Approved: 3-17-99
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on February 8, 1999 in Room 313-S of the Capitol.

All members were present except:
Representative Marti Crow - Excused
Representative Tony Powell - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Avis Swartzman, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Marilyn Scafe, Kansas Parole Board
Tim Madden, Chief Legal Council Department of Corrections
Judge Marla Luckert, Kansas Judicial Council
Jim Clark, Kansas County & District Attorney Association
Kay Falley, Court Administrator 3rd Judicial District
Elwaine Pomeroy, Kansas Credit Attorneys Association and Kansas Collectors Association

Hearings on **HB 2149 - parole board, membership, members pro tem and hearings,** were opened.

Marilyn Scafe, Kansas Parole Board, appeared before the committee as the sponsor of the proposed bill. She talked about the reorganization of the board from four to three members, and requiring those who want to serve on the board to have a college degree. The bill would also allow hearing officers that are employees of the Department of Corrections to conduct hearings on behalf of the Parole Board. (Attachment 1)

Tim Madden, Chief Legal Council Department of Corrections, appeared in support of the portion of the bill that would require the Department of Correction to conduct hearings. This procedure would be a better use of state's resources than requiring board members to travel to each hearing. (Attachment 2)

Hearings on **HB 2149** were closed.

Hearings on **HB 2155 - grants of immunity by county or district attorney or the attorney general**, were opened.

Judge Marla Luckert, Kansas Judicial Council, appeared before the committee as a proponent of the bill. There are two types of immunity: transactional - which grants immunity for any transaction or matter in which a person is compelled to testify and derivative use immunity - which prohibits the use of any fruits of a witness' testimony from being used in any matter in connection with the criminal prosecution of a witness. This would allow the courts clarity and flexibility in the granting immunity in criminal prosecutions. (Attachment 3)

Jim Clark, Kansas County & District Attorney Association, appeared before the bill in support of the bill redefining the two types of immunity. (Attachment 4)

Hearings were on **HB 2155** closed.

Hearings on **HB 2184 - limited actions, claims for possession of property, bond, forms**, were opened.

Kay Falley, Court Administrator 3rd Judicial District, appeared before the committee as a proponent of the bill. The bill would change the signature line from clerk to judge on forms 11, 20, 22 and 23. This would limit the confusion as to who should sign the forms. (Attachment 5)

Hearings were on **HB 2184** were closed.

Hearings on **HB 2221 - limited actions, worthless checks, liability, action to collect,** were opened.

Elwaine Pomeroy, Kansas Credit Attorneys Association and Kansas Collectors Association, appeared before the committee as the sponsor of the proposed bill. He commented that this would ensure that those actions brought under Chapter 61 would be applicable to Chapter 60. (Attachment 6)

Hearings on **HB 2221** were closed.

Hearings on **HB 2222 - limited actions, forcible detainer of rental premises**, were opened.

Elwaine Pomeroy, Kansas Credit Attorneys Association and Kansas Collectors Association, appeared before the committee as the proponent of the bill. The bill would amend K.S.A. 61-2305 to allow landlords to file an action for possession only and still pursue a claim for rent in a subsequent action. (Attachment 7)

Hearings on **HB 2222** were closed.

HB 2184 - limited actions, claims for possession of property, bond, forms

Representative Carmody made the motion to report **HB 2184** favorably for passage and be placed on the consent calendar. Representative Long seconded the motion. The motion carried.

HB 2221 - limited actions, worthless checks, liability, action to collect

Representative Carmody made the motion to report **HB 2221** favorably for passage and be placed on the consent calendar. Representative Lightner seconded the motion. The motion carried.

Representative Carmody made the motion to approve the committee minutes of January 21, 26 & 27 1999. Representative Pauls seconded the motion. The motion carried.

The committee meeting adjourned at 4:45 p.m. The next meeting is scheduled for February 9, 1999.

