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

9:30 a.m. on January 24, 1992 in room 514-S of the Capitol.

All members were present except:
Senators Moran and Feleciano who were excused.

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:
James Parrish, Kansas Securities Commissioner
Ben Coates, Kansas Sentencing Commission
Gary Stotts, Kansas Department of Corrections
Chuck Simmons, Kansas Department of Corrections
Ron Miles, Kansas Board of Indigents' Defense Services
Steve Kessler, Legal Services for Prisoners, Inc.
Sister Therese Bangert, Kansas Council Against Crime and Delinquency

Chairman Winter called the meeting to order by continuing the hearing on SB 479.
SB 479 - enacting the Kansas Sentencing Guidelines Act.

James Parrish, Kansas Securities Commissioner, testified in support of SB 479 and suggested amendments. (ATTACHMENT 1)

Ben Coates, Executive Director of the Kansas Sentencing Commission, presented the Committee with proposed amendments of a technical nature and to give judges the ability to handle unclassified, or "orphan," felonies. (ATTACHMENT 2)

Mr. Coates, on behalf of Judge Gary Rulon and the with the unanimous agreement of the Kansas Court of Appeals, presented a request to amend SB 479. (ATTACHMENT 3)

Gary Stotts, Secretary of the Kansas Department of Corrections, stated to the Committee that the effective date of SB 479 would severely affect the Department's ability to implement the retroactivity measure of the bill as drafted.

Mike Heim, Kansas Legislative Research Department staff of the Committee, presented a memorandum to the Committee outlining some of the changes to SB 479 suggested by various conferees. (ATTACHMENT 4)

Senator Bond presented a proposed change to the retroactivity provision of SB 479. The proposal separates retroactivity into three segments.

1) Retroactivity would apply for those persons convicted of non-violent crimes against property, subject to objection by the county or district attorney and court review
2) Retroactivity would apply for persons convicted of drug crimes, with the provision that all previously stipulated programs and conditions must be completed prior to release, subject to objection by the county or district attorney and court review.
3) Retroactivity would not apply to any person convicted of crimes against persons.

Discussion followed that expressed the view of the Committee is to allow retroactivity but not at the expense of the public safety or detriment of field services.

Senator Bond moved to amend SB 479 by adopting his proposal for retroactivity. Senator Martin seconded the motion. The motion to amend carried.

Secretary Gary Stotts discussed the potential fiscal impact of SB 479 on the Department of Corrections. He also suggested amendments to delay the date of implementation, remove the executive exclusion from the trigger mechanism, and to alter the establishment of a permanent Kansas Sentencing Commission to a criminal justice coordinating body. (ATTACHMENT 5)

Chuck Simmons, Kansas Department of Corrections, offered three amendments of a technical nature to SB 479. These amendments address:

- due process procedures not required in awarding of good time credits (ATTACHMENT 6);
- clarify amount of good time to be added to post-release supervision period (ATTACHMENT 7);
- and clearly state the automatic review process. (ATTACHMENT 8)

Ron Miles, Kansas Board of Indigents' Defense Services, offered a technical amendment to SB 479. (ATTACHMENT 9)

Steve Kessler, Director of Legal Services for Prisoners, Inc., responded to questions from the Committee by estimating the costs of indigents' legal services resulting from implementation of SB 479 to be approximately $75,000.

Sister Therese Bangert, Kansas Council Against Crime and Delinquency, reminded the Committee that SB 479 is the result of concerns about fiscal resources and fairness in sentencing. She urged the Legislature to keep the issue of fairness in full view and stated it is shameful that both Russia and South Africa have lower incarceration rates than the United States. Sister Therese concluded her remarks by stating what we are doing to education (increasing prison funding more than the funding to education) is a national scandal, and is creating a very violent society.

This concluded the hearings for SB 479.

Chairman Winter opened the discussion on SB 479 by suggesting the Committee use the memorandum from Mike Heim as a guide. (see ATTACHMENT 4)

It was the consensus of the Committee that the Revisor has full authority to correct any technical faults of SB 479, such as typographical errors, without specific actions by the Committee.

The issue of what constitutes a "small amount" of marijuana was discussed. It was the consensus of the Committee there should be a difference between personal use and "dealing." Senator Martin moved to amend SB 479, section 5(c) to reduce the amount to "250 grams or 10 plants". Senator Rock seconded the motion. The motion carried.

After further discussion on the matter, Senator Kerr moved to amend the amount of marijuana on page 8, section 5(c) to "500 grams or 25 plants". Senator Martin seconded the motion. The motion carried.

Presentence report forms were discussed by the Committee. Senator Morris moved to amend SB 479 in Section 13(g) to read "All presentence reports shall use format substantially similar to the following format:". Senator Kerr seconded the motion. The motion carried.

