Approved: 2-5-96
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on January 23, 1996 in Room 514-S of the Capitol.

All members were present except:

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee: Helen Stephans, Kansas Peace Officers Association
Rebecca Woodman, Kansas Sentencing Commission
Matthew Lynch, Judicial Council
Randy Hearrell, Judicial Council
Jean Schmidt, Special Assistant Attorney General, Kansas Insurance Department
John Campbell, Deputy Attorney General, Civil Litigation Division
Bill Sneed, State Farm Insurance Company
David Hanson, National Association of Independent Insurers

Others attending: See attached list

The Chair called the meeting to order at 10:10 a.m.

Motion was made by Senator Bond, second by Senator Oleen to approve the minutes of January 16, 1996.

Bill introductions:

Helen Stephens, Kansas Peace Officers Association and Kansas Sheriffs Association presented proposed legislation regarding the felonization of battery occurring against a city or county jailer while in performance of his/her duties. The second proposed bill requested by the conferee would amend 8-1506, duties of authorized emergency vehicle, by adding a new section pertaining to bicycle officers.(Attachment 1)

A motion was made by Senator Reynolds, second by Senator Parkinson to introduce both requests as Committee bills. The motion carried.

Rebecca Woodman, Kansas Sentencing Commission, submitted two bill requests. The conferee requested legislation that would delete the following forms: presentence investigation report form, the journal entry form, the journal entry of revocation form. The conferee explained that the purpose of the proposed amendments is to remove all mandated forms from the guidelines statutes. This action would facilitate necessary adjustments/alterations as needed. The conferee also requested that K.S.A. 22-3426(f) be amended by deleting the requirement that the journal entry contain a listing of the original offenses charged by the state. The conferee stated that deleting this requirement will avoid a potential detriment to accurate statistical reporting by faulty data entry, if the original charge differs from the actual crime of conviction. The conferee concluded by stating that this legislation would help the Sentencing Commission in getting the forms in together, this would also give the field officer a single point of reference to know what needs to be sent to the appropriate agencies. (Attachment 2)

Ms Woodman also requested a technical amendment to K.S.A. 21-4611(a) which would seek to rectify a conflict in the two statutes between the old law dealing with periods of probation; and the sentencing guideline provisions, specifying specific periods of probation for crimes committed after July 1, 1993. The Commission recommends amending this statute by adding the following language at the beginning of subsection: "(a) For crimes committed prior to July 1, 1993....." The conferee stated that this would avoid conflict between language in subsection (a) and subsection (c) of this same statute.

The second bill requested by Ms Woodman would correct an oversight in the omission of language that integrates into the juvenile detention statute, crimes classified under the sentencing guidelines.(Attachment 2)

A motion was made by Senator Parkinson, second by Senator Reynolds to introduce the legislation requested by the Sentencing Commission. The motion carried.

The Chair requested the introduction of legislation as recommended by the Interim Committee that will make intentional second degree murder an off-grid crime.

A motion was made by Senator Bond, second by Senator Harris to introduce as a Committee bill, legislation that will take intentional second degree murder off-grid. The motion carried.

Senator Parkinson presented a request from Shawnee County Commissioners to make a charge of up to $25.00 for each cremation assigned by the coroner's office. The Senator commented that currently there is no charge for this service and it is taking a lot of time.

A motion was made by Senator Parkinson, second by Senator Petty to submit the request of the Shawnee County Commissioners as a Committee bill. The motion carried.

SB 467--Concerning reimbursement to municipal courts for legal defense by convicted indigent defendants.

Mr. Matt Lynch, Judicial Council addressed the Committee in support of **SB 467**. The conferee explained the Judicial Council is requesting this bill because the reimbursement of costs of counsel appointed by municipal courts is not covered under current law. The conferee stated that municipal courts would also be authorized to make reimbursement of such costs of appointed counsel a condition of probation with the enactment of this legislation. (Attachment 3)

A motion was made by Senator Parkinson , second by Senator Reynolds to report **SB 467** favorably and place it on the Consent Calendar. The motion carried.

SB 468--Concerning the closing of certain small conservatorships

Mr. Randy Hearrell, Judicial Council, addressed the Committee in support of **SB 468**. Mr. Hearrell explained that the funds in some conservatorships do not amount to enough to warrant action by the SRS or others seeking to recover medical assistance expenses. The conferee continued by stating that **SB 468** would allow a judge to direct funds from these small conservatorships to cover medical expenses and then close them.(Attachment 4)

In answer to Committee members questions Mr. Hearrell stated that this bill would not authorize the payment of other expenses.

A motion was made by Senator Bond, second by Senator Oleen to move the bill favorably. The motion carried.

SB 489--Concerning insurance fraud; reporting, investigation, setting of criminal penalties, and increasing the statute of limitations for insurance fraud.

The Chair opened the hearing on **SB 489** with the introduction of Jean M. Schmidt, Special Assistant Attorney General, Fraud Unit, Kansas Department of Insurance.