HOUSE JUDICIARY COMMITTEE
GUEST LIST

February 8, 1999

NAME	REPRESENTING
Stephanie Buchanan	DOB
[illegible]	Attorney General
[illegible]	Sentencing Comm.
Kay Falley	KADCCA
Kathy Porter	OJA
Judy M. Hearrell	Kansas Judicial Council
Marla J. Luckert	Kansas Judicial Council
Christy Molzen	Kansas Judicial Council
JAMES CLARK	KCDAA
Whitney Damron	Kansas Bar Assn.
Charisse Powell	Kansas Bar Association
Derek A. Blaylock	Intern for Teresa Sittenauer
Martha Jane Smith	KCMHA
Tom Bruno	Mental Health Assoc.
Arlene M. Gledhill	KTLA

KANSAS PAROLE BOARD
LANDON STATE OFFICE BUILDING
900 SW JACKSON STREET, 4TH FLOOR
TOPEKA, KANSAS 66612-1236
(913) 296-3469

MEMORANDUM

TO: **Representative Michael O'Neal, Chairman**
House Judiciary Committee

FROM: **Marilyn Scafe, Chair**
Kansas Parole Board

RE: **HB 2149**
Reorganization of the Kansas Parole Board

DATE: **February 8, 1999**

In cooperation with the Governor, the Kansas Parole Board is proceeding with the plan to adjust the size of the Board according to the workload and the number of "old law" inmates under our jurisdiction. I have attached a report based on the Sentencing Commission numbers and record keeping by our staff which attempts to track the workload of the Board. These numbers were used to determine the FY97 reduction of the Board from five (5) to four (4) members. Increments of twenty percent (20%) deceases in the workload and "old law" inmates were targeted for appropriate timing of the reduction of members. By the end of FY99, projections show approximately thirty-two percent (32%) reduction of inmates. In FY95, 5599 total hearings were held by the five member Board. The hearings have not reduced as quickly, due largely to the number of violation hearings conducted. The use of video conferencing resulted in better use of time by the Board, and therefore, allowed the reduction of the Board by one member in FY97. If SB 131 is passed, the waivers for final revocation hearings should reduce the number of violation hearings significantly. 740 hearings (50% of the FY99 projected "new law" violators) is a conservative estimate of the number of violators who would waive their final revocation hearing before the Board. This would result in a projected thirty-seven percent (37%) reduction in total hearings from FY95. Therefore, HB 2149 is introduced as a plan to reorganize the Board to three (3) full time members.

The Board continues to strive for responsible release decisions and quality parole plans. Therefore, it is important to keep in mind that cutting the membership is not the only strategy for the Board. We have been involved with the Department of Corrections this year to develop a stronger role for the Board in release planning for the "new law" inmates. The numbers under the heading of "File Review" reflect those responsibilities that remain important duties of the Board.

REORGANIZATION OF THE BOARD:

Number of Positions:

Two of the remaining four positions expire January 15, 1999. Only one would be filled.

Qualifications:

Succeeding appointments would be required to meet the qualifications of a college degree. This is a step toward bringing experience to the position.

Rational for qualifications:

- A parole board member is the only position at this level in the criminal justice system that does not have any requirements.
- Considering the volume of work, the level of decision-making and the limited time available to the three members, the efficiency and quality of the Board will be limited if all members are not at least familiar with information necessary to deal with the mental health and substance abuse issues we must consider, as well as the growing number of sex offenders.
- The Board has communicated expectations and standards for offender behavior. Experience in this area is important in order to hold offenders accountable to realistic expectations.
- The Board must be part of a collaborative effort for assessment and planning of offenders. Therefore, decisions need to be made by integrating information from many agencies and resources on a professional level in the fields of behavioral science and criminal justice.
- Experience and knowledge enable the Board to comprehend and use the available information in the best interests of the inmate and the community.

PRO TEM MEMBERS

Extended absence due to illness or other leave and conflict of interest issues which would require a member to refrain from voting have been mentioned as concerns for reducing the Board. In the event of one of these occurrences, there would not be sufficient members for a vote. The appointment of a pro tem member would allow the Board to continue to carry out its duties. Pro tem members would meet the same requirements as regular members. The Governor would determine the compensation for such services. This appointment would not be subject to confirmation and would be temporary.