Committee discussion turned to the question of departures and to reassure judges they have full authority to depart while make it clear the listing in SB 479 is not intended to be an exclusive listing. Senator Martin moved to insert language suggested by Professor David Gottlieb into the body of the minutes. Senator Kerr seconded the motion. The motion carried. The "Gottlieb" language immediately follows:

> The Committee wishes to emphasize several factors concerning the court's power to depart for substantial and compelling circumstances.
>
> First, the list of aggravating and mitigating factors set forth does not purport in any way to be an exclusive list of factors and the court may take into account when it determines whether the offender or offense are so atypical that a departure is warranted. Factors such as the youth of the offender, the offender's mental and emotional condition, and the offender's physical condition, including drug and alcohol dependence, may render that individual's behavior less culpable that the typical offender for a particular crime. Likewise, a sophisticated offender whose crime requires special planning and skill may be more culpable than the typical offender. Other factors not mentioned here or in the guidelines may also be relevant to the culpability of the offender. It is the Committee's expectation that precision in the factors that may be considered will develop over time as the appellate courts of the State develop a common law of sentencing.
>
> Second, the Committee recognized that the guidelines are designed to regulate judicial discretion, not to eliminate it. The guidelines contemplate that a typical offense and offender will be sentenced within the guidelines. For an individual somewhat more or less culpable than a typical offender, the court may choose a sentence at the top or bottom of the applicable guideline. However, where the individual is substantially more or less culpable than the typical offender, the court may consider a departure.

Finally, the Committee believes that no individual should be sentenced to prison solely or primarily to be rehabilitated. However, that general consideration does not mean that rehabilitative factors are always irrelevant in deciding whether to sentence an individual to probation rather than imprisonment. In exceptional cases, the court should be able to consider a defendant's amenability to probation when deciding whether to grant a dispositional departure. (ATTACHMENT 10)

The Committee next turned to the question of whether gang related activity should be added as an aggravating factor in Section 16(b)(2). Senator Rock moved to amend SB 479 by adding a new aggravating factor as a separate subsection for participating in gang activity. Senator Martin seconded the motion. The motion carried.

The Committee discussed whether "hate" crimes should be included in the legislation. Senator Kerr moved to amend SB 479 by deleting lines 12 through 14 on page 24, Section 16(b)(2)(c). Senator Martin seconded the motion. The motion to amend failed.

The Committee next turned to the amendment suggestion received from Judge Rulon (see ATTACHMENT 3). Senator Rock moved to adopt Judge Rulon's suggestion for amendment on page 24, Section 16(b)(2). Senator Petty seconded the motion. The motion to amend carried.

Committee discussion addressed the trigger mechanism described in Section 25 of SB 479. Senator Parrish moved to amend the trigger mechanism procedure making Sentencing Commission proposed adjustments recommendations only, the legislature and governor would have to act in order for any action to be authorized. Senator Kerr seconded the motion. The motion carried.

Senator Martin moved to amend the percentage stated from 85 percent to 90 percent for the trigger mechanism to engage. Senator Morris seconded the motion. The motion carried.

The dollar amount differential stated in section 100 of SB 479 was discussed by the Committee. Senator Martin moved to amend the penalty differential for presumptive incarceration from $50,000 to $25,000, and to include the amendments as proposed by Securities Commissioner Parrish. (see ATTACHMENT 1) Senator Parrish seconded the motion.

Senator Petty made a substitute motion to amend SB 479 by drawing a distinction and leave the tangible amount at $50,000, but to incorporate the suggested amendments of Securities Commissioner Parrish. Senator Kerr seconded the motion. The substitute motion to amend carried. It was noted by the Committee that this amendment would create more stringent penalties for "white collar" crimes.

The Committee next discussed the questions of whether boot camps should be altered or expanded, and if they should alter the good time provisions of SB 479. No action was taken on either question.

The next question addressed by the Committee was whether to involve the Kansas Sentencing Commission in examining legislative proposals that affect sentencing and corrections. Senator Parrish moved to require the Kansas Sentencing Commission to prepare fiscal impact statements and recommendations on all newly proposed legislation prior to legislative action on bills affecting sentencing. Senator Martin seconded the motion. The motion carried.

Chairman Winter requested an estimate from Ben Coates of the fiscal impact of the Committee's actions on this date, similar to the requirement stated in the newly adopted amendment.

Senator Martin moved to amend the effective date for SB 479 to July 1, 1993. Senator Parrish seconded the motion. The motion carried.

Senator Morris moved to adopt the amendment as suggested by Ben Coates. (see ATTACHMENT 2) Senator Kerr seconded the motion. The motion carried.

Senator Morris moved to adopt the three amendments presented by Chuck Simmons as technical amendments. (see ATTACHMENTs 6, 7 and 8) Senator Oleen seconded the motion. The motion carried.

Senator Petty moved to adopt the amendment as suggested by Ron Miles. (see ATTACHMENT 9) Senator Parrish seconded the motion. The motion carried.

The Committee discussed whether to amend Section 283 of SB 479 which established the makeup, functions and future name of the Kansas Sentencing Committee. No action was taken.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 9:30 a.m. on January 24, 1992.

Chairman Winter turned the Committee's attention to SB 358.
SB 358 - amendments to the criminal code.

Chairman Winter noted that SB 358, although it could be amended into SB 479, is needed whether determinate sentencing, SB 479, were adopted or not. It was the consensus of the Committee to keep each measure separate.

Chairman Winter noted that in the event SB 358 should be sent to a Conference Committee, the full Senate Judiciary Committee would meet to discuss and decide any policy questions for the Senate members of the Conference Committee to present to the House.

Senator Rock moved to amend SB 358 by incorporating the remaining, second half of the Judicial Council recommendations. Senator Parrish seconded the motion. The motion to amend carried.