Ms Schmidt testified in favor of **SB 489**. Ms Schmidt discussed the need for **SB 489** by stating that the ultimate financial burden of insurance fraud cost consumers in the form of higher rates. The conferee stated that the Insurance Commissioner had been contacted by District Attorney, Paul Morrison , of Johnson county who was one of the district attorneys in the state prosecuting securities and insurance fraud. Ms Schmidt reported that Mr. Morrison pointed out some deficiencies in the statutes that he felt were a stumbling block to criminal prosection. The conferee stated that the Insurance Department is aware of the need to combat fraud, therefore, the Insurance Department is requesting **SB 489** which would update the statutory framework under which investigations are done to provide a legally sufficient authorizing statute and efficient framework in which to coordinate investigations with other legal entities involved in the identification, investigation, and

prosecution of insurance fraud.

The conferee stated that most of the proposed legislation consists of clarifying the powers and authority of the Commissioner by specific authorizing statues. Ms Schmidt stated that the investigation part of the proposal models the Kansas Securities Act, which has a very similar legislative and public benefit purpose. The conferee stated that another important change in this legislation is changing the statute of limitation to five years.(Attachment 5)

The conferee and Committee members discussed issues concerning conflict of Workers Compensation Act, issues of investigative jurisdiction, issues of immunity and issues of mandatory reporting of claims occurring by other than accidental causes. The conferee answered questions concerning budgetary increases, by stating that it is not anticipated that this bill would increase costs, because the investigative positions have been in the agency's budget for years.

In response to a Committee member's question, the conferee stated that on page 3, line 15, the word, "may" should be replaced with *"shall"* concerning referring evidence to the county attorney, Attorney General, or district attorney who may prosecute. The conferee stated that the penalties in Section 5 are the same as current law, except there is an additional penalty, page 5, line 9 concerning a non-person misdemeanor for failure to report. Issues concerning the setting of precedence if this bill were passed were discussed.

Senior Deputy Attorney General, John Campbell, testified in opposition to **SB 489**. The conferee stated that the provisions of this bill are sweeping in nature. This bill would greatly expand the power over every citizen. The conferee stated that this bill would create a new class of law enforcement officer authorized to make searches and seizures. The bill could be construed to grant the Department the power to grant immunity from criminal prosecution. The conferee continued by stating that this bill creates new crimes and statute of limitations for existing crimes. Senior Deputy stated that the bill places new responsibilities not only on the Department, but on numerous state and local agencies. Senior Deputy Attorney General stated that the Attorney General strongly recommends that before any action on this bill is taken that several issues be considered. Some of the issues addressed by the conferee included the certification of Insurance Department investigators as law enforcement officers. The conferee stated that the issue of enforcing out of state administrative subpoenas needs to be addressed. The conferee posed a question concerning legislative intent to authorize the Department to grant immunity from prosecution for criminal offenses in return for administrative testimony. The conferee continued with additional concerns regarding the scope and intent of **SB 489**. The conferee concluded by stating that the power of this bill should be analyzed. (Attachment 6)

In answer to a Committee member's question, the conferee stated that according to this bill it would be a crime not to turn over information that might be deemed pertinent in an insurance investigation.

Mr. Bill Sneed, The State Farm Insurance Companies, testified in opposition to **SB 489**. Mr. Sneed stated that insurance statutes were modified in the eighties in accordance with security laws. The conferee stated that for the sake of self-protection, this legislation will increase the Insurance Department's and agents' volume of work because the clause, "failure to inform" would drastically increase the number of losses reported to the Department. (Attachment 7)

Mr. David Hanson, National Association of Independent Insurers, (NAII), addressed the Committee to express opposition to the passage of **SB 489**.

The Chair closed the hearing on **SB 489.**

The Chair adjourned the meeting at 11:00 a.m.

The next meeting is scheduled for January 24, 1996.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-23-96

NAME	REPRESENTING
Jean Schmidt	Kansas Insurance Dept
Callie Denton	KS Insurance Dept
Rebecca Woodman	KS Sentencing Comm
Babe Towles	KS Sentencing Comm.
Julie Meyer	KS Sentencing Comm
Mindy M. Hearrell	Judicial Council
John Campbell	KS AG
Helen Stephens	KPOA/KSA
Jim Clark	KCDAA
Ron Smith	KSA
Joe Turijanic	KCA
Roger C. Utt & Hem	KS Dept SRS, ERU
Jake Reisinger	KS Dept. on Aging
B. H Sneed	State Farm
Pat Morris	K.A.I.A.
Gayle Larkin	Attorney General's Office
Tom Langdon	Attorney General's office
Julie Klem	Heim, Ebert & Klem
Kelly Kultala	KTLA

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-23-96

NAME	REPRESENTING
Glen Deller	Sen Mata
Steve Sutton	State Farm
Nancy Lindberg	Atty Gen
Kevin Davis	Am Family Ins
Matt Spurgeon	Jackson/Colonial
David Hanson	KS Assoc Insur Cos / NAII
Kathy Taylor	Kansas Bankers Assoc.
Martha Hodgesmill	Attorney General
Tom Wilder	Kansas Insurance Dept
David C. Pfland	Sen. Ehnert
Bill Sneed	State Farm

January 16, 1996

TO: Senate Judiciary Committee

FROM: Helen Stephens, Representing
Kansas Peace Officers Association and Kansas Sheriffs Association

We would ask the committee to introduce two bills.

