practice & Procedure § 879 et seq.

West Key Number

Criminal Law ⇐ 993, 997 et seq.

CJS

Criminal Law §§ 1587 et seq., 1606(1) et seq.

651:57 Review Division. The chief justice of the superior court shall appoint 3 superior court justices or judicial referees to constitute a board of 3 members to act as a review division of the court and shall designate one of these judges as division chairman. The term shall be for 3 years. The division shall meet at the times and places as its business requires, as determined by the chairman. The decision of 2 members is sufficient to determine any matter before the review division. No member may sit or act on a review of a sentence imposed by him. If the review to be acted on by the division is a review of a sentence imposed by a member serving on the review division or if it is inexpedient for a member to attend at the time for which a meeting is called, the division chairman shall designate, from among the superior court, a justice to act as an alternate in place of the absent or disqualified member. The review division may appoint a secretary-clerk, whose compensation shall be fixed by the review division and paid by the state.

HISTORY

Source. 1975, 267:1. 1976, 25:1. 1979, 407:2. 1981, 186:1, eff. June 2, 1981. Amendments—1981. Deleted "and a member of the superior court as an alternate" fol-

lowing "referees" in the first sentence and rewrote the sixth sentence.

—1979. Substituted "a member of the superior court as an alternate" for "3 superior court justices or judicial referees, as alternates" following "referees and" in the first sentence, rewrote the second sentence, deleted the former third sentence and substituted

"division chairman" for "chief justice" preceding "shall designate" in the sixth sentence and "the" for "an" thereafter.

—1976. Substituted "3" for "two" following "referees and" in the first sentence and preceding "alternates" in the third sentence and made minor changes in phraseology.

ANNOTATIONS

1. Cited

Cited in *Bell v. State Superior Court Sentence Review Division* (1977) 117 NH 474, 374

A2d 659; *State v. Goodwin* (1978) 118 NH 862, 395 A2d 1234.

651:58 Application for Review.

I. Any person sentenced to a term of one year or more in the state prison, except in any case in which a different sentence could not have been imposed, may file with the clerk of the superior court for the county in which the judgment was rendered an application for review of the sentence by the review division. The application may be filed within 30 days after the date the sentence was imposed, but not thereafter except for good cause shown. The filing of an application for review shall not stay the execution of the sentence.

II. Upon imposition of the sentence the clerk shall give oral and written notice to the person sentenced of his right to make such a request. This notice shall include a statement that review of the sentence may result in a decrease or increase of the minimum or maximum term within the limits fixed by law. A form for making the application shall accompany the notice. If an application is filed, the clerk shall forthwith transmit it to the review division and shall notify the chief justice and the judge who imposed the sentence of the filing.

III. The sentencing judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within 7 days if requested to do so by the review division.

HISTORY

Source. 1975, 267:1, eff. Aug. 5, 1975.

CROSS REFERENCES

Application following incarceration, see Rule 3, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Late applications, see Rule 8, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Sentences subject to review, see Rules 12 and 13, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

ANNOTATIONS

1. Cited

Cited in *State v. Church* (1975) 115 NH 537, 345 A2d 392, certiorari denied, 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 360 (1976); *Bell v.*

State Superior Court Sentence Review Division (1977) 117 NH 474, 374 A2d 659; *State v. Goodwin* (1978) 118 NH 862, 395 A2d 1234.

651:59 Review Procedure.

I. The review division has jurisdiction: to consider an appeal with or without a hearing; to review the judgment insofar as it relates to the sentence imposed; to review any other sentence imposed when the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence; to amend the judgment by ordering substituted therefor a different appropriate sentence or sentences; or to make any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review.

II. The review division may require the production of any records, documents, exhibits or other things connected with the proceedings. The superior court shall by rule establish forms for appeals hereunder and may by rule make such other regulations of procedure relative thereto, consistent with law, as justice requires.

HISTORY

Source. 1975, 267:1, eff. Aug. 5, 1975.

CROSS REFERENCES

Decisions regarding sentence, see Rule 14, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Factors considered in decision, see Rule 20, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Material requiring production, see Rule 15, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Matters which will be considered, see Rule 15, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Matters which will not be considered, see Rule 16, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Personal appearance by defendant and counsel required to increase sentence, see Rule 17, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Right of applicant to appear and be represented by counsel, see Rule 17, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

Scope of review, see Rule 22, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

ANNOTATIONS

1. Increase of sentence

Superior court sentence review division had authority to increase sentences where the appropriateness of the sentences was the very subject of appeal to it by prisoner given adequate notice that division might find sentence too short as well as too long and nothing in procedure created any realistic likelihood of vindictiveness. *Bell v. State Superior Court Sentence Review Division* (1977) 117 NH 474, 374 A2d 659.

Constitutional requirements of due process do not require statement of reasons which justify increase of sentence in sentence review proceedings where it is the appropriateness of

original sentence which is the very issue on appeal to board. *Bell v. State Superior Court Sentence Review Division* (1977) 117 NH 474, 374 A2d 659.

Increased sentences in sentence review proceedings do not have to be based on events occurring after original sentence. *Bell v. State Superior Court Sentence Review Division* (1977) 117 NH 474, 374 A2d 659.

