

Approved: February 6, 1992
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter Jr. at 10:05 a.m. on January 22, 1992 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:

Ben Coates, Kansas Sentencing Commission
Judge Gary Rulon
Judge Richard Walker
Gene Olander, Kansas County and District Attorneys Association

Chairman Winter opened the meeting by presenting two bill requests he had received from the office of Attorney General Robert Stephen. A request to amend K.S.A. 65-4127b to include prior convictions from other jurisdictions for similar offenses. The request would include municipal, federal and other states' convictions for drug offenses as serving to enhance subsequent conviction in Kansas.

Senator Kerr moved to introduce the bill as requested by the Attorney General. Senator Morris seconded the motion. The motion carried.

The request from the Attorney General would provide for a new crime of adult abuse. It was pointed out that current law makes it a crime to fail to report abuse, but it does not make it a crime to commit abuse.

Senator Rock moved to introduce the bill as requested. Senator Feleciano seconded the motion. The motion carried.

Chairman Winter turned the committee's attention to SB 479 and reopened the hearing.
SB 479 - enacting the Kansas Sentencing Guidelines Act.

Judge Gary Rulon, Kansas Court of Appeals, and member of the Kansas Sentencing Commission, spoke in favor of SB 479. He restated his comments of previous hearings and requested an amendment to strike section 21 (e)(1), page 28 lines 34 and 35. The Appellate Court feels the language is too general and causes ambiguity regarding appellate procedures.

Judge Rulon suggested the Judicial Council be directed to study K.S.A. 21-3107, multiple prosecution for same acts, and their recommendation on lesser included crimes being codified into the statutes. He further stressed the importance of adequate funding appropriated to the Judicial Council to allow them to study the issues properly.

Judge Rulon added that it would be much easier for the Appellate Court to deal with specific cases if they had a clear picture of legislative intent.

Senator Feleciano moved to request that the Judicial Council complete the two studies identified by Judge Rulon; and to send a strong recommendation from the Senate Judiciary Committee to the Ways and Means Subcommittees urging the appropriate funding for the Judicial Council to be able to complete the requested studies. Senator Parrish seconded the motion. The motion carried.

Ben Coates, Executive Director of the Kansas Sentencing Commission, responded to questions from the Committee. He stated that one of the duties assigned to the KSC is to provide the training for judges. They have included that training in their budget request, but would not be able to

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,
room 514-S, Statehouse, at 10:05 a.m. on January 22, 1992.

complete the training program in the limited time between passage of SB 479 and the bill's implementation date of July 1, 1992. It would require approximately six months to complete the necessary training manuals and hold the training sessions across the state.

Judge Richard Walker, Ninth Judicial District, testified in support of SB 479. He stated that judges will support any system that is fair and equitable. He supported amending the implementation date for SB 479 to January 1, 1993, which would allow enough time for all parties involved to be educated and informed.

Judge Walker commented on the issue of departures by stating that as long as legislative intent is clearly stated, either in the statute or in the minutes, criteria for departures should not be a problem for judges. Any concerns about non-specific departures should be resolved by development of case law.

Judge Rulon rose to speak to the issue of departures by stating that statutory language would be best, but clear legislative intent incorporated in the Committee's minutes would be of great help to the Court.

Chairman Winter responded on the issue of departures by stating if specific statutory language is not adopted it would not reflect any lesser legislative intent than if the language was in the minutes.

Gene Olander, Shawnee County District Attorney, spoke on behalf of the Kansas County and District Attorneys Association in limited opposition to SB 479. They support reduction of disparity and truth in sentencing, but are concerned with a number of provisions in the bill. Those concerns include the negative fiscal impact on community corrections and alternatives to incarceration, imposition of good time credit, the trigger mechanism and the retroactivity provisions. (ATTACHMENT 1) Mr. Olander indicated that their position would change to support if changes were made in the trigger, retroactivity and particularly if adequate funding of community corrections was provided.

Written testimony was presented to the committee from Ron Smith, Kansas Bar Association, in opposition to SB 479. (ATTACHMENT 2)

The meeting was adjourned at 11:00 a.m.

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TESTIMONY IN OPPOSITION TO

SENATE BILL NO. 479

Presented by Gene Olander, Shawnee County District Attorney
KCDAAs Legislative Chairperson

The Kansas County and District Attorneys Association appears in opposition to SB 479, however, we want to preface our remarks by reminding the Committee that we have supported the general concept of the report of the Kansas Sentencing Commission, for two basic reasons: 1. **Reduction of Disparity** - The Commission Report documents a wide disparity in sentencing throughout the state, which most if not all prosecutors were unaware of. As county and district attorneys our duties are not just to prosecute, but to seek justice. In our view, justice requires us to seek to eliminate the disparity of sentencing based on race, gender, age or geographic location. 2. **Truth in Sentencing** - Prosecutors have always been the contact point for the public, particularly victims, to the criminal justice system. Recent statutory duties require prosecutors to notify victims at various stages of the criminal proceeding, which is made more difficult by the uncertainty of indeterminate sentencing. In our view, a determinate sentence, with an established and well-publicized grid, will make the job of informing the public much easier, and will give victims, and the general public more confidence in our criminal justice system.

As for SB 479, there are several concerns that our members have expressed over the provisions of the Sentencing Commission Report contained in the bill, as well as the additions made by the Interim Judiciary Committee . We understand that the legislative intent behind the creation of the Commission was to reduce prison overcrowding, and that the projections made by the Commission staff achieve that end. Our main concern, however, is that the Legislature will not adequately fund the alternatives to incarceration, including treatment programs, for those offenders who fall below the incarceration line on the grid, particularly the career property crime offenders. Adoption of the Sentencing Commission Report must be accompanied by increased funding of community corrections, which I understand is probably to be cut this year, intensive probation, and drug and alcohol treatment facilities, yet SB 479 does not deal with these alternative measures. It is primarily for this reason that we oppose the effective date of July 1, 1992. Funding for alternatives to incarceration should begin immediately, regardless of whether or not SB 479 is passed this year.