The first would felonize battery against a city or county jailer, as follows:

> 21-3413 (1) "Correctional institution" means any institution or facility under the supervision and control of the secretary of corrections, *a city jail, or a county jail.* (2) "Correctional officer or employee' means any officer or employee of the Kansas department of corrections or any independent contractor, or any employee of such contractor, working at a correctional institution, *or any officers or employee of the city police or county sheriff or county consolidated law enforcement agency while engaged in the performance of duties involving the care, custody or confinement of prisoners.*

The second would amend 8-1506, duties of authorized emergency vehicles -- adding a new section pertaining to bicycle officers. I do not have specific language, but would ask your permission to work with the revisor on same. As you know many communities are using bicycles officers to enhance their community policing efforts; this amendment would further their efforts.

Thank you for your consideration. I would stand for questions.

Sen Jud
1-23-96
Attach 1

State of Kansas
KANSAS SENTENCING COMMISSION

SUMMARY OF BILL REQUESTS
Kansas Sentencing Commission
January 23, 1996

The Kansas Sentencing Commission submits the following requests for legislative amendments/enactments:

BILL REQUEST NO. 1:

K.S.A. 21-4714(g) - Delete the presentence investigation report form from the subsection, and amend the language of the subsection to read as follows: "All presentence reports in any case in which the defendant has been convicted of a felony shall be on a form approved by the Kansas sentencing commission."

K.S.A. 22-3426(f) - Delete the journal entry form from the subsection, and amend the language of the subsection to read as follows: "The journal entry shall be recorded on a form approved by the Kansas sentencing commission."

K.S.A. 22-3426a - Delete the journal entry of revocation form from the subsection, and amend the language of the subsection to read as follows: "The journal entry shall be recorded on a form approved by the Kansas sentencing commission."

The purpose of the proposed amendments set forth above is to remove all mandated forms from the guidelines statutes in order to facilitate necessary adjustments/alterations from time to time.

Jayhawk Tower 700 Jackson Street - Suite 501 Topeka, Kansas 66603-3731
(913) 296-0923

Sen Judiciary
1-23-96
Attach 2-1

K.S.A. 22-3426(f) - The first paragraph of this subsection, which sets forth the items which shall be contained in the journal entry of sentencing, should be amended by deleting number (5), the requirement that the journal entry contain a listing of the original offenses charged by the state.

The purpose of this amendment is to rectify problems pertaining to the feasibility of listing original offenses when the complaint may have been amended several times before final disposition of the case, and to avoid a potential detriment to accurate statistical reporting by faulty data entry if an original charged offense differs from the actual crime of conviction.

"**K.S.A. 21-3426b. Certain information forwarded to Kansas sentencing commission and Kansas bureau of investigation.** (a) For all felony convictions for offenses committed on or after July 1, 1993, the court shall forward a signed copy of the journal entry, attached together with the presentence investigation report as provided by K.S.A. 21-4714, to the Kansas sentencing commission within 30 days after sentencing.

(b) For probation revocations which result in the defendant's imprisonment in the custody of the department of corrections, the court shall forward a signed copy of the journal entry of revocation to the Kansas sentencing commission within 30 days of final disposition.

(c) The court shall insure that information concerning dispositions for all other felony probation revocations based upon crimes committed on or after July 1, 1993, and for all class A and B misdemeanor crimes and assault as defined in K.S.A. 21-3408 and amendments thereto committed on or after July 1, 1993, is forwarded to the Kansas bureau of investigation central repository. Such information shall be transmitted on a form or in a format approved by the attorney general within 30 days of final disposition."

The general purpose of the proposed new statute is to consolidate into one statute several provisions now under separate statutes requiring courts to forward certain information to the Kansas sentencing commission or the Kansas bureau of investigation, thus avoiding any confusion about exactly what information is to be sent to which agency. Requires deletion of K.S.A. 21-4714(h), K.S.A. 22-3426(g) and (h), and K.S.A. 22-3426a(d) and (e).

K.S.A. 21-4611(a) - Amend this subsection by adding the following language at the beginning of the subsection: "(a) For crimes committed prior to July 1, 1993,..."

The purpose of the above amendment is to avoid a conflict between the language in subsection (a) of the statute stating, "In no event shall the total period of probation, suspension of sentence or assignment to community corrections for a felony exceed the greatest maximum term provided by law for the crime,..." and the recommended probation periods for guidelines sentences set forth in subsection (c) of this same statute.