2. Cited

Cited in *State v. Goodwin* (1978) 118 NH 862, 395 A2d 1234; *Allard v. Power* (1982) 122 NH 27, 440 A2d 450; *State v. Stone* (1982) 122 NH 987, 453 A2d 1272.

651:60 Amendment of Sentence. If the judgment is amended by an order substituting a different sentence or sentences or disposition of the case,

the review division or any member thereof shall resentence the defendant or make any other disposition of the case in accordance with the order of the review division. Time served on a sentence appealed from shall be deemed to have been served on a substituted sentence.

HISTORY

Source. 1975, 267:1, eff. Aug. 5, 1975.

ANNOTATIONS

1. Cited

A2d 659; State v. Goodwin (1978) 118 NH 862, 395 A2d 1234.

Cited in Bell v. State Superior Court Sentence Review Division (1977) 117 NH 474, 374

651:61 Records. The secretary-clerk shall attend all sittings of the review division, shall record all appointments to the division, notifying the clerk of the superior court in each county thereof, and shall record the proceedings of the division.

HISTORY

Source. 1975, 267:1, eff. Aug. 5, 1975.

CROSS REFERENCES

Inspection of record book, see Rule 6, Sentence Review Division Rules, Rules of the Superior Court, New Hampshire Court Rules Annotated.

ANNOTATIONS

1. Cited

Cited in Bell v. State Superior Court Sentence Review Division (1977) 117 NH 474, 374 A2d 659.

Restitution

HISTORY

Purpose. 1981, 329:1, eff. Aug. 16, 1981, provided:

"I. The legislature finds and declares that the victims of crimes often suffer losses through no fault of their own and for which there is no compensation. It also finds that repayment, in whole or in part, by the offender to the victim of his crime can operate to rehabilitate the offender in certain instances. It is the purpose of this act to encourage the compensation of victims by the person most responsible for the loss incurred by the victim, the offender. Restitution by the offender can serve to reinforce the offender's sense of responsibility for the offense, to provide him

the opportunity to pay his debt to society and to his victim in a constructive manner, and to ease the burden of the victim as a result of the criminal conduct.

"II. The legislature recognizes that a crime is an offense against society as a whole, not only against the victim of the crime, and that restitution for victims is therefore ancillary to the central objectives of the criminal law. It intends restitution to be applied only when other purposes of sentencing can be appropriately served. It does not intend the use of restitution to result in preferential treatment for offenders with substantial financial resources."

CROSS REFERENCES

Restitution for vandalism committed by minors, see RSA 169-B:45.
Restitution to government for losses incurred as a result of food stamp fraud, see RSA 167:17-c.

N.H. REVISED STATUTE ANNOTATED 651:57 - SENTENCE REVIEW DIVISION

1. Current Board members:

Honorable Joseph A. DiClerico, Jr., Chairman
Honorable Robert H. Temple, Member
Honorable Walter L. Murphy, Member

2. The Board meets the third Friday of every month at the Merrimack County Superior Court, Concord, New Hampshire. Usually 4 to 7 cases are heard per month.
3. There are 25 justices on the N.H. Superior Court.
4. Holly Aquizap, Secretary-Clerk. Annual salary: \$21,244.30 for a 37.5 hour work week.
5. Such as a sentence of life in prison without parole.
6. See Attachment "A", Application for Sentence Review.
7. Once Application for Sentence Review has been received by the Secretary-Clerk of the Review Division, the following people are notified that an application has been submitted: sentencing judge, clerk of sentencing court, prosecutor, and defense counsel.
8. Prior to Sentence Review Hearing, the designated Board members have reviewed the following material: indictments and sentence sheets; report of the probation department; evidence, if any, introduced at time of sentencing; and the transcript of the sentencing hearing.
9. Notices of hearings, and dispositions thereof, are forwarded to the following: sentencing judge; clerk of sentencing court; prosecutor; defense counsel; defendant; administrator of the N.H. State Prison (or other facility in which defendant is incarcerated).

All proceedings are tape recorded and transcribed at the discretion of the Review Division.

A' Attachment "A"

THE STATE OF NEW HAMPSHIRE

Cheshire

, SS.

SUPERIOR COURT

St. 87-5-367
87-5-366
85-5-391

State of New Hampshire

vs.

Nelson Field

NOTICE OF RIGHT TO APPLY

For

SENTENCE REVIEW

You are hereby notified that you have the right to apply for a review of the State Prison sentence imposed on you today (Insert the date, if not the same as the date of this notice: _____). The application may be filed within 30 days after the date of sentence, but not thereafter except for good cause shown. If you file such an application, your sentence will be reviewed by a Board of three members, who will be either Judicial Referees and/or Superior Court Judges. Review of the sentence may result in a decrease or increase of the minimum or maximum term within the limits fixed by law, or there may be no change in the sentence. A form for making application, if you wish to do so, is set forth below.

4/27/89

Date

[Signature] Clerk

Note: The right to sentence review exists where the person has been sentenced to a term of one year or more in the State Prison, except in any case in which a different sentence could not have been imposed.

APPLICATION FOR SENTENCE REVIEW

I hereby apply for a review of the sentence imposed on me on

4/27/89

(Date)

I have read the above notice and understand it.

I also understand that the sentence review board may consider my appeal with or without a hearing.

I further understand that the sentence review board may make any disposition of my case that could have been made at the time of the imposition of the sentence from which I appeal.