VOTE:

2 out of 3 votes will determine the action of the Board consisting of three members.

HEARING OFFICERS:

Hearing Officers would be qualified employees of the Department of Corrections authorized by the Board to conduct the hearings. This would be subject to the approval of the Secretary of Corrections. Use of hearing officers would be for temporary emergencies or in situations where the use of a DOC employee is a better use of resources than requiring a Board member to travel to a facility for a hearing.

Statistical Information

The previously listed items are all duties of the Kansas Parole Board. Below, please find the number of Board actions for Fiscal Years 1996, 1997 and 1998 as well as the projections for Fiscal Years 1999 and 2000 for some of the Board's duties:

	FY96 Actual	FY97 Actual	FY98 Actual	FY99 Estimated	FY2000 Estimated
Parole Hearings	3,235	2,765	2,259	2,033	1,931
Parole Violator Hearings	1,701	1,884	2,079	2,244	2,244
Total Hearings	4,936	4,649	4,338	4,277	4,175
Public Comment Sessions	36	36	36	36	36
File Reviews*	2,587	4,676	4,790	4,885	5,129

*File reviews include setting conditions of parole, conditional release and post release supervision as well as decisions regarding clemency recommendations and early discharges.

Inmates Under "Old Law" as of June 30th, 1998
(End of FY 1998)*

6/30/95 (actual)	6/30/96 (actual)	6/30/97 (actual)	6/30/98 (actual)	6/30/99 (projected)	6/30/2000 (projected)	6/30/2001 (projected)
4802	4424	3929	3486	3247	2427	2000

*Numbers provided by the Sentencing Commission

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
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(785) 296-3317

Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

DATE: February 8, 1999

TO: House Judiciary Committee

FROM: Charles E. Simmons
Secretary of Corrections

RE: HB 2149

HB 2149 is one of the Kansas parole board's legislative initiatives. The parole board has consulted with the department of corrections relative to the impact of HB 2149 on the operations of the department. The department supports the provisions of HB 2149 that impact the department of corrections.

Section 3 of HB 2149 authorizes the parole board to utilize employees of the department of corrections to conduct hearings on behalf of the board. This authority is contingent on the approval of the secretary of corrections. Pursuant to discussions between myself and parole board chairperson, Marilyn Scafe, it is the understanding of both the department and the board that the frequency of hearings conducted by employees of the department on behalf of the board would be limited.

Employees of the department would be requested to conduct hearings on behalf of the board when it would not be a good use of the state's resources for a member of the board to preside at the hearing. An example of such a situation would be when the board is conducting hearings by video conference and one of the inmates for whom the hearings are being conducted is in the infirmary and is physically unable to be present at the location within the correctional facility where the video conference is being transmitted. Use of a department employee to conduct the hearing for that inmate would be a better use of the state's resources than requiring a parole board member to travel to the facility. Both the parole board and the department are cognizant that neither the department's operations nor its budget would permit an extensive use of department personnel as hearing officers for the board.

CES/TGM/nd

House Judiciary
2-8-99
Attachment 2

JUDICIAL COUNCIL TESTIMONY
IN SUPPORT OF
H.B. 2155

HOUSE JUDICIARY COMMITTEE
February 8, 1999

On behalf of the Judicial Council, I am testifying in support of H.B. 2155. This legislation came to the Judicial Council through its Criminal Law Advisory Committee. The Committee members include judges, prosecutors, defense attorneys, law professors and counsel to law enforcement agencies. The Criminal Law Advisory Committee recommended the adoption of this legislation as did the Judicial Council.

H.B. 2155 is very similar to 1998 H.B. 2819. The committee watched that bill with interest last session. When it was not enacted, the Committee began a study of the bill, made some modifications and recommends it in the current form.

The purpose of the bill is to provide clarity and increased flexibility in the granting of immunity in criminal prosecutions. The bill allows the state to grant a witness either transactional or derivative use immunity. Section 1 relates to witnesses who appear before a grand jury, section 2 to witnesses at an inquisition, and section 3 to witnesses at other criminal proceedings.