BILL REQUEST NO. 2:

K.S.A. 38-1640(a)(2) - This subsection should be amended to read as follows: "(2) The juvenile is alleged to have committed an offense which if committed by an adult would constitute a class A, B or C felony if committed prior to July 1, 1993 or would constitute an off-grid felony, a nondrug severity level 1, 2, 3, 4 or 5 felony or drug level 1, 2 or 3 felony if committed on or after July 1, 1993, or would constitute a crime described in article 35 of chapter 21 of the Kansas Statutes Annotated."

The purpose of this amendment is to integrate into the juvenile detention statute crimes classified under the sentencing guidelines. Its omission from this statute appears to have been a simple oversight.

Submitted by:

Rebecca E. Woodman
Staff Attorney
Kansas Sentencing Commission
700 Jackson, Suite 501
Topeka, Kansas 66603
(913) 296-0923

4-3

JUDICIAL COUNCIL TESTIMONY ON
1996 SB 467
SENATE JUDICIARY COMMITTEE
JANUARY 23, 1996

Senate Bill 467 was requested by the Judicial Council and would authorize municipal courts to order defendants to reimburse cities for costs of appointed counsel in municipal courts, after making appropriate inquiry into a defendant's ability to pay. Municipal courts would also be authorized to make reimbursement of such costs of appointed counsel a condition of probation.

In supplementing the Municipal Court Manual, the Municipal Court Committee discussed the decision in City of Dodge City v. Anderson, 20 Kan.App. 2d 272 (1994). In Dodge City, the Court of Appeals held there is no statutory authority to require a convicted, indigent defendant to repay the city for expenditures for appointed counsel in municipal court. The court also noted that the code of procedure for municipal courts, unlike K.S.A. 21-4610 relating to district courts, does not authorize the court to require repayment of attorney fees as a condition of probation. The court suggested that this matter needs to be addressed by the Legislature and a presiding court should be able to require the repayment of attorney fees as a condition of probation on a municipal conviction.

SB 467 amends K.S.A. 12-4509, part of the code of procedure for municipal courts, by adding new subsections (e) and (f). Proposed subsection (f) would authorize the court to order repayment of attorney fees whether the defendant is placed on probation or incarcerated. Proposed subsection (e) elaborates on the conditions of probation or suspension of sentence that the municipal court may impose and is patterned after, although somewhat modified, the language in K.S.A. 21-4610(c).

Sen Jud Comm
1-23-96
Attach 3-1

No. 70,623

CITY OF DODGE CITY, *Appellee*, v. MARK ANDERSON, *Appellant*.

SYLLABUS BY THE COURT

1. JUDGES—*Appeal from Municipal Court—District Judge Hearing Appeal Has No More Authority to Impose Sanctions Than Does Municipal Judge.* A district court judge hearing a case on appeal from a municipal court sits as a municipal court judge and has no more authority to impose sanctions than does a municipal court judge.

2. SAME—*Appeal from Municipal Court—Municipal Court Judge without Authority to Order Defendant to Reimburse City for Appointed Counsel.* A municipal court judge has no authority on a municipal conviction to order a defendant to reimburse the city for attorney fees, incurred on behalf of the defendant, as costs of the action.

3. COURTS—*Municipal Court—Fine Imposed on Indigent Defendant—Determination of Amount and Method of Payment.* In determining the amount and method of payment of a fine, a municipal court must take into consideration the financial resources of a defendant and the nature of the burden the fine imposes.

Appeal from Ford District Court; DANIEL L. LOVE, judge. Opinion filed December 16, 1994. Affirmed in part, vacated in part, and remanded.

Barry K. Gunderson, of Dodge City, for the appellant.

Terry J. Malone, city attorney, for the appellee.

Before LEWIS, P.J., PIERRON, J., and WILLIAM F. LYLE, JR., District Judge, assigned.

LYLE, J.: Mark Anderson appeals from a decision of the district court finding him guilty of driving while under the influence. He argues that the district court abused its discretion in fining him more than the minimum amount, ordering him to reimburse the City of Dodge City and the State of Kansas for money spent in his defense, and denying his motion for a new trial.

The facts of this case are irrelevant to the issues presented and will not be repeated in this opinion.

The first issue Anderson raises is whether the district court abused its discretion in assessing more than the minimum fines for his offenses. According to Anderson, the district court failed

3-2

to take into account Anderson's financial resources or the burden that the fines would place on him.

Generally, a sentence imposed within the statutory guidelines will not be disturbed on appeal if it is within the trial court's discretion and not a result of partiality, prejudice, oppression, or corrupt motive. *State v. Turner*, 252 Kan. 666, 668, 847 P.2d 1286 (1993). However, K.S.A. 21-4607(3) provides that in determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden the fine imposes. In *State v. Scherer*, 11 Kan. App. 2d 362, 370-372, 721 P.2d 743, *rev. denied* 240 Kan. 806 (1986), this court found an abuse of discretion when the district court did not consider the ability of the defendant to pay when levying a fine. See *State v. Shuster*, 17 Kan. App. 2d 8, 10, 829 P.2d 925 (1992).