In addition, I understand that the sentence review board has jurisdiction to review any other sentence imposed when the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence.

My lawyer has explained the sentence review procedure to me.

4/27/89

Date

Nelson Field

SENTENCE REVIEW DIVISION

MAY 1989

3-24/31

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

SENTENCE REVIEW DIVISION

Joseph A. DiClerico, Jr.

CHAIRMAN

Robert H. Temple

Walter L. Murphy

MEMBERS

SUPERIOR COURT CENTER

99 No. State Street

Concord, N.H. 03301

Telephone 271-2030

STRAFFORD, SS.

MAY 19, 1989

* * * * *
STATE OF N.H.
v.
GARY SAMPSON
* * * * *

#87-S-540, 541

DECISION OF THE SENTENCE REVIEW BOARD

By unanimous decision of Justices DiClerico, Murphy and Manias, the following sentences are hereby AFFIRMED:

#87-S-540: Five (5) years to ten (10) years in the New Hampshire State Prison. Restitution in the amount of \$15,000.00. To be served concurrent with Carroll County sentence.

#87-S-541: Three and one-half (3-1/2) years to seven (7) years in the New Hampshire State Prison, suspended, consecutive to #87-S-540.

May 22, 1989
Date

Joseph A. DiClerico, Jr.
Chairman

ha

Attachment "c"

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

SUPERIOR COURT CENTER
99 No. State Street
Concord, N.H. 03301
Telephone 271-2030

SENTENCE REVIEW DIVISION
Joseph A. DiClerico, Jr.
CHAIRMAN
Robert H. Temple
Walter L. Murphy
MEMBERS

SULLIVAN, SS.

APRIL 21, 1989

* * * * *
STATE OF N.H.
v.
KEVIN KINCAID
* * * * *

#87-S-157, 158

DECISION OF THE SENTENCE REVIEW BOARD

By unanimous decision of Justices Murphy, William O'Neil and Cann, the sentences in #87-S-157 and 87-S-158 are hereby MODIFIED as follows:

As to 87-S-157: Twelve (12) months in the House of Correction with credit for 134 days pre-sentence incarceration.

With respect to 87-S-158: Two (2) years to four (4) years in the New Hampshire State Prison, suspended upon good behavior, consecutive to the sentence imposed in #87-S-157; and upon condition that when released from incarceration, Defendant shall have one (1) year in which to reimburse the county for the expense of his extradition. Payment is to be made through the Department of Corrections. The suspended sentence shall not be brought forward after a period of five (5) years from his release from incarceration.

May 5, 1989
Date


Walter L. Murphy
Acting Chairman

3-26/31

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

SENTENCE REVIEW DIVISION
Joseph A. DiClerico, Jr.
CHAIRMAN
Robert H. Temple
Walter L. Murphy
MEMBERS

SUPERIOR COURT CLERK
199 No. State Street
Concord, N.H. 03301
Telephone 271-2030

HILLSBOROUGH, SS.

SEPTEMBER 30, 1988

* * * * *
STATE *
*
v. *
*
STEVEN TANNER *
*
* * * * *

#87-1585

DECISION OF THE SENTENCE REVIEW BOARD

By unanimous decision of Justices DiClerico, Temple and Contas, the sentence of five (5) years to ten (10) years, with four (4) years of the minimum suspended is hereby REDUCED to the following:

The defendant is sentenced to serve not less than one (1) year and one (1) day and not more than three (3) years at hard labor in the New Hampshire State Prison. Stand committed.

There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of defendant's sentence, to be prorated for every part of the year, RSA 651:2, II e.

Defendant shall pay the balance of restitution in the amount of \$4,402.00 in full, and shall participate in regular mental health therapy, if indicated, as conditions of parole. In reducing this sentence, the Board has considered and weighed the following: (1) the lack of any prior record; (2) the nature of the offense; (3) sentences

Steven Tanner
Sentence Review Hearing
September 30, 1988
Page -2-

imposed in similar cases; and (4) the fact that a 3 year maximum sentence will provide sufficient parole supervision of the defendant given the circumstances of this case.

October 7, 1988
Date

Joseph A. DiClerico, Jr.
Chairman

ha

3-28/31

STATE OF NEW HAMPSHIRE
SUPERIOR COURT
SENTENCE REVIEW DIVISION

CHESHIRE, SS.

DECEMBER 16, 1983

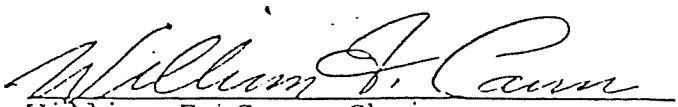
* * * * *
STATE *
v. *
GARY HOWARD *
* * * * *

#SR-37-83-Ch

DECISION OF THE SENTENCE REVIEW BOARD

By unanimous decision of Justices Cann, Dunn, and Nadeau, the sentences are hereby affirmed except that the suspended sentence under #83-S-156 of no more than six years nor less than three years is hereby made consecutive to the sentence of not more than seven years nor less than two and one-half years imposed under #83-S-155.

The reason for this increase is that in the event the defendant fails to respond to the rehabilitative programs available, or upon release demonstrates that they have been unsuccessful, this added time will insulate defendant from society, will further defer defendant from committing additional offenses, and finally will provide to defendant more incentive to rehabilitate himself.