The use of immunity grants to preclude reliance upon the self-incrimination privilege predates the United States' Constitution. Despite that, the United States Supreme Court has struggled with the interplay between the doctrines. Some of this history is important to understand why the current Kansas statute is worded in the way in which it is and why the proposed legislation results from an evolution of case law.

Generally, there are two types of immunity: transactional and use. "Transactional immunity" grants immunity for any transaction or matter about which a person is compelled to testify. "Use immunity" prohibits witness' compelled testimony from being used in any manner in connection with criminal prosecution of the witness. A subclass of "use immunity", which may also be viewed as a third type of immunity, is known as "derivative use immunity". "Derivative use immunity" prohibits the use of any fruits of a witness' testimony from being used in any manner in connection with the criminal prosecution of the witness.

In early United States Supreme Court cases, the Court struck down the use of use or derivative use testimony. Accordingly, the United States Congress adopted a statute providing for transactional immunity. Most state statutes were patterned after the federal provision. Later cases and subsequent amendments to the statutes recognized two limitations in transactional immunity. First, the witness may still be prosecuted for perjury committed in the immunized testimony. Second, immunity will not extend to a transaction noted in an answer totally unresponsive to the question

asked. Thus, the witness cannot gain immunity from prosecution for an unrelated criminal act by simply injecting a comment into the testimony.

However, in the 1960's the United States Supreme Court upheld immunity that was not as broad in scope as the traditional transactional immunity. Following the decision, the United States Congress adopted a new immunity provision. In 1972, in companion cases of *Kastigar v. United States,* 406 U.S. 441 (1972) and *Zicarelli v. New Jersey,* 406 U.S. 472 (1972), the Supreme Court upheld federal and state statutes, respectively, allowing the granting of derivative use immunity. Following *Zicarelli,* states began to amend statutes to allow derivative use immunity.

The Kansas statute was last amended in 1972, just months before the release of the *Kastigar* and *Zicarelli* decisions. In 1975, the Kansas Supreme Court held that the current version of K.S.A. 22-3415 made a grant of immunity both a transactional and use immunity. Not one or the other, but both. *In re Birdsong,* 216 Kan. 297, 304, 532 P.2d 1301 (1975). Thus, in practical effect, transactional immunity has been retained in cases.

The principal purpose of H.B. 2155, is to allow for the granting of either transactional or use and derivative use immunity. As is often the case, the fact that we have waited to reconsider the Kansas statute in light of the evolving case law has advantages. In the subsequent decades, the debate has continued as to whether use immunity of transactional immunity is better. For example, with respect to the effectiveness of the immunity in gaining truthful and complete testimony from a recalcitrant witness, each side claims advantages for the type of immunity it favors. Proponents of transactional immunity claim that a witness given use/derivative use immunity lacks confidence that the prosecutor will be prevented from making use of the witness' testimony in any subsequent prosecution. On the other hand, proponents of derivative use immunity argue that under a grant of transactional immunity a witness will say no more than he has to since a single admission gains him full immunity from prosecution. Proponents of derivative use immunity argue that the absence of an absolute protection against prosecution has value in making the immunized witness' testimony more credible to the jury and that it allows the prosecution of everyone who should be prosecuted.

Through this debate and by observing the experience of the federal system and other states we have the record of knowing that in different situations there are advantages to different forms of immunity. What may be effective in one case, may not be under a different factual pattern. Generally, the subsequent prosecution of a witness granted use immunity has been rare. However, at times the use and subsequent prosecution are important. On the other hand, as I noted, the defense counsel on our committee were also supportive of the provision, noting that the options for a defendant were also increased and that some of the confusion of current law would be removed.

The fact that the provision parallels other states gives us case law to look to with regard to the application of the statute. This is most important, perhaps, in regard to the so-called "taint" hearings which test whether the prosecutor is utilizing evidence derived from the testimony of the witness. In such a hearing, the state has the burden to prove by clear and convincing evidence that the evidence was obtained independently and from a collateral source.