Senator Parrish moved to amend the effective date of SB 358 to January 1, 1993. Senator Rock seconded the motion. The motion carried.

Senator Kerr moved to recommend SB 479 favorable for passage as amended. Senator Martin seconded the motion. The motion carried.

Senator Parrish moved to recommend SB 358 favorable for passage as amended. Senator Petty seconded the motion. The motion carried.

The meeting was adjourned at 12:30 p.m.

Date Jan 24, 1992

VISITOR SHEET

Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
Ray Nila / BIDS	
Laurie Hartman / KBA	
Paul Shelby / USA	
Jan Johnson Dept of Corrections	
GARY STOTTS CORRECTIONS	

STATE OF KANSAS

OFFICE OF THE SECURITIES COMMISSIONER
Second Floor
618 South Kansas Avenue
Topeka, Kansas 66603-3804
(913) 296-3307

Joan Finney
Governor

James W. Parrish
Securities Commissioner

EXPLANATION OF PROPOSED AMENDMENTS
TO SENATE BILL 479

Mr. Chairman and Members of the Committee:

The Office of the Kansas Securities Commissioner supports certain amendments Senate Bill 479 to provide an identifiable location on the sentencing grid for criminal violations of the Kansas Securities Act (K.S.A. 17-1252 et. seq.) and criminal violations of the Kansas Loan Brokers Act (K.S.A. 50-1001 et. seq.). The Securities Commissioner is charged with enforcing both Acts. The omission of these offenses from the sentencing grid was an oversight. We have discussed these amendments with Mr. Ben Coates, Executive Director of the Sentencing Commission. The proposed amendments are submitted in balloon form for your review.

The amendments to K.S.A. 17-1267 would tie in the current Class D and Class E felonies defined in K.S.A. 17-1267 to the new sentencing grid proposed in the new sentencing guidelines. The amendments define the crime of securities fraud as a severity level six, nonperson felony, and all other violations of the Securities Act as severity level seven, nonperson felonies.

In addition, we are also submitting that any violation of the Securities Act resulting in a loss of greater than $25,000 would result in a sentence with a presumption of incarceration. This presumption would override the provisions of the sentencing grid. The $25,000 threshold was used to conform with other similar policy proposals under consideration. Currently, there is no distinction between violations which result in minor losses and violations which

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result in large monetary losses. A person who defrauds investors out of hundreds of thousands of dollars technically is subject to the same penalty as one whose offense results in a small monetary loss.

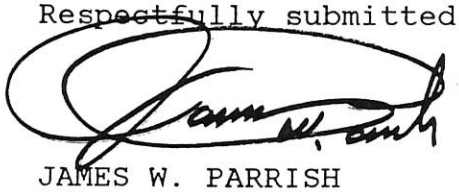
Proposed amendments to the criminal provisions of the Kansas Loan Brokers Act define violations of the Act to be at severity level seven, nonperson felonies. We have included the same $25,000 threshold for the presumption of incarceration described above for Securities Act violations.

Finally, we propose language for new section 16 of Senate Bill 479. This language provides that if the criminal offense involved a fiduciary relationship between the defendant and the victim, the judge would have the discretion to consider the abuse of this fiduciary relationship as an aggravating factor in considering a departure sentence under the sentencing grid.

The policy of establishing the $25,000 thresholds described above, and the policy of identifying a fiduciary relationship as an aggravating factor are matters which very well may require additional thought and consideration. We are recommending them as additional tools to help discourage the escalating number of criminal acts under our jurisdiction. However, at minimum, the crimes defined in the Kansas Securities Act and the Kansas Loan Brokers Act should be specifically identified in the sentencing grid regardless of the broader policy considerations raised. Clearly, these offenses should be amended to state a specific severity level.

Thank you for your time and consideration.

Respectfully submitted,



JAMES W. PARRISH
KANSAS SECURITIES COMMISSIONER

1-3/5

17-1267. Violations of act or rules and regulations; penalties; prosecution, commencement and limitations. (a) Any person who willfully violates any provision of this act except K.S.A. 17-1264, and amendments thereto, or who willfully violates any rule and regulation adopted or order issued under this act, or who willfully violates K.S.A. 17-1264, and amendments thereto, knowing the statement made to be false or misleading in any material respect, shall upon conviction be guilty of a felony. A conviction for a violation of K.S.A. 17-1253, and amendments thereto, shall be a class D felony. All other convictions for violation under this act shall be a class E felony. No person may be imprisoned for the violation of any rule and regulation or order if such person proves that such person had no knowledge of the rule and regulation or order.

No prosecution for any crime under this act may be commenced more than five years after the alleged violation. A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution, except that no prosecution shall be deemed to have been commenced if the warrant so issued is not executed without unreasonable delay.

(b) The commissioner may refer such evidence as may be available concerning violations of this act or of any rule and regulation or order hereunder to the attorney general or the proper county or district attorney, who may in the prosecutor's discretion, with or without such a reference, institute the appropriate criminal proceedings under this act. Upon receipt of such reference, the attorney general or the county attorney or district attorney may request that a duly employed attorney of the commissioner prosecute or assist in the prosecution of such violation or violations on behalf of the state. Upon approval of the commissioner, such employee shall be appointed a special prosecutor for the attorney general or the county attorney or district attorney to serve without compensation from the attorney general or the county attorney or district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for assistant attorneys general or assistant county or district attorneys and such other powers and duties as are lawfully delegated to such special prosecutor by the attorney general or the county attorney or district attorney.