(Over)

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Attachment 1

As for other recommendations made by the Interim Committee, we oppose the insertion of good time credit. While 20% credit is an improvement over the present system, the net result is the possibility of a subtraction of 20% from truth in sentencing: and the addition of a possible 20% in racial disparity.

We are also concerned about the safety valve provisions in Section 25. The procedure raised a strong possibility that punishment depends on the year in which the offense was committed rather than the actual degree of crime severity: the result will be chronological or historical disparity.

Finally, we oppose the retroactivity provisions in Section 24. The wholesale release of inmates, those who have not met basic parole release requirements, will impose an unmanageable burden on the present system, and will impose an unacceptable threat to the safety of Kansas citizens.



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POSITION STATEMENT

TO: Senate Judiciary Committee
FROM: Ron Smith, KBA General Counsel
SUBJ: Sentencing Guidelines, SB 479
DATE: January 21, 1992

Mr. Chairman, and members of the Senate Judiciary committee. KBA's membership includes 5,300 Kansas attorneys and judges. I appreciate the opportunity to provide written comments on this topic.

KBA opposes sentencing guidelines. It is not the particulars of the bill that we oppose. We recognize the hard work of the Commission. However, rarely have we seen legislation from a state-appointed commission that has engendered so much public criticism from the very appointees who served on the Commission.

Budgets versus Perception. We feel that if lawmakers are voting for the guidelines on the promise of less-costly future Corrections budgets, the savings will prove to be illusory.¹ One possible reason is the competing political forces behind the perception of criminal justice in Kansas. A January 19, 1992 Wichita Eagle poll indicated that while 65% of Kansans would pay higher taxes for prosecution of crimes, only 38% indicated they would approve more taxes for prisons -- even if it would make Kansas safer. While KBA never suggests public policy be made by poll, this one is interesting because it discloses Kansans want criminals put away for a long period but they do not want tax money spent on prisons.

Unfortunately, determinant sentencing is viewed as able to change this public perception. The Interim report indicates,

"The Committee believes that (a presumptive sentencing system) may assist the public and convicted persons in understanding the sentencing system and thereby lead to more faith by the public in our criminal justice system and less discontent among prison inmates regarding dis-

¹We understand this to be the position of the Department of Corrections, too.

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Attachment 2*

*parities in sentencing and probation which currently exist."*²

The goal is laudable, but presumes the public understands and believes guidelines will enhance the system, a view the Wichita Eagle poll results do not support. I believe the public's view is more basic. They do not like crimes or criminals and would just as soon all such persons go to prison.

Community Corrections. The Interim Committee report indicates "the guidelines system will work only if the Legislature provides adequate funding for community-based prison alternatives." Such an observation is a self-fulfilling prophecy. Recent legislative history shows consistent benign fiscal neglect of community corrections programs. CC programs have been subject to recent across the board budget cuts.

Costs. New Sec. 24 of SB 479 calls for hearings to determine whether guidelines should apply retroactively. The Department of Corrections must review all sentences and assigns what it feels is the "appropriate sentence" under the guidelines. Either the prosecutor or the offender can ask for a hearing in front of the sentencing court, and within a relatively short period of time the Court must hold the hearing and determine whether the person's sentence should be modified. The indigent convict must be represented by the Kansas Board of Indigent defense services.

The section does not indicate what criteria the court must use in this determination. Further, Gary Stotts told you last week over 5300 inmate files must be reviewed. What psychiatric evidence and testimony will be needed in each case? Will there be a PSI-equivalent document created for this hearing so the judge would have known what information to have sentenced on? If not, is the determination left to the whim of the judge who perhaps is not the sentencing judge?

We don't oppose retroactive application of guidelines. However, there is a substantial cost for retroactivity. The state will have to hire lawyers to handle the indigent cases. Prosecutors must do all of this within the confines of their own county budgets and limits on assistant prosecutors. Counties may have to employ pro tem judges. The cost of retroactivity is considerable. None of these costs are reflected in the budget, however.

²1992 Interim Committee Reports, pp. 160-161.

Different Paths. The guidelines are a complicated system of arriving at a sentence which, when all is said and done, still allows "back-door judicial discretion" so that some accused's avoid a longer sentence. For example, probation can be achieved by prosecutors agreeing to charge a much lesser crime so that the crime and the accused's criminal history does not impose a presumption of prison time. Further, even if the crime charged more clearly reflects the offense, prosecutors and defense counsel can agree not to appeal a judicial finding outside the grid, thus allowing a defendant to escape the "determinant" nature of the guidelines. In other words, the new system is not free of manipulation and its "truth in sentencing" promise is mislabeled.

Those working on the grid system shied away from the harsher federal sentencing model, with good reason: to re-inject discretion into the Kansas model. If sentencing discretion is desirable then the current system can achieve similar results without the overlay of an entire new law into our criminal justice system. We believe more judicial training and perhaps looking at sentencing guidelines by judicial rule could achieve similar ends.

Public Safety. On balance the KBA Board of Governors believes that while determinant sentencing is doable, public protection is not a clear winner. We cannot support the magnitude of change sentencing guidelines would bring to the criminal justice system when the fuzzy cost projections and actual trade offs do not work to enhance overall public protection.

Thank you.