William F. Cann, Chairman

/vjml

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

SENTENCE REVIEW DIVISION
Joseph A. DiClerico, Jr.
CHAIRMAN
Robert H. Temple
Walter L. Murphy
MEMBERS

SUPERIOR COURT CENTER
99 No. State Street
Concord, N.H. 03301
Telephone 271-2030

PROPOSED BUDGET FOR 1990-1991 (SENTENCE REVIEW)

SUPPLIES

(7/1/89-6/30/90) (7/1/90-6/30/91)

	<u>1990</u>	<u>1991</u>
Graphic Services (envelopes)	\$120.00	\$150.00
Country Road Press (stationery)	60.00	80.00
Other supplies	<u>300.00</u>	<u>350.00</u>
TOTAL:	\$480.00	\$580.00

EQUIPMENT

Kemco (repair contract for typewriter)	45.00	50.00
Typewriter (replacement) (Panasonic KX-E708)	900.00	-
Wang Terminal OR	?	-
Personal Computer and related supplies	<u>3,500.00</u>	<u>50.00</u>
TOTAL:	\$4,445.00	\$100.00

POSTAGE

Includes cost of mailing transcripts	312.00	350.00
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FURNISHINGS

File cabinet (4 drawer)	-	280.00
-------------------------	---	--------

SALARY AND BENEFITS (Karl Secretary-Clerk)

Salary (includes 5% cost of living increase)	23,421.83	24,592.92
Benefits (FICA, Retirement)	2,100.00	2,400.00 approx.
Dental, life, BC/BS	<u>3,400.00</u>	<u>3,600.00 approx.</u>
TOTAL:	\$28,921.83	\$30,592.92

GRAND TOTALS:	\$34,158.83	\$31,902.92
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Expendable supplies:	<u>193.00</u>	<u>250.00</u>
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3-30/31

Attachment "G"

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

SENTENCE REVIEW DIVISION
Joseph A. DiClerico, Jr.
CHAIRMAN
Robert H. Temple
Walter L. Murphy
MEMBERS

SUPERIOR COURT CENTER
99 No. State Street
Concord, N.H. 03301
Telephone 271-2030

SENTENCE REVIEW DIVISION STATISTICS

1975 to May, 1989

APPLICATIONS

Hearings	495
Withdrawals	144
Moot before hearing	46
Pending appeal	30
Pending hearing	20
Rejected applications	3

HEARINGS/DECISIONS

Affirmed	387	78%
Reduced	58	11%
Modified	35	7%
Increased	15	4%

Total applications received: 736

prepared 6/30/89

3-31/31

REMARKS FOR SENATE JUDICIARY COMMITTEE HEARING
FEBRUARY 7, 1991, CONCERNING KANSAS SENTENCING
COMMISSION RECOMMENDATIONS TO THE KANSAS LEGIS-
LATURE

What Judges can and must do is Judge.

Judges have no inherent authority to fix penalties for crime. Only the Legislature can do that.

Neither a sentencing grid nor a Ouija Board can substitute for a conscientious Judicial consideration of the interests and needs of society, the victims, and the defendant.

Mechanistic grids fly in the face of common sense, wisdom, and experience. They depersonalize and dehumanize. They reduce a person to a case.

They factor out all common sense.

If you adopt these recommendations to factor out "socio demographic" variables that's what you will be doing under the real though mistaken belief you are eliminating racial discrimination.

"In dealing with crime and delinquency, it is imperative that the sentencing judge learn the causes of the behavior which have led the offender into the toils Of the law. These "causation factors" may be most complex. It is a simple matter to be guided entirely by what the offender did. The symptoms are obvious. The serious question is, however, what are the causes of these symptoms? Unless the causes are identified and are known to the

Senate Judiciary Committee

Attachment 4

2-7-91

4-1/4

judge, (the judge) cannot make an intelligent disposition of the case." (1)

"The presentence investigation is indispensable. In many cases basic causes can be found and reported to the judge in a sound report. In some cases a complete diagnostic study is needed. Even a physical defect may give a clue to the problem."...

"...It must be recognized that each individual is different, that (each) has a distinctive I.Q., distinctive aptitudes, and that the combination of underlying factors which precipitated (the) trouble likewise is distinctive."

"The presentence investigation report normally includes the background of the offender, (-) family, (-) home, school and community relationships, to indicate whether there are factors in (the) social history which will account for (the) behavior. When the complete diagnostic study is done, the judge who enjoys the benefit of such services should have enough information about the person (- -) to be able to mete out individualized justice. (And) is then in a position to make a determination of the kind of sentence best suited to protect society and yet meet the needs of the individual offender." (2)

"If (the judge) has excellent probation services with a professionally trained staff, (the judge) can afford to use probation in a higher percentage of cases than if (there is) probation in name only."...

- (1). National Conference of State Trial Judges,
- (2). State Trial Judge's Book, 2nd Ed. West Publishing Company, St. Paul, Minnesota (1969) P. 291, 292, 293 and 296

"For certain types of offenders commitment to an institution is the most appropriate disposition. If a defendant is inextricably involved in criminal behavior and undesirable associations, or if (the) personal pattern of living holds no promise of recovery in the community even if (the person) helped, then commitment is necessary to break the associations and, in time, to modify the antisocial tendencies."