The State argues that 21-4607 is inapplicable to this case because Anderson was convicted of a violation of a municipal ordinance rather than a state statute. However, in *Scherer*, the fine was also levied for a violation of a municipal ordinance. 11 Kan. App. 2d at 368. Furthermore, the municipal ordinance in question mirrors K.S.A. 1990 Supp. 8-1567. Therefore, this argument is without merit.

The question thus becomes whether the district court considered Anderson's financial resources and the burden the fine would impose. The district court did ask if Anderson was employed. However, the court made no further inquiry into Anderson's financial status but instead simply imposed the same fine the municipal court had earlier handed down. The court's failure to consider the factors mandated by K.S.A. 21-4607 constitutes an abuse of discretion, the fine is vacated, and the matter is remanded for reconsideration of the issue in light of Anderson's financial status.

Anderson, an indigent defendant, was represented by a court-appointed attorney. He argues that the district court erred in ordering him to repay the City and the State of Kansas for money spent on his defense. He argues that the court had no jurisdiction to impose such a sentence and, therefore, the sentence is illegal.

This question involves the interpretation of several statutes. The interpretation of a statute is a question of law. *State v. Donlay*, 253 Kan. 132, Syl. ¶ 1, 853 P.2d 680 (1993).

K.S.A. 1993 Supp. 21-4610(c) authorizes the district court to require a defendant to reimburse the state general fund for expenditures by the State Board of Indigents' Defense Services on a defendant's behalf *as a condition of probation*. However, K.S.A. 12-4509 does not provide such an authorization for a municipal court. Further, the district court in this case did not require the repayment of attorney fees as a condition of probation but rather simply ordered Anderson to pay the fees in addition to the fine.

It has been stated that a district court judge hearing a case on appeal from a municipal court sits as a municipal court judge. *City of Overland Park v. Estell & McDiffett*, 225 Kan. 599, 603, 592 P.2d 909 (1979). If a municipal court has no authority to order the repayment of the attorney fees, neither does the district court on an appeal of this nature.

The State argues that the attorney fees were properly awarded as an element of costs. K.S.A. 22-3611 provides that if on appeal to the district court the defendant is convicted, the district court shall impose sentence and render judgment against the defendant for all costs in the case, both in the district court and the court appealed from. However, there is a question whether attorney fees for indigent defendants qualify as costs.

Criminal statutes are required to be construed strictly against the State. *State v. JC Sports Bar, Inc.*, 253 Kan. 815, 818, 861 P.2d 1334 (1993). Generally, when attorney fees are to be included as part of costs, the statute authorizing recovery of costs explicitly includes them. See, *e.g.*, K.S.A. 1993 Supp. 61-2709(a) (stating that if an appeal is taken to the district court from the small claims court and is determined adversely to the appellant, "the court shall award to the appellee, as part of the costs, reasonable attorney fees incurred by the appellee on appeal"); K.S.A. 1993 Supp. 60-1610(b)(4) (providing that costs and attorney fees may be awarded in a divorce action); K.S.A. 1993 Supp. 60-2006(a) (providing that in actions brought for the recovery of damages as a result of negligent operation of a motor vehicle, the

prevailing party "shall be allowed reasonable attorneys' fees which shall be taxed as part of the costs of the action"). The fact that the legislature chose not to specifically include attorney fees when referring to costs of the action is an indication that the costs which the defendant is obliged to pay do not include repayment of his attorney fees. This is a matter that needs to be addressed by the legislature. The presiding court *should* be able to assess attorney fees as part of the costs in this action after making the appropriate inquiry into the defendant's ability to pay. The repayment of fees should then become a condition of probation.

Because K.S.A. 22-3611 does not explicitly authorize the recovery of attorney fees as part of the costs of the action, the district court was without statutory authority to require Anderson to pay them.

Finally, Anderson argues that the district court erred in denying his motion for a new trial. He contends that he presented new evidence which showed that Officer Bates could not have had his car in sight at all times and could have missed the real perpetrator getting out of the car.

The granting of a new trial is within the discretion of the district court, and appellate review is limited to whether the district court abused its discretion. See *Taylor v. State*, 251 Kan. 272, 277, 834 P.2d 1325 (1992).

Anderson contends that because the distance between the place where the dumpster was hit and the place where his car ran up onto the curb was actually less than a third of a mile rather than the half-mile as testified to by the State and adopted by the court, Officer Bates could not have turned around and followed the car without losing sight of it briefly. However, Anderson does not explain how that distance relates to the inability of Officer Bates to keep the car in sight. Anderson testified at the trial the patrol car began following his car. Furthermore, the court heard testimony by the officer that he never lost sight of Anderson's car, saw the car run up on the curb, and saw Anderson, and no one else, get out of the car. Based on these facts, the district court did not abuse its discretion in denying the motion for new trial.

Anderson's convictions for driving while under the influence and driving while suspended are affirmed. Those portions of the sentence fining Anderson more than the minimum and requiring him to reimburse the City of Dodge City and the State of Kansas for his attorney fees are vacated, and the case is remanded for the court to appropriately consider Anderson's ability to pay.