(c) Nothing in this act limits the power of the state to punish any person for any conduct which constitutes a crime by statute or at common law.

History: L. 1957, ch. 145, § 16; L. 1979, ch. 61, § 5; L. 1982, ch. 98, § 9; L. 1990, ch. 83, § 1; July 1.

A conviction for a violation of K.S.A. 17-1253, and amendments thereto, committed on or after July 1, 1992, is a severity level 6, nonperson felony. All other convictions for violation of this act, committed on or after July 1, 1992, are severity level 7, nonperson felonies. Any violation of this act committed on or after July 1, 1992, resulting in a loss of $25,000.00 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of incarceration.

1-4/5

50-1013. Willful violation classified as class E felony. Any person who willfully violates this act commits a class E felony.

History: L. 1988, ch. 328, § 13; July 1.

A conviction for a violation of this act, committed on or after July 1, 1992, is a severity level 7, nonperson felony, and any such violation resulting in a loss of $25,000.00 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of incarceration.

Proposed Amendment to Senate Bill No. 479
New Sec. 16, Pages 23 - 24

1-5/5

New Sec. 16. (a) The sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines for crimes committed on or after July 1, 1992, unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.

(b) (1) Subject to the provisions of subsection (3), the following nonexclusive list of mitigating factors may be considered in determining whether substantial and compelling reasons for a departure exist:

(A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.

(B) The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense.

(C) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor.

(D) The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(E) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

(2) Subject to the provisions of subsection (3), the following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

(A) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity which was known or should have been known to the offender.

(B) The defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense.

(C) The offense was motivated entirely or in part by the race, color, religion, ethnic, national origin or sexual orientation of the victim.

(D) The offense involved a fiduciary relationship which existed between the defendant and the victim.

(3) If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the crime severity scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime.

(c) In determining aggravating or mitigating circumstances, the court shall consider:

(1) Any evidence received during the proceeding;

(2) the presentence report; and

(3) any other evidence relevant to such aggravating or mitigating

(b) When the statutory definition of a crime includes a broad range of criminal conduct, the crime may be subclassified factually in more than one crime category to capture the full range of criminal conduct covered by the crime.

(c) The provisions of this subsection shall be applicable with regard to ranking offenses according to the crime severity scale as provided in this section:

(1) When considering an unranked offense in relation to the crime severity scale, the sentencing judge should refer to comparable offenses on the crime severity scale. All felony crimes omitted from the crime severity scale are considered nonperson felonies for purpose of computing criminal history.

(2) When a person is convicted of any other felony crime or crime punishable by state imprisonment which is omitted from the crime severity scale, the sentence shall be in accordance with the sentence specified in the statute that defines the crime.

(3) With regard to anticipatory offenses committed on or after July 1, 1992, the provisions of this subsection shall be applicable:

(A) A conviction for an attempt to commit an offense shall be ranked on the crime severity scale at two crime levels below the appropriate level for the underlying or completed crime. A conviction for attempted murder in the first degree, attempted treason or attempted aircraft piracy shall be ranked at severity level 1 on the severity scale. In all cases, the lowest severity level for an attempt to commit a felony offense shall be level 10.

(B) A conviction for conspiracy to commit the off-grid crimes of murder in the first degree, treason and aircraft piracy shall be ranked on the crime severity scale at severity level 2. A conviction for conspiracy to commit any other felony crime shall be ranked on the scale at two crime levels below the appropriate level for the underlying or completed crime. In all cases, the lowest severity level for a conspiracy to commit a felony offense shall be 10.

(C) A conviction for soliciting the off-grid crimes of murder in the first degree, treason and aircraft piracy shall be ranked on the crime severity scale at severity level 3. A conviction for soliciting any other felony crime shall be ranked on the scale at three crime levels below the appropriate level for the completed crime. In all cases, the lowest severity level for a solicitation to commit a felony shall be 10.

New Sec. 8. (a) The crime severity scale contained in the sentencing guidelines grid for drug offenses as provided in section 5 consists of 4 levels of crimes. Crimes listed within each level are considered to be relatively equal in severity. Level 1 crimes are the

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(2)

(3)

All unclassified felonies shall be scored as Level 10 non-person crimes for the purpose of computing criminal history

from Ben Coates
Kansas Sentencing Commission

"A sentence imposed by a trial court will not be disturbed on the ground it is excessive, provided it is within the limits prescribed by law and within the realm of discretion on the part of the trial court, and the sentence is not the result of partiality, prejudice, oppression, or corrupt motive. [Citations omitted.]" *State v. Doile*, 244 Kan. 493, 503-04, 769 P.2d 666 (1989). See *State v. Gibson*, 246 Kan. 298, 304, 787 P.2d 1176 (1990); *State v. Dunn*, 243 Kan. 414, 434, 758 P.2d 718 (1988); *State v. Kulper*, 12 Kan. App. 2d 301, 307, 744 P.2d 519 *rev. denied* 242 Kan. 905 (1987); *State v. Potts*, 11 Kan. App. 2d 95, Syl. ¶ 3, 713 P.2d 967 (1986).

CURRENT LANGUAGE:

(e) In any appeal, the appellate court may review a claim that:

(1) The sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence;

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(2) . . .