This bill also provides for one other substantive change. Under current law, the statute provides that it is the judge who grants immunity to witnesses before a grand jury. The statute provides that notice shall be given to the prosecuting attorney whose recommendations shall be heard. The committee strongly believed that the better policy was to leave the decision to grant immunity in the hands of the entity who would ultimately have to try the case, either the local prosecutor or the attorney general. There has been litigation in other parts of the country related to whether the court has an inherent power to grant immunity. Some courts, including federal circuit courts, have held that a court can grant immunity where a defendant's due process rights are being violated by prosecutorial misconduct which disrupts the fact finding process. Arguably, therefore, there is an inherent power where necessary for the judge to grant immunity. However, it seems that in the first instance, the decision should lie with the prosecutor.

In summary, we urge your support of this legislation which would bring Kansas current with the law of immunity as it has evolved; would eliminate the confusion which exists under the current statute; and would provide increased flexibility so that decisions can be made as felt most appropriate under the specific facts of a case.

Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR, JAMES W. CLARK

February 8, 1999

TO: House Judiciary Committee

FROM: Kansas County and District Attorneys Association

RE: Immunity Issues, HB 2155

The Kansas County and District Attorneys Association appears in support of HB 2155, which merely redefines the immunity statutes by recognizing that there are two types: transactional immunity and use immunity (and derivative use immunity). Transactional immunity concerns a grant of immunity over an entire transaction, the effect being that a person giving testimony or information concerning a matter may not be prosecuted for any offense related to the information given. Use immunity (or derivative use immunity) means that while prosecution on the offense may be allowed, information given under the grant of immunity (or information derived from it) may not be admitted against the person giving the information.

The bill makes this change in the three separate statutes in which immunity appears: K.S.A. 22-3008 (grand juries); K.S.A. 22-3102 (inquisitions); and K.S.A. 22-3415 (prosecutorial authority in general).

The bill is the same as HB 2819, which was heard by this committee last year, and subsequently referred to the Judicial Counsel.

HOUSE BILL 2184

Kansas Association of District Court Clerks and Court Administrators

Testimony presented by Kay Falley

February 8, 1999

I am here on behalf of the Legislative Committee of the KADCCA and appreciate the opportunity to speak with you.

We are requesting K.S.A. 61-2605 forms 11, 20, 22 and 23 to reflect a judges signature in lieu of the clerks signature.

Changing the signature line from the clerk to the judge on Form 11 a "General Execution and Return" and Form 23 an "Execution on foreclosure of Secured Interest and Return" would make these forms parallel to Form 16 that was changed a few years ago.

Changing the signature line from the clerk to the judge on Form 20, an "Order for Delivery of Property in Replevin and Return" will conform with 61-2401b stating, "the judge may enter or cause to be entered an order for the delivery of property to the plaintiff".

Changing the signature line from the clerk to the judge on Form 22, an "Order for Possession of Property and Foreclosure of Secured Interest and Return" will conform with 61-2402b stating "a judge may enter or cause to be entered an order for the delivery of the property as provided in subsection (c)".

The changing of these forms 11, 20, 22 and 23 in K.S.A. 61-2605 would be consistent with the statutes and other forms, therefore eliminating confusion of our clerks and the attorneys as to who are to sign these particular forms.

Thank you for taking the time to listen to our views regarding House Bill 2184.

House Judiciary
2-8-99
Attachment 5

REMARKS CONCERNING HOUSE BILL 2221

HOUSE JUDICIARY COMMITTEE

FEBRUARY 8, 1999

Thank you for giving me the opportunity to appear before you in support of HB 2221, which was introduced by your Committee at the request of the Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

HB 2221 would amend K.S.A. 61-1725 in the code of civil procedure for limited actions to provide that the provisions of K.S.A. 60-2610 and 60-2611 relating to civil actions brought on worthless checks are adopted as a part of the code of civil procedure for limited actions and made applicable to actions brought on worthless checks under Chapter 61.

Most attorneys who handle claims for worthless checks believe that current law allows suits on worthless checks to be brought under Chapter 61. Most suits on worthless checks are in fact filed under Chapter 61.