Affirmed in part, vacated in part, and remanded.

Sec. 2. K.S.A. 1994 Supp. 21-4610 is hereby amended to read as follows: 21-4610.

(a) Except as required by subsection (d), nothing in this section shall be construed to limit the authority of the court to impose or modify any general or specific conditions of probation, suspension of sentence or assignment to a community correctional services program, except that the court shall condition any order granting probation, suspension of sentence or assignment to a community correctional services program on the defendant's obedience of the laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject.

(b) The court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation, suspension of sentence or assignment to a community correctional services program. For crimes committed on or after July 1, 1993, in presumptive nonprison cases, the court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation or assignment to a community correctional services program. The court may at any time order the modification of such conditions, after notice to the court services officer or community correctional services officer and an opportunity for such officer to be heard thereon. The court shall cause a copy of any such order to be delivered to the court services officer and the probationer or to the community correctional services officer and the community corrections participant, as the case may be.

(c) The court may impose any conditions of probation, suspension of sentence or assignment to a community correctional services program that the court deems proper, including but not limited to requiring that the defendant:

(1) Avoid such injurious or vicious habits, as directed by the court, court services officer or community correctional services officer;

(2) avoid such persons or places of disreputable or harmful character, as directed by the court, court services officer or community correctional services officer;

(3) report to the court services officer or community correctional services officer as directed;

(4) permit the court services officer or community correctional services officer to visit the defendant at home or elsewhere;

(5) work faithfully at suitable employment insofar as possible;

(6) remain within the state unless the court grants permission to leave;

(7) pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court;

(8) support the defendant's dependents;

(9) reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs;

(10) perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;

(11) perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days determined by the court on the basis of ability to pay, standard of living, support obligations and other factors;

(12) participate in a house arrest program pursuant to K.S.A. 21-4603b, and amendments thereto; or

(13) in felony cases, except for violations of K.S.A. 8-1567 and amendments thereto, be confined in a county jail not to exceed 30 days, which need not be served consecutively.

(d) In addition to any other conditions of probation, suspension of sentence or assignment to a community correctional services program, the court shall order the defendant to comply with each of the following conditions:

(1) Make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefor;

(2) pay the probation or community correctional services fee pursuant to K.S.A. 21-4610a, and amendments thereto; and

(3) reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment.

#4

JUDICIAL COUNCIL TESTIMONY
ON 1996 SB 468
SENATE JUDICIARY COMMITTEE
JANUARY 23, 1996

K.S.A. 59-3026 authorizes the court to order the conservator of a deceased conservatee to pay appropriate funeral expenses and expenses of last illness. If payment of those expenses deplete the assets of the estate, the court can discharge the conservator and the surety and close the case.

K.S.A. 39-709 (e) authorizes SRS to file a claim against a conservatorship estate of a decedent for medical assistance provided after June 30, 1992. This claim will usually include some expenses of last illness and some expenses for long-term nursing home care.

It is not unusual to have a conservatee die intestate with no known heirs, a very modest estate and no unpaid claims except that of SRS. It is a common interpretation of the present statute by judges of the district court that because SRS claims are not specifically named in the statute that SRS must petition to administer the estate before it can recover. Some estates are not large enough to justify the costs of administration and they remain open. By amending the statute as proposed by the Judicial Council a number of these conservatorships could be closed.

Sen Jud. Com
1-23-96
4-1

PROBATE LAW ADVISORY COMMITTEE

Hon. Edward Larson
(Acting Chair)
301 W. 10th Street
Topeka, KS 66612
(913) 296-6146

Cheryl C. Boushka
P.O. Box 25830
40/400 Corporate Woods
9401 Indian Creek Pkwy
Overland Park, KS 66225
(816) 292-2000
(816) 292-2150 FAX

Hon. Sam K. Bruner
Johnson County Courthouse
Olathe, KS 66061
(913) 764-8484 Ext. 5564
(913) 791-5258 FAX

Jack R. Euler
P.O. Box 326
137 S. Main
Troy, KS 66087
(913) 985-3561
(913) 985-2322 FAX

Gerald L. Goodell
515 S. Kansas Ave.
Topeka, KS 66603
(913)233-0593
(913) 233-8870 FAX

John F. Kuether
Washburn Law School
Topeka, KS 66621
(913) 231-1010
(913) 232-8087 FAX

Richard L.D. Morse
2429 Lookout Drive
Manhattan, KS 66502
(913) 539-5135

Philip D. Ridenour
P.O. Box 1028
107 S. Main Street
Cimarron, KS 67835
(316) 855-7051
(316) 855-3207 FAX

Marvin E. Thompson
525 Main St.
Russell, KS 67665
(913) 483-3195

Willard Thompson
P.O. Box 997
125 N. Market, Ste. 1600
Wichita, KS 67202
(316) 267-7361
(316) 267-1754 FAX

Special Member
Rep. Tim Carmody
4707 College Blvd. #206
Leawood, KS 66211
(913) 491-6332