(3) . . .

SUGGESTED LANGUAGE:

"(e) In any appeal, the appellate court may review a claim that:

(1) The sentence resulted from partiality, prejudice, oppression, or corrupt motive;"

(2) . . .

(3) . . .

From Judge Gary Rulon
Kansas Appellate Court

3-2/2

MEMORANDUM

Kansas Legislative Research Department

Room 545-N -- Statehouse
Topeka, Kansas 66612-1586
(913) 296-3181

January 24, 1992

To: Senate Judiciary Committee

Re: S.B. 479 -- Sentencing Guidelines Suggested Changes

1. Grid needs correction. (page 5)

2. What are small amounts of marijuana? (page 8, Section 5(c))

3. Should Section 13(g) be amended to make the forms permissive? (pages 16-23)

4. Should Professor Gottlieb's suggested clarification of the departure standard be inserted in the bill or just in the minutes? (pages 23-25)

5. Should gang related activity be added as an aggravating factor in Section 16(b)(2)? (page 24)

6. Should the reasons for appeals be more specific or should Section 21(e)(1) be deleted as Judge Rulon suggested? (page 28)

7. Should the retroactivity section be deleted or amended in any way? (Section 24, pages 29-30)

8. Should the trigger mechanism be amended to include the Governor; to raise the percentage; or some other change? (Section 25, page 31)

9. Should theft and related crimes where a dollar amount is stated be amended to provide a penalty differential at $25,000 rather than $50,000? (Section 100, pages 61-62 and others)

10. Should the use of boot camps be expanded or changed? (Section 237, page 130)

11. Should good time be altered in any way?

12. Should a provision be added to require the Kansas Sentencing Commission to prepare prison and fiscal impact statements on proposed legislation? (Section 284, page 209)

13. Should the effective date of the bill be changed to January 1, 1993 or to some other date? (Section 293, page 217)

sb479.mem/MH/jar

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STATE OF KANSAS

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

Gary Stotts
Secretary

MEMORANDUM

To: Senator Wint Winter, Jr., Chairperson
Senate Judiciary Committee

From: Gary Stotts
Secretary of Corrections

Subject: Fiscal Impact of SB 479 on the Kansas Department of Corrections

Date: January 24, 1992

The purpose of this memorandum is to convey the Department of Corrections' preliminary assessment of the potential impact of SB 479 on the operations of the Kansas correctional system. The information is being supplied to the House and Senate Judiciary Committees, as well as the Division of the Budget, to assist in estimating the fiscal impact of the bill.

The approach we have taken in evaluating the bill's impact is to project capital improvements, operational needs and costs of the correctional system through FY 2001 under two scenarios: 1) requirements assuming continuation of existing policy; and 2) requirements assuming enactment of SB 479. All of the estimates we have prepared are adjustments to the FY 1993 base of operations and expenditures reflected in the FY 1993 Governor's Budget Report.

The estimates we have prepared are intended to portray the relative impact of adopting sentencing guidelines as opposed to continuation of current policy. To provide this basis of comparison, we have deliberately avoided inclusion of enhancements to the system that might otherwise be warranted on their own merits during the course of the projection period. Therefore, the amounts given do not represent a blueprint for the correctional system through FY 2001 under either scenario. The fiscal comparison is based on adding appropriate increments of capacity and operating costs under the

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current policy scenario, and on subtracting or shifting costs under the sentencing guidelines scenario.

It must be emphasized that performing this analysis has required that we make many assumptions, most of which have a major impact on the outcome. The timeframe is long and the variables are complex and not highly predictable. While eventual outcomes will almost certainly vary from the ones we have projected, we nonetheless believe that the comparisons provide an indication of relative impact.

The estimates reflect impact only on the Department of Corrections and its facilities, programs and services. No attempt has been made to quantify the impact on other state agencies, local units of government or the general public.

As a final introductory comment, impacts have been calculated based on the provisions of the bill as introduced, including an effective date of July 1, 1992. The department still objects strongly, however, to that implementation date because we do not believe the retroactivity provisions can be implemented that quickly. We also have reservations about whether adequate community-based supervision resources can be in place within that limited amount of time. If the bill is amended to postpone the implementation date, fiscal impacts would need to be adjusted accordingly.

Summarized below are the key assumptions, decisions, and conclusions contained in the department's analysis.

General Comments Pertaining to Estimates in Both Scenarios

- The projection model developed for the Department of Corrections by the National Council on Crime and Delinquency (NCCD) was used by the department as the basis for projecting inmate populations through FY 2001 under the current policy scenario. The Sentencing Commission also used the NCCD model to estimate inmate population levels under the sentencing guidelines scenario. The actual inmate population to date in FY 1992, the first projection period in the model, already exceeds the FY 1992 year-end inmate population projected by the model. No adjustments have been made to either scenario to reflect experience in recent months.

- All cost estimates are presented in FY 1993 constant dollars; no attempt has been made to estimate inflationary impacts.

Scenario 1: Projected Adjustments to the Correctional System Assuming Continuation of Current Law, Policy and Practice

- The inmate population is projected to reach 8,121 by June 30, 2001. Given current correctional capacity of 6,622, approximately 1,500 beds would need to be added to accommodate the projected population level.