"This does not necessarily apply only to the so-called hardened offender; it may also be true of the young person. The defendant may be a dangerous individual, one whose personality has a basic criminal pattern and whose behaviour cannot be controlled by the type of supervision offered through probation. Such an individual requires long commitment. For guidance in identifying the "dangerous offender" see "Guides for Sentencing the Dangerous Offender." ⁷

"A defendant who has none of the foregoing characteristics but whose crime caused a high degree of social injury, may have to be committed for society's protection; but such commitments must be approached cautiously to avoid the vindictiveness possible when sentencing is done in the heat of community passion."... (3)

"A judge should attempt to personalize the sentence in such a way as to "reach" the defendant."...

"A judge has no more difficult duty nor awesome responsibility than the pronouncement of sentence in a criminal case. (The judge) is in effect the conscience of the community.

(3) (ibid.)

"The late Chief Judge Bolitha J. Laws, first chairman of the Council of Judges, made the following statements in the foreword to Guides for Sentencing:

"The sentencing of the convicted offender demands of the trial judge the best that (the judge) has in wisdom, knowledge, and insight, as a jurist and as a human being. Difficult as it is to do, (the judge) must constantly weigh in the balance the future course of life of the individual before him with (the judge's) judicial responsibility for the protection of the community." (4)

I have studied the Commission's conscientious and painstaking work.

I agree with much of the research and some of the conclusions.

I disagree with some of the conclusions because they do not take into account all the variables that a system of justice must.

I have marked up my copy with some comments, knowing you do not have the time to take up all of them but your staff, I believe, will.



KEITH SANBORN
DISTRICT COURT JUDGE, DIVISION III
18TH JUDICIAL DISTRICT



DEPARTMENT OF CORRECTIONS

OFFICE OF THE SECRETARY

Landon State Office Building
900 S.W. Jackson—Suite 400-N
Topeka, Kansas 66612-1284
(913) 296-3317

Joan Finney
Governor

Steven J. Davies, Ph.D.
Secretary

To: Senate Judiciary Committee

From: Steven J. Davies, Ph.D. *Steven J. Davies*
Secretary of Corrections

Subject: Kansas Sentencing Commission Report

Date: February 7, 1991

INTRODUCTION

As Secretary of Corrections, I am pleased to have been an active participant in the development of the Kansas Sentencing Commission's recommendations. The Department supported the concept of a sentencing commission for many years. I was very impressed by the quality of members making up the Sentencing Commission. I was impressed with the time and energy exerted by the Commission while developing its recommendations. It should be pointed out there was a lot of give and take on the recommendations by the Commission members. The Kansas Department of Corrections supports the concept of presumptive sentencing guidelines and believes adoption of these guidelines will provide the Kansas Department of Corrections with an enhanced ability to project inmate population, and, in turn, to thereby predict our needs for particular types of facilities, placements, programs, and services.

We realize that approval of the recommendations will result in significant changes in virtually every aspect of the criminal justice system in Kansas. Staff in Kansas Department of Corrections' facilities, parole regions, and central office are currently conducting a complete review of the information contained in the final recommendations in an attempt to identify their impact on Departmental operations. We are also monitoring the observations of others in the criminal justice system to determine if they identify issues which could potentially have an impact on Departmental operations. Following is a chapter-by-chapter analysis of the issues which we have identified thus far.

Senate Judiciary Committee
Attachment 5
2-7-91

Chapter 2 - Racial and Geographical Disparity

Basic concept of chapter (pages 8-26):

The Sentencing Commission investigated the presence or absence of racial and/or geographical biases in the Kansas sentencing process. The data for this investigation was collected using court and KDOC records. Upon completing the investigation the analysis indicates that racial and geographical bias does exist.

Kansas Department of Corrections' comments:

Basic effects:

- The KDOC does support this change in the system in the decision making process, as the solution to this dilemma.
- The KDOC endorses the Sentencing Commission's recommendation of creating a decision making process that only deals with the gravity of the present offense and the convicted person's prior criminal history.
- Would reduce the prison population at the on set.

Concerns:

- The racial and geographical disparity must end as soon as possible and the guideline sentences be made retroactive (covered in chapter 16).
- Rehabilitation efforts must not be diminished even though the socio-economic factors would no longer be used in the sentencing process.

Chapter 3 - The Crime Seriousness Scale

Basic concept of chapter (pages 27-44):

The Sentencing Commission designed a form of presumptive sentence which is felt to be appropriate for all "typical" cases. A method was also created if the court feels the case is not "typical," for the judge to depart from the guidelines and pronounce a different sentence. During the process the Commission felt incarceration should be reserved for serious offenders, the primary purposes of a prison sentence is punishment, and a set of guidelines should be developed that promote public safety by incarcerating violent offenders.

Based upon the needs presented above, the Crime Seriousness Scale was developed.

Kansas Department of Corrections' comments:

Basic effects:

- The KDOC does support the Crime Seriousness Scale developed by the Kansas Sentencing Commission.
- The KDOC does support the concept of incarceration for the more violent offenders and diversion programs for the least severe crime level crimes.