(Revised 05/95)

JUDICIAL COUNCIL OF KANSAS
Kansas Judicial Center
301 W. 10th, Room 262
Topeka, KS 66612
(913) 296-2498

Hon. Tyler C. Lockett, Chair
301 W. 10th Street
Topeka, KS 66612
(913) 296-4900

J. Nick Badgerow
500/40 Corporate Woods
9401 Indian Creek Pkwy.
Overland Park, KS 66225-5407
(913) 345-8100

Hon. J. Patrick Brazil
301 W. 10th, Rm. 263
Topeka, KS 66612
(913) 296-5407

Sen. Tim Emert
P.O. Box 747
304 N. 6th St.
Independence, KS 67301
State Capitol, Rm. 143-N
(316) 331-4831

Gerald L. Goodell
515 S. Kansas Ave.
Topeka, KS 66603
(913) 233-0593

Hon. Marla Luckert
Shawnee Co. Courthouse
200 S.E. 7th St.
Topeka, KS 66603
(913) 233-8200, Ext. 4130

Phillip Mellor
200 W. Douglas, Ste. 200
Wichita, KS 67202
(316) 262-4403

Rep. Michael R. O'Neal
P.O. Box 2977
335 N. Washington #260
Hutchinson, KS 67504-2977
(316) 662-0537

Marvin E. Thompson
525 Main Street
Russell, KS 67665
(913) 483-3195

Hon. Nelson E. Toburen
120 W. 4th
Pittsburg, KS 66762
(316) 231-3570

(Revised 12/95)

'45

Senate Bill 489
Hearing before the Senate Committee on Judiciary
January 23, 1996
Jean M. Schmidt
Fraud Unit - Kansas Department of Insurance
Special Assistant Attorney General

Insurance fraud effects every level of the industry but the ultimate financial burden of that crime rests on the shoulders of the consumer in the form of higher rates. Insurance fraud costs Kansas consumers an additional $50 million a year in premium costs. As the department has evolved over the past few decades, so has its awareness of the necessity to combat fraud. Unfortunately, the statutory framework governing the department has not changed to accommodate this awareness and has not developed an effective response. The department needs to update the statutory framework under which investigations are done in order to provide a legally sufficient authorizing statute and efficient framework in which to coordinate investigations with other legal entities involved in the identification, investigation, and prosecution of insurance fraud.

The passage of the Fraudulent Insurance Act in 1985 and the subsequent criminal penalties assigned to the Act in 1994 were important steps in the fight. It now reasonably and logically follows that we should take the steps necessary to actually put the statute to work. Most of the proposed legislation consists of simply clarifying the powers and authority of the Commissioner by specific authorizing statutes. The investigation part of the proposal models the Kansas Securities Act, which has a very similar legislative and public benefit purpose. The present statute is vague and lacks adequate enforcement mechanisms.

Sen Jud. Com.
1-23-96
Attach. 5-1

Critical portions of the proposed legislation that could be considered as significant changes include:

-Section 2, specifically defines and sets out the legal authority of the Commissioner to investigate violations of the Kansas Insurance Code;

-Section 3, subsection (b)(1), requires insurance companies to report suspected fraud;

-Section 5, subsection (c), extends the time in which to file a fraudulent insurance act criminal case from two years to five years, and;

-Section 5, subsection (d), outlines criminal sanctions for failing or refusing to comply with the reporting statute.

The Commissioner urges passage of this bill because it provides a framework for effective exchange of information and coordination of investigative and prosecutorial resources. There should be no fiscal note attached to this bill because the department can simply absorb the new responsibilities within existing positions. It would alleviate any potential claims that the agency is acting outside statutory authority by actively participating in the investigation and prosecution of events that may be criminal in nature.

This legislation would significantly promote joint investigations between the Insurance Department and other law enforcement agencies by removing any perceived barriers to full information exchange. Through clearly articulated powers of investigation designed to work compatibly with corresponding law enforcement entities, the Kansas Department of Insurance will be more effective in its anti-fraud efforts.

Respectfully submitted: Jean M. Schmidt

- 6

State of Kansas

Office of the Attorney General

301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
FAX: 296-6296

SENATE COMMITTEE ON JUDICIARY

TESTIMONY IN OPPOSITION

TO

SENATE BILL 489

by

John W. Campbell
Senior Deputy Attorney General
January 23, 1996

Mr. Chairman, members of the committee, my name is John Campbell, I am the Senior Deputy Attorney General for the State of Kansas. I am here today on behalf of the Attorney General Carla Stovall to testify in opposition to Senate Bill 489.

Yesterday the Attorney General's Office became aware of the introduction of Senate Bill 489. The provisions of this bill are to say the least sweeping in nature.

SB 489 would greatly expand the Insurance Department's power over every citizen even those who are not in the business of insurance. The bill would create a new class of law enforcement officer authorized to make searches and seizures. The bill could be construed to grant the Department the power to grant immunity from criminal prosecution. The bill creates new crimes. The bill creates new statute of limitations for existing crimes. The bill places new responsibilities not only on the Department but on numerous state and local agencies.