- Bed expansions would be phased throughout the nine-year period, timed to meet projected need and configured to provide the department with the most flexibility in use and the greatest operational options. The earliest capacity expansion project would become operational in FY 1996, requiring appropriations beginning in FY 1994.

- Capacity needs beyond FY 2001 were not considered. At the end of the projection period, virtually all of the expanded capacity would be utilized. If new capital improvement projects are required to meet projected inmate populations beyond FY 2001, additional funds may be required during the last two years of the projection period to begin construction of those projects.

- Start-up year staffing and operations funding for expanded capacity may in fact be needed only for a partial year. However, to simplify estimation procedures, operating costs have been annualized in the estimates.

- Parole population projections were based on estimates from the NCCD model, adjusted primarily to include compact cases not included in the model.

- Based on the above, costs for constructing and equipping the additional capacity is estimated to total $61.9 million over the nine-year period FY 1993-FY 2001. Staff, program and operating costs related to facility expansions and increased parole caseloads would require an estimated $108.6 million in cumulative costs over the same timeframe. At the end of the projection period, annual operating costs will have increased by $24.4 million compared to the FY 1993 base. Again, all costs are expressed in FY 1993 constant dollars.

- If current practice concerning double-celling of medium and minimum custody inmates was changed, additional capacity could be gained or capital improvement costs could be reduced by

constructing fewer units and by increasing the use of double occupancy. Feasibility of increased use of double-celling, however, would depend on circumstances unique to each living units. Moreover, any increase of capacity at an existing facility, including that achieved through double-celling, is subject to court approval per the April 1989 order. The projected increase in staff costs could be reduced somewhat if double occupancy were used. Some utility savings would also result but other operating costs would remain much the same as they are primarily population driven.

- If inmate labor is used for projects, construction costs could be reduced from the estimated amounts.

- Our bed expansion estimates include one construction project--a new reception and diagnostic unit in Topeka--that needs to be considered in the next couple of years whether or not populations increase as projected. As presently envisioned, the project would have a capacity of 300 beds, replacing existing capacity of 227 beds, for a net increase of 73.

Scenario 2: Implementation of Sentencing Guidelines as Proposed in SB 479

- The Sentencing Commission's projections, using the NCCD model, estimate that sentencing guidelines, excluding the impact of retroactivity, would result in a relatively stable inmate population during most of the projection period--fluctuating within a fairly narrow range between approximately 5,500 and 5,700.

- The department has used the maximum projected inmate population of 5,725 (the June 30, 2001 level) as the basis for determining its capacity requirements. Using that figure, plus an operating reserve of 5 percent, the department estimates that capacity totaling 6,011 beds would be sufficient to operate the system through the projection period.

- Given the current system operating capacity of 6,622, the targeted capacity reduction used by the department was 611 beds; the group of options configured for reduction came very close to that amount, at 612 beds.

- To provide adequate lead time for closing down facility units, and for making necessary operational adjustments, the department assumed that units would be closed six months after the effective date of the bill.

- The commission's inmate population projection does not explicitly model the impact of the bill's retroactive provisions, although the commission has performed a separate estimate of the potential impact of retroactivity based on data files supplied by the department. The commission concluded that 1,200 to 1,800 inmates might become eligible for immediate release if guidelines are enacted. Because the effect of retroactivity is to accelerate release dates, retroactivity alone does not permanently reduce the size of the inmate population.

  Uncertainty still exists as to the actual number of inmates who would be released upon implementation of the guidelines--that can only be determined upon individual file review and after opportunity for hearings prescribed by the bill have been met and the outcomes known. Another major unknown factor is the length of time necessary for the effects of retroactivity to be exhausted and for the inmate population to "catch up" to the projected levels.

  For purposes of estimating fiscal impact, we have assumed that 1,200 inmates would be released immediately upon implementation of SB 479. Our estimates include a supplemental appropriation in FY 1992 for temporary employees and overtime to process all of the files that would need to be reviewed and to recalculate sentences prior to the effective date of the bill.

  We also have estimated that three years will be required before the immediate impact of retroactivity will be largely worked out of the system.

- Because the effect of retroactivity is temporary, no permanent adjustments to facility capacity requirements were made in the estimates. Adjustments were made, however, in operating costs to reflect the reduction in average daily population.

- Retroactivity would cause an immediate surge in the parole caseload, which also would be a temporary phenomenon. Addition of 1,200 parolees to the existing caseload would make supervision more difficult since existing parole caseloads already exceed recommended levels. The department therefore has included additional staff to provide the necessary

supervision. The estimate used by the department is based on the addition of 46 new positions, which is the number currently estimated necessary to reach an average caseload of 50 cases per officer by the end of FY 1993 without guidelines.

- Cost estimates for community corrections are based on the Sentencing Commission's estimates of total probation/community corrections caseload increases if guidelines are enacted. The commission projected incremental "front-end" caseload increases, but did not distinguish between community corrections and probation cases supervised by court services officers. The department's estimates assume that 90 percent of the incremental increases in caseload would be assigned to community corrections for intensive supervision, day reporting and residential services. The department also assumed restoration of existing residential services provided by community corrections agencies but not funded in the Governor's FY 1993 recommendations.

- Based on the above, the cumulative costs to the Department of Corrections for implementation of sentencing guidelines between FY 1992 and FY 2001 are estimated at $20.3 million over the current FY 1993 base.