Concerns:

- Diversion programs (such as Court Services, Community Corrections, Conservation Camps) be expanded and funded properly.
- Must insure prisons are staffed properly and are secure enough for the type inmates incarcerated in the facilities.
- It must be kept in mind that the sentencing guidelines were based on incapacitation and punishment and not rehabilitation needs. But the Commission pointed out that once a person is incarcerated they must have access to rehabilitation programs. Rehabilitation programs should not and must not be reduced.

Chapter 4 - The Criminal History Scale

Basic concept of chapter (pages 45-53):

The Department of Corrections concurs with the use of an individual's criminal history as an indicator of increased or decreased culpability. Since the chapter is otherwise technical, the Department has not analyzed the chapter in detail.

Chapter 5 - Legal Issues and Procedures

Basic concept of chapter (pages 56-62):

This chapter discusses various procedural steps involved in sentencing an offender under the guidelines system. Most

involve the judicial process rather than the corrections process.

Kansas Department of Corrections' comments:

Basic effects:

- Only sections 7 and 8 directly impact the Department of Corrections.
- Section 7 provides for a presentence report in every felony crime case. Presumably this report would be provided to the Department of Corrections when an offender was committed to the custody of the Secretary. Such background information on an offender is critical to proper inmate management.
- Section 8 provides that there be a procedure in place to identify mentally disordered offenders prior to their release. I concur with this recommendation due to the obvious public safety impact of releasing someone to the community when that person is dangerous to self or others.

Concerns:

- The Commission's report states that unit teams and mental health personnel within the correctional system will have to bear a greater responsibility for monitoring or identifying mentally ill offenders. These responsibilities will be in addition to those already assigned to these staff. This could result in a need for more staff, offices, and monitoring equipment, so that this important public safety role can be fulfilled.

Chapter 6 - Pre-Sentence Investigations

Basic concept of chapter (pages 63-66):

This recommendation calls for a pre-sentence report to be prepared on each and every felony case. Further, the report prepared will follow a structure pattern to ensure that all required information is presented to the sentencing judge. Finally, the recommendation clarifies the role of the pre-sentence investigator as that of an investigator, not as one who makes recommendations to the judge.

Kansas Department of Corrections' comments:

Basic effects:

- Will ensure 100% availability of a pre-sentence report.
- Establishes the pre-sentence report as the responsibility of the court; the Department of Corrections Reception and Diagnostic Unit will no longer provide pre-sentence reports.
- Pre-sentence reports will provide uniformity with regard to the type of information presented.
- Reinforces the concept that crime seriousness and criminal history are the sole determinants of the sentence.
- Establishes the judge as the decision maker.

Concerns:

Though the Department of Corrections supports this recommendation, we do have the following concerns:

- Is the number of court services officers adequate to ensure 100% compliance?
- How will uniformity and consistency among the various judicial districts be ensured?
- Will narrowing the content of pre-sentence reports to crime seriousness and criminal history information provide the judge with enough information upon which to justify deviation from the sentencing grid?
- Will the pre-sentence reports provide the Department of Corrections with enough information upon which to establish a program strategy for the offender? This is of particular concern in that another Sentencing Commission recommendation, (i.e. repeal of the 120 day call back) suggests that the need for a diagnostic evaluation is necessary.

Chapter 7 - Presumptive Sentences
Chapter 8 - Concurrent and Consecutive Sentences
Chapter 9 - Departure Sentences
Chapter 10 - Appellate Review

Basic concept of chapters (pages 67-102):

- These chapters provide specific details concerning the implementation of sentencing guidelines.
- The system creates a procedure whereby inmates with similar crimes and similar criminal histories will receive similar sentences.
- The guidelines will significantly increase the incarceration rates for persons who commit violent acts or sell or possess drugs.
- The number of property offenders will decrease by more than one half.
- The percent of those going to prison for sex offenses involving children will double.
- Sentencing judges may impose either concurrent or consecutive sentences.
- The court may for "substantial and compelling reasons" depart from the presumptive sentence.
- An appellate process regarding sentences was recommended.

Kansas Department of Corrections' comments:

Basic effects:

- The type of person sent to prison will change.
- Violent offenders will have a longer length of stay.
- Drug offenders and property offenders will have a shorter length of stay.
- The Commission concluded that both the number of people sentenced to prison and the number of person months to be served will be reduced by application of the guidelines.

Concerns:

- The type of inmates the Department receives will be different. There will be more serious violent offenders.
- The types of beds (custody level) now available may not be appropriate for the new inmate population.
- The facilities will be more stressful places for staff to work due to the different makeup of the inmate population.
- Work placements for inmates will have to be restructured due to the different makeup of the inmate population.

Chapter 11 - Behavior Attitude Adjustment Time

Basic concept of chapter (pages 103-104):

This recommendation by the Sentencing Commission would establish a system whereby time could be added to the base sentence for negative behavior on the part of the inmate. The specific recommendation provides that up to 20 percent of the base sentence would be added as a penalty for negative behavior.

Kansas Department of Corrections' comments:

Basic effects:

- The Department of Corrections strongly recommended that a form of good time be retained as a management tool. The total elimination of a good time system was viewed as making inmate management more difficult and less effective.
- As pointed out in the Commission report, 44 of the 50 states have a good time system. Of the states with sentencing guidelines, only one (Pennsylvania) does not have a good time system. However, a Pennsylvania legislative committee studying recent inmate riots in that state has recommended that a good time system be implemented.
- The widespread use of good time in inmate management is, I believe, due to its effectiveness in maintaining discipline and order in correctional facilities. I continue to believe that it is important to retain such a system.