However, it is not entirely clear that the provisions of K.S.A. 60-2610 and 60-2611 apply to suits brought under Chapter 61. This bill will merely clarify what most attorneys believe already applies, and will implement what appears to have been the intent of the legislature in 1986 when K.S.A. 60-2610 was first adopted (House Bill No.

2849, Chapter 223, 1986 Session Laws). Chapter 223 was a part of the section of the Session Laws dealing with "Procedures, Civil, For Limited Actions".

There was nothing in HB 2849 which restricted the bringing of a civil action on a worthless check to Chapter 60 only. The bill provided in pertinent part, which is still the law today, the following:

> "..... (b) The amounts specified by subsection (a) shall be recoverable in a *civil action* (emphasis added) ....."

After HB 2849 became law, it was surprisingly placed in Chapter 60 at the apparent whim of the Revisor of Statutes. It could have just as easily, and we believe more appropriately, been placed in Chapter 61.

There is nothing in the jurisdictional limits under Chapter 61 (K.S.A. 61-1603) which would prohibit the filing of an action on a worthless check under Chapter 61.

K.S.A. 60-2610 has been construed twice by Kansas appellate courts. (Shollenberger v. Sease, 856 P. 2d 951, 18 Kan. App. 2d 614 (1993) and Dillon's Food Stores v. Brosseau, 842 P. 2d 319, 17 Kan. App. 2d 657 (1992). Both of these cases had originally been filed in district court under Chapter 61. In neither case did the appellate court mention anything to indicate that the cases had been filed under the wrong chapter.

The Small Claims Procedure Act (K.S.A. 61-1701, et seq.) which is a part of Chapter 61, was amended by 1986 HB 2849 to specifically authorize actions on worthless checks to be filed in small claims court. (See K.S.A. 61-2703, 61-2706, and 61-2713.) It would be an odd situation if our law specifically authorized the bringing of worthless check actions under the small claims act but not under Chapter 61 in general.

In short, this proposed amendment will simply clarify the law as we believe was originally intended by the legislature and give express authority to a procedure that most attorneys are already following.

I have attached copies of K.S.A. Supp. 60-2610, K.S.A. 60-2611, and the first page of Chapter 223 of the 1986 Session Laws, which gives the title of 1986 HB 2849.

Elwaine F. Pomeroy
For Kansas Credit Attorneys Association
And Kansas Collectors Association, Inc.

REMARKS CONCERNING HOUSE BILL 2222

HOUSE JUDICIARY COMMITTEE

FEBRUARY 8, 1999

Thank you for giving me the opportunity to appear in support of House Bill 2222, which is a bill introduced by this Committee at the request of the Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

HB 2222 would amend K.S.A. 61-2305 pertaining to forcible detainer (eviction) actions filed under the code of civil procedure for limited actions (Chapter 61). The amendment would allow a landlord to file an action for possession only and pursue a claim for rent in a subsequent action. Current law requires that any rent which is due at the time of filing must be included in the action for possession or the claim for rent is waived.

Current law creates a problem for attorneys who handle eviction matters. Those attorneys are considered to be debt collectors under the federal Fair Debt Collection Practices Act (15 U.S.C. Sec, 1692, et. seq.). The federal law, which takes precedence over state law, requires a debt collector to wait a period of 30 days after first contact with a debtor before taking any action to collect the debt. That means an attorney handling an eviction action must either wait at least 30 days after making initial contact with the

tenant before bringing the action for possession and rent or bring an action for possession only and waive the claim for rent.

Landlords whose tenants are not paying rent don't want to wait 30 days to evict the delinquent tenant. They want action taken immediately to stop the loss. Additionally, they do not want to waive an otherwise legitimate claim for rent due from the tenant. Kansas law by itslef does not require them to do this. It is the combination of state and federal law that brings about these results.

The proposed amendment will simply allow attorneys for landlords to fully enforce their clients' legitimate claims and not run afoul of the federal law.

Elwaine F. Pomeroy
For Kansas Credit Attorneys Association
And Kansas Collectors Association, Inc.