Net Impact of Guidelines on the Department of Corrections

- Under both scenarios, costs to the Department of Corrections exceed the FY 1993 base of operations, services and programs.

- The net fiscal impact of SB 479 between now and the end of FY 2001 is estimated by subtracting the cumulative cost of implementing guidelines from the cumulative cost of continuing operations under current law, policy and practice.

- Based on these estimates, and given the caveats regarding the assumptions we have used, implementation of sentencing guidelines under the provisions of SB 479 would cost the Department of Corrections approximately $150 million less in capital improvements and operating costs over the next ten years than would operations under current law. (See table below.)

Estimated Adjustment
to
Department of Corrections Expenditures
FY 1992-2001
1993 Non-Inflated Dollars (Millions)

A. Accumulated 10-Year Period, FY 1992-2001

	Sentencing Guidelines	Current Policy	Net Impact
Capital Improvements & Related Equipment	$ -	$61.9	$ (61.9)
Facility Operations	(67.9)	100.6	(168.5)
Field Services (Parole)	14.7	8.0	6.7
Community Corrections	64.6	-	64.6
Other	8.9	-	8.9
Totals	$ 20.3	$170.5	$(150.2)

B. Annual Adjustment to Base

At End of Ten-Year Period, FY 1992-2001	$ 6.2	$24.4	$(18.2)

Other Issues

Trigger

Section 25 of Senate Bill 479 provides that the secretary of corrections will notify the Kansas Sentencing Commission any time the state's correctional facilities are filled to 85% or more of capacity. The commission shall then consider modifications of the sentencing guidelines grid necessary to maintain the prison population within reasonable management capacity. The proposed modifications are to be submitted to the legislature by February 1

and shall become effective unless modified or rejected by the legislature. This procedure appears to exclude the Governor from a role in approving or disapproving modifications to the guidelines. This exclusion raises a separation of powers issue which should be considered and addressed prior to enactment of the bill. Action of the legislature regarding the modifications made by the sentencing commission, whether by modifying or rejecting them, should be subject to approval or veto by the Governor, since the result of the action will clearly impact a function of the executive branch of government.

Sentencing Commission

Section 284 of the bill provides for the establishment of the Kansas Sentencing Commission. Some of the functions of the commission as set forth in the bill do not appear appropriate for a "sentencing commission" but rather appear more properly to be functions of a criminal justice policy coordinating body. Functions number (6), (8), (9), and (10) (see pages 208 and 209 of the bill) are more than sentencing or guidelines issues. These issues will be much broader and will affect all areas of the criminal justice system, thus suggesting the need for a criminal justice coordinating body.

cc: Representative Solbach, Chairperson, House Judiciary Committee
Division of the Budget
Legislative Research Department
Ben Coates, Director, Kansas Sentencing Commission

DEPARTMENT OF CORRECTIONS
LEGISLATIVE PROPOSAL

New Section 22. p. 29

Senate Judiciary Committee
January 24, 1992
Attachment 6

New Sec. 22. (a) For purposes of determining release of an inmate for a crime committed on or after July 1, 1992, the following shall apply with regard to good time calculations:

(1) A system shall be developed whereby good behavior by inmates is the expected norm and negative behavior will be punished; and

(2) the amount of time which can be subtracted from any sentence is limited to an amount equal to 20% of the presumptive sentence.

(b) Any time which is subtracted from any presumptive sentence of any inmate pursuant to good time calculation shall be added to such inmate's time of postrelease supervision.

(c) The secretary of corrections is hereby authorized to adopt rules and regulations to carry out the provisions of this act regarding good time calculations. Such rules and regulations shall provide circumstances upon which an ~~amount of time can be subtracted from the inmate's sentence and due process procedures and protections that apply to such process~~ inmate may earn good time credits and for the forfeiture of earned credits.

earned by an inmate and

earned and

Sec. 270. K.S.A. 1991 Supp. 22-3717 is hereby amended to read as follows: 22-3717. (a) Except as otherwise provided by this section and K.S.A. 1990 Supp. 21-4628 and amendments thereto, an inmate including an inmate sentenced pursuant to K.S.A. 21-4618 and amendments thereto, shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.

(b) An inmate sentenced for a class A felony, including an inmate sentenced pursuant to K.S.A. 21-4618 and amendments thereto but not including an inmate sentenced pursuant to K.S.A. 1990 Supp. 21-4628 and amendments thereto *or on or after July 1, 1992, inmate sentenced for an off-grid offense*, shall be eligible for parole after serving 15 years of confinement, without deduction of any good time credits.

(c) Except as provided in subsection (d), if an inmate is sentenced to imprisonment for more than one crime and the sentences run consecutively, the inmate shall be eligible for parole after serving the total of:

(1) The aggregate minimum sentences, as determined pursuant to K.S.A. 21-4608 and amendments thereto, less good time credits for those crimes which are not class A felonies; and

(2) an additional 15 years, without deduction of good time credits, for each crime which is a class A felony.