Concerns:

- A concern with the Commission's recommendation is with the level of due process required in order to add BAAT time to the base sentence. The Department now has in place a procedure which complies with constitutional requirements for the forfeiture of earned good time credits. While the forfeiture of good time credits under current law may impact an inmate's parole eligibility and conditional release dates, it does not add to the sentence imposed by the Court as does the Commission's recommendation.
- Adding time to a sentence may require a more extensive due process procedure than currently exists. If so, additional staff time and resources will be required. This could have budget impact through a need for more staff and staff training.
- From a management and operations standpoint, we believe a system whereby an inmate earns credits is more effective than one which is only negative. An incentive for inmates is a valuable management tool for control purposes as well as betterment of the inmate.
- It is important that BAAT be perceived as something to be earned by the inmate and not simply given as a reward.

Chapter 12 - 120 Day Callbacks

Basic concept of chapter (pages 105-106):

This recommendation of the Sentencing Commission calls for the repeal of the 120 day period of court jurisdiction after sentencing. Traditionally, the 120 day period of court jurisdiction served a two-fold purpose: 1) It provided the court with the opportunity to obtain diagnostic information from an outside source that could be used in determining the appropriateness of the sentence; and 2) it enabled the court to subject many offenders to a short period of incarceration.

Kansas Department of Corrections' comments:

Basic effects:

- Reinforces the position that the extent of punishment is to be determined by two factors: 1) Seriousness of the criminal act; and 2) criminal history of the offender.

This, in effect, totally dispels the concept that there are psychological sentencing considerations.

- Makes the court totally reliant upon the pre-sentence report for an assessment of the crime seriousness and criminal history.
- Makes the assumption that the diagnostic report prepared by the Reception and Diagnostic Unit is used only by the court.

Concerns:

- Though required by current statute, pre-sentence reports are not always provided and the accuracy of those provided is not always guaranteed.
- The diagnostic report is utilized by the court once; that is, during the final sentencing decision. On the other hand, the diagnostic report is used by the Department of Corrections initially in establishing a program strategy and throughout incarceration as a benchmark in assessing progress and planning post incarceration supervision needs.
- Elimination of the 120 day call back provisions will not eliminate the need for a centralized reception center, nor will it eliminate the Department of Corrections' need for diagnostic information.
- While it can be argued that the diagnostic information needed by the Department of Corrections could be obtained in a decentralized manner, such an approach would cause much disparity and inconsistency.
- Removal of the 120 day call back will drastically alter the attitude and behavior of newly received inmates.
- The possibility of a sentence reduction within the 120 day call back period serves as a major incentive to the inmate during the diagnostic/evaluation process. Removal of this incentive is likely to significantly alter the behavior and adjustment of the inmate; a major behavioral control tool will be lost.
- The existing reception and diagnostic unit, while old and outdated as a detention facility, is adequate to control the current inmate population. However, it is doubtful that the existing physical plant will be adequate to

handle an inmate population that has lost a major incentive. The control factor in the diagnostic unit will have to be enhanced.

Chapter 13 - Parole Board

Basic concept of chapter (pages 107-108):

- Problems to be solved - (1) no one can predict how long someone will serve on any given sentence; (2) virtually impossible to forecast prison space needs because exit dates aren't predictable.
- Persons sentenced under guideline system will not be released by parole board.
- Once sentence is in place, no one can alter fixed term.
- Inmates can have limited time added to sentence for negative behavior.
- Parole board will continue to release persons with life sentences.
- The 5,500 plus inmates currently in the system will continue to have release dates and revocations determined by the parole board.
- Parole board will review community supervision plans and add special conditions.
- Parole board will conduct technical and new crime revocation hearings.
- Parole board will require rule and regulation authority.
- Commission endorses continued rehabilitation efforts but not as the primary reason to incarcerate.

Kansas Department of Corrections' comments:

Basic effects:

- Parole board ceases to function as a gatekeeper. Determination of inmate release dates is no longer a function.

- Parole board still establishes expectations of behavior and programming for parolees.

Concerns:

- The inmate incentive to alter negative behavior or to deal with addictions, educational deficits, or emotional problems in order to satisfy the parole board and win release is lost.
- Many inmates will be less inclined to deal with problematic behavior while incarcerated. They may then return to Kansas communities with poorer preparation and a reduced chance for success.
- Placement of conditions on parolees without significant positive or negative incentives to comply with them may result in more opportunities for them to fail and be returned to institutions albeit for shorter periods of time.