It may well be that insurance fraud has reached such a point that drastic action is needed. However, the Attorney General strongly recommends that before enacting this legislation the following be considered:

Will the Department's Special Investigators be required to obtain and maintain state certification as Kansas Law Enforcement Officers?

Sen Jud Com.
1-23-96
Attach 6

Is it the intent of the Legislature that the Department be authorized to grant immunity from prosecution for criminal offenses in return for administrative testimony?

Should the Department enforce out of state administrative subpoenas?

What are the individual's due process of law protections from Department and non-department requests for information?

Would simply having an automobile or homeowners insurance policy subject one to the provisions of this bill?

How does the Kansas Administrative Procedures Act and the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions tie into this bill?

The above stated questions should be answered before SB 489 is enacted. The fight against insurance fraud is a laudable effort. However, the full power of SB 489 should be understood before it becomes the law.

7

MEMORANDUM

TO: The Honorable Tim Emert, Chairman
Senate Judiciary Committee

FROM: William W. Sneed, Legislative Counsel
The State Farm Insurance Companies

DATE: January 23, 1996

RE: S.B. 489

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I represent the State Farm Insurance Companies. We appreciate the opportunity to testify in opposition to S.B. 489.

S. B. 489 purports to extend the investigatory powers of the Commissioner of Insurance to unprecedented levels. This legislation allows the commissioner to conduct private investigations of any person on any matter, as long as it somehow relates to the business of insurance. Further, the commissioner may appoint special investigators empowered to issue subpoenas, conduct searches, and even seize and store evidence. The commissioner may compel attendance of witnesses, administer oaths, and take evidence. The commissioner may require production of documents.

These provisions alone give the commissioner not only police power, but hint at the force of a court of law. Not only does this grant of power impermissibly mix executive and judicial functions, it has the potential to interfere with substantive and procedural due process rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

Other problems arise in regard to the provision which allows the commissioner to compel

POLSINELLI, WHITE, VARDEMAN & SHALTON
707 S.E. Quincy
Suite 200
Topeka, Kansas 66603
(913) 233-1446
(913) 233-1939 (FAX)

Sen Jud Com
1-23-96
Attach 7

testimony of a witness over the witness' invocation of his or her privilege against self-incrimination. This broad, overreaching power once again clearly raises the specter of the Fifth Amendment. Again, it appears that the office of the commissioner seeks to adopt and perhaps move beyond judicial powers. This same provision suffers a slight technical infirmity in that K.S.A. 40-417, the current perjury statute in the insurance code, clearly applies to written and oral perjury. The language of Section 2(e) is unclear as to whether it applies only or oral testimony or to written statements as well.

Further, by and through Section 3 of this bill and the language of H.B. 2646, the commissioner is authorized to require release of information by an insurance company to the extent that the material is deemed relevant to an investigation by the commissioner. There are two obvious problems with this. The first is that the commissioner and the insurance company may not agree on what information is relevant in a given situation. Second, the legislation specifically provides that the commissioner may demand any material relating to the investigation of a loss or claim, including personal statements or proof of loss. This broad mandate implicates serious privacy issues for the insured.

Another apparent technical infirmity appears in Section 3(c). The bill states on page 4 line 13 that the agency provided with information pursuant to (a) or (b) or K.S.A. 40-2,119 may release information. K.S.A. 40-2,119 relates to immunity from civil liability for certain persons releasing information. The function of the cite to the immunity statute in this provision is unclear.

The penalty provisions in this legislation have been substantially stiffened as well. The level 6 nonperson felony for fraudulent acts involving $25,000 or more may involve, according to the

sentencing guidelines, a midline sentence of 18 months in prison. The sentence is considerably higher if the defendant has prior convictions, even misdemeanors. This is a significant jump from the possible six month penalty incurred under current law.

As I mentioned before, the problem with this legislation is that it is too broad. The Insurance Department wants mechanisms in place to help it crack down on fraudulent arson claims. This legislation does not stick to that narrow, meritorious purpose. Instead, it confers police and judicial powers on the office of the insurance commissioner. It addresses not only arson investigations, but any matter or any person related in any way to not only the "business" of insurance, but to incidentals of the business, such as insurance applications, ratings, claims, or other benefits.

While we agree that fraudulent arson claims present a problem which must be addressed, we submit that a sweeping grant of police and judicial powers to the commissioner of insurance is not the answer. We stand ready to work with the Insurance Department on a narrowly tailored bill to address the specific problems where they exist. We cannot, however, support S.B. 489 in its present form. Thus, we respectfully request your disfavorable action on S.B. 489.

We appreciate the opportunity to present our testimony. Please contact me if you have any questions.

Respectfully submitted,

William W. Sneed

POLSINELLI, WHITE, VARDEMAN & SHALTON
707 S.E. Quincy
Suite 200
Topeka, Kansas 66603
(913) 233-1446
(913) 233-1939 (FAX)