(d) *Persons sentenced for crimes committed on or after July 1, 1992, will not be eligible for parole, but will be released to a mandatory period of postrelease supervision upon completion of the prison portion of their sentence as follows:*

(1) Persons sentenced for nondrug severity level 1 through 6 crimes and drug severity levels 1 through 3 must serve ~~at least~~ 24 months on postrelease supervision;

(2) persons sentenced for nondrug severity level 7 through 10 crimes and drug severity level 4 must serve ~~at least~~ 12 months on postrelease supervision; and

(3) in cases where sentences for crimes from more than one severity level have been imposed, the highest severity level offense will dictate the period of postrelease supervision. Supervision periods will not aggregate.

~~(d)~~ *(e)* If an inmate is sentenced to imprisonment for a crime committed while on parole or conditional release, the inmate shall be eligible for parole as provided by subsection (c), except that the

, plus the amount of good time earned and retained pursuant to section 22,

, plus the amount of good time earned and retained pursuant to section 22,

Senate Judiciary Committee
January 24, 1992
Attachment 7

(c) The department of corrections shall conduct a review of all persons who committed crimes and were sentenced prior to July 1, 1992. The department shall prepare a sentencing guidelines report which shall review and determine based on the crime severity and criminal history classification as provided in this act, what the person's appropriate sentence as provided by the Kansas sentencing guidelines act would be as if the crime were committed on or after July 1, 1992. ~~If the person's sentence should be modified based on such review, the report shall order such modification.~~ A copy of the report shall be transmitted to the person who committed the crime and the prosecution officer who originally prosecuted such person.

(d) Within 60 days of the issuance of such report, the person who committed the crime and the prosecution officer shall have the right to request a ~~modification~~ hearing to be held in the jurisdiction where the original criminal case was held. If ~~no~~ request for a ~~modification~~ hearing is filed within 60 days of the issuance of the report, the department shall ~~enter the order to modify~~ in the jurisdiction where the original criminal case was held. At the ~~modification~~ hearing, the court shall determine whether the ~~person's sentence should be modified~~ as provided by the Kansas sentencing guidelines act ~~or continue to serve the sentence imposed prior to July 1, 1992.~~ Such person shall be represented by counsel. If indigent, such person shall be represented by the Kansas board of indigent defense services. ~~If modification is granted, the court must find that release under the sentence currently being served will not present a danger to society or is not incompatible with the welfare of society.~~

(e) If a sentence is ~~modified~~ as provided by this section, then all the rights and privileges accorded by the Kansas sentencing guidelines act shall be applicable.

regarding the report

The secretary of corrections shall receive notice of any request for a hearing.

a

not

convert the person's sentence to one provided for under the sentencing guidelines and provide notification of that action to the court.

person's criminal history was correctly determined and whether the person should receive a departure sentence

The court shall enter an order regarding the inmate's sentence and forward the order to the secretary of corrections who shall administer the sentence.

converted

A person's sentence shall not be increased in length through a conversion of one under sentencing guidelines.

Senate Judiciary Committee
January 27, 1992
Attachment 8

STATE OF KANSAS

BOARD OF INDIGENTS' DEFENSE SERVICES

LANDON STATE OFFICE BUILDING
900 JACKSON, ROOM 506
TOPEKA, KANSAS 66612-1220

(913) 296-4505

DATE: January 23, 1992

TO: Senator Wint Winter, Jr.
Chairman, Senate Judiciary Committee

FROM: Ronald E. Miles, Director REM

SUBJECT: TECHNICAL AMENDMENT TO S.B. 479

The language in Senate Bill 479, Sec. 24, subsection d, lines 33-35, should be amended to read,

> "If indigent, such person shall be represented by appointed counsel pursuant to the provisions of K.S.A. 22-4501 et. seq."

The board does not, per se, represent persons. This adjustment will help us avoid confusion along this line.

REM:mcm

Senate Judiciary Committee
January 24, 1992
Attachment 9

To: Judy Crosser

The Committee wishes to emphasize several factors concerning the court's power to depart for substantial and compelling circumstances.

First, the list of aggravating and mitigating factors set forth does not purport in any way to be an exclusive list of factors the court may take into account when it determines whether the offender or offense are so atypical that a departure is warranted. Factors such as the youth of the offender, the offender's mental and emotional condition, and the offender's physical condition, including drug and alcohol dependence, may render that individual's behavior less culpable that the typical offender for a particular crime. Likewise, a sophisticated offender whose crime requires special planning and skill may be more culpable that the typical offender. Other factors not mentioned here or in the guidelines may also be relevant to the culpability of the offender. It is the committee's expectation that precision in the factors that may be considered will develop over time as the appellate courts of the State develop a common law of sentencing.

Second, the Committee recognizes that the guidelines are designed to regulate judicial discretion, not to eliminate it. The guidelines contemplate that a typical offense and offender will be sentenced within the guidelines. For an individual somewhat more or less culpable than a typical offender, the court may choose a sentence at the top or bottom of the applicable guideline. However, where the individual is substantially more or less culpable than the typical offender, the court may consider a departure.

Finally, the Committee believes that no individual should be sentenced to prison solely or primarily to be rehabilitated. However, that general consideration does not mean that rehabilitative factors are always irrelevant in deciding whether to sentence an individual to probation rather than imprisonment. In exceptional cases, the court should be able to consider a defendant's amenability to probation when deciding whether to grant a dispositional departure.

Gottlieb language
to be adopted in minutes.

Keep & Bring up the day we Act
on the Bill.

Senate Judiciary Committee
January 24, 1992
Attachment 10