Chapter 14 - Post Release Supervision

Basic concept of chapter (pages 109-111):

- Post release supervision is maintained for two reasons: (1) public safety and (2) reintegration into the community.
- Post release period is part of the sentence. The length will be fixed by statute at 24 months for severity levels I through VI and 12 months for severity levels VII through X.
- For multiple sentences, the severity level of the most serious crime will dictate the post release period.
- For consecutive sentences, the highest severity level in the series of sentences will determine the post release period. Only one post release period will be served.
- Time served on post release will vest. Once served, it cannot be lost.
- Department of Corrections will be responsible for developing an individual release plan for each offender. The plan must include:

- (1) a description of support services and progress;
 - (2) conditions of supervision;
 - (3) Level of supervision;
 - (4) public safety concerns;
 - (5) restitution amount if any;
 - (6) other conditions as deemed necessary.
- Parole board may add any special conditions it deems appropriate.
 - Failure to approve a plan will not prohibit an inmate from being released.
 - If a technical violation occurs or a new crime is committed during the post release period, parole staff will begin revocation procedures.
 - Parole board will conduct revocation hearing to determine if a violation has occurred.
 - Penalty for a technical violation cannot exceed a return to prison for 90 days and cannot carry someone beyond the end of their post release period.
 - Penalty for a new criminal offense shall be return to prison for the remainder of the post release period.
 - Returns to prison for post release violations will not generate a new post release period.
 - Once the post release period is finished, the parole board will issue a discharge certificate and restore the offender's civil rights.

Kansas Department of Corrections' comments:

Basic effects:

- Average length of time an individual is under supervision will be reduced.
- Focus of parole supervision will continue to work to achieve positive behavioral change by offenders and will continue to exercise discretion in decisions to initiate revocation proceedings.
- Responsibility for determination of restitution amounts will shift from the parole board to the Department of Corrections.

Concerns:

- The number of offenders revoked may increase significantly as will repeat revocations.
- The post release period length is fixed by severity level of the offense. This has proven to be a poor predictor of problematic behavior while in the community. This does not correlate well with the stated goals of public safety and community reintegration.
- Parole plans may become more difficult to enforce. Inmates may have less incentive to formulate a meaningful plan when release is automatic. This is the case now with conditional releases.
- With reduced sanctioning ability, parole staff may have less control over parolees and are likely to experience less cooperation, particularly around treatment and reporting issues.
- Pressure to file more criminal charges may be placed on district/county attorneys. These are frequently deferred now in lieu of revocations.
- More parolees are likely to be held in county jails as revocations increase. Jail populations and Department of Corrections jail per diem costs will increase.
- Parolees may return to the community more dangerous and unmanageable because they may exit facilities less prepared to return and with less incentive to behave.
- The Department of Corrections believes the authority to determine restitution amounts should remain with the parole board as currently defined by statute.

Chapter 15 - Future Role of Commission

Basic concept of chapter (pages 112-113):

The Department of Corrections believes that it is important to continue the Commission so that the implementation of the guidelines may be accomplished in an orderly manner. In addition, operations under the guidelines must be monitored in order to identify and address any modifications which might be necessary.

**Chapter 16 - Other Recommendations
Monitoring System**

Basic concept of chapter (page 114)

This recommendation recognizes the critical importance of a common shared database among all segments of the criminal justice system. The Department of Corrections supports this concept.

Kansas Department of Corrections' comments:

Basic effects:

- Will ensure availability of information at all levels of the criminal justice system.
- This will enable an offender to be tracked throughout his/her involvement in the criminal justice system.
- Retrieval of information will be facilitated.
- Much duplication of effort will be avoided.

Concerns:

- Who will monitor the database and audit compliance?
- To what extent will a common database limit each participating agency's internal management information system?
- To be effective, this concept must have full funding to both establish and maintain the system.

**Chapter 16 - Other Recommendations
Consolidation of Field Services Study**

Basic concept of chapter (page 114):

- The consolidation of probation, community corrections, and parole services requires further study.
- The study should be under the auspices of a neutral body such as the Sentencing Commission.
- The Sentencing Commission will manage a task force to develop recommendations for the 1992 legislative session.

Kansas Department of Corrections comments:

- The Department of Corrections supports study of this concept, supports the proposal of the sentencing commission on how it should be studied, and intends to cooperate fully with the study.

Chapter 16 - Other Recommendations - Retroactivity

Basic concept of chapter (pages 114-115):

- The Commission indicated support for making the guidelines retroactive.
- The Commission further recommended that the issue be studied and that the 1992 legislature develop a proposal.

Kansas Department of Corrections' comments:

Basic effects:

- As of February 1st, there were 5,777 inmates incarcerated and 5,179 parolees. The Commission's proposal would apply the guidelines to all of these individuals.

Concerns:

- The Department of Corrections supports the concept of retroactive application of the guidelines. However, if the procedure for retroactive application is not developed until the 1992 session, I do have a concern about the Department's ability to convert almost 12,000 records to the new system in only a few months.
- I suggest that if retroactive application is favored, sufficient time to convert to the new system be provided. I suggest the overall implementation date be set at January 1, 1993, rather than July 1, 1992, unless the bill is passed this session.

**Chapter 16 - Other Recommendations
Population Limits**

Basic concept of chapter (page 115):

- The Commission does not favor legislation which places caps on prison population which mandates automatic release.
- The Commission recommends an early warning system - whereby the Secretary of Corrections certifies a potential crisis. Once crisis is certified the Commission would meet to review grid/current practices and make recommendations.
- The recommendations made by the Commission may include adjustment in the current grid and/or propose facilities expansion.

Kansas Department of Corrections' comments:

Basic effects:

- Kansas needs to have an early warning system when dealing with the federal caps placed on our correctional facilities. The Department of Corrections has begun work on this concept.
- The Department does not want an automatic release program. We feel this places public safety in question.

SJD/pa