Approved: 4-2-99
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 March 16, 1999 in Room 313-S of the Capitol.

All members were present except:
Representative David Adkins - Excused
Representative John Edmonds - Excused
Representative Ward Loyd - Excused
Representative Candy Ruff - Excused

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

Conferees appearing before the committee:
Barbara Tombs, Kansas Sentencing Commission
Paul Morrison, Vice-Chairman Kansas Sentencing Commission
Charles Simmons, Secretary Department of Corrections
Marilyn Scafe, Kansas Parole Board
Jim Clark, Kansas County & District Attorneys Association
Marla Luckert, Judge, Judicial Council Criminal Law Advisory Committee
Kyle Smith, Kansas Bureau of Investigation

Hearings on **SB 131 - crimes and punishments, sentencing**, were opened.

Barbara Tombs, Kansas Sentencing Commission, appeared before the committee as a proponent of the bill. She explained the provisions of the bill. (Attachment 1)

Paul Morrison, Vice-Chairman Kansas Sentencing Commission, stated that the Sentencing Commission conducted a comprehensive review of the sentencing laws. Since they were enacted there have been numerous amounts of changes to the laws and the proposed bill would take care of the inequities that have been created. (Attachment 2)

Charles Simmons, Secretary Department of Corrections, appeared before the committee in support of all portions of **SB 131** except the section that reduces the presumptive prison sentences that have been established for nondrug Severity Levels I and II. (Attachment 3)

Marilyn Scafe, Kansas Parole Board, appeared before the committee as a proponent of the bill. The proposed bill would allow those offenders who are under determinate sentences to waive their appearances at the final hearings, if they have admitted guilt to all violations. (Attachment 4)

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee with concerns about the section that distinguishes sex crimes based on the offender's age. (Attachment 5)

Kansas Peace Officers' Association did not appear before the committee but requested that their testimony be included in the minutes. (Attachment 6)

Hearings on **SB 131** were closed.

Hearings on **SB 98 - sentencing when new felony committed while offender is on release**, were opened.

Marla Luckert, Judge, Judicial Council Criminal Law Advisory Committee, appeared before the committee is support of the bill. It would allow the sentencing judge to impose a sentence be served consecutively for a new crime that was committed while he was on bond for the original crime. (Attachment 7)

The Attorney General did not appear before the committee but requested her testimony be included in the minutes. (Attachment 8)

Hearings on **SB 181 - rating of assault convictions and adjudications in determining criminal history classifications,** were opened.

Barbara Tombs, Kansas Sentencing Commission, appeared before the committee as a proponent of the bill. The bill would simply clarify the calculation procedure for determining an offenders criminal history score. (Attachment 9)

Hearings on **SB 181** were closed

Hearings on **SB 206 - search incident to lawful arrest includes evidence of any crime**, were opened.

Kyle Smith, Kansas Bureau of Investigation, appeared before the committee as a proponent of the bill. The proposed bill would repeal the statute that sets out searches that may be conducted by a law enforcement officer incident to a lawful arrest. (Attachment 10)

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee in support of the proposed bill. He explained that this would allow searches of areas incident to arrest for the fruits of any crime, not just the crime for which the arrest was made. (Attachment 11)

The Kansas Peace Officers Association did not appear before the committee but requested that his testimony be included in the minutes. (Attachment 12)

Hearings on **SB 206** were closed.

Hearings on **SB 207 - background checks conducted by the KBI for appointees of the governor**, were opened.

Kyle Smith, Kansas Bureau of Investigation, appeared before the committee as a proponent of the bill. He stated that the proposed bill would require background checks to any gubernatorial appointees and judicial appointments. (Attachment 13)

Hearing on **SB 207** were closed.

The committee meeting adjourned at 6:00 p.m. The next meeting is scheduled for March 17, 1999.

State of Kansas
KANSAS SENTENCING COMMISSION
Honorable Richard D. Walker, Chair
District Attorney Paul Morrison, Vice Chair
Barbara S. Tombs, Executive Director

Testimony on Senate Bill 131
House Judiciary Committee
March 16, 1999

The Kansas Sentencing Commission is testifying today in support of Senate Bill 131. The proposed bill reflects the Commission's discussions and deliberations over the past months relating to the underlying intent and goals of Sentencing Guidelines. In addition, the bill addresses the issue of proportionality in sentencing, which has become a growing concern of the Commission.

Sentencing Guidelines were legislatively enacted into law on July 1, 1993. Five years after enactment, the Sentencing Commission met for two days last fall to review the sentencing guidelines and examine changes that have occurred over the past years. From the issues raised during that meeting, a Subcommittee was appointed to complete a comprehensive review and identify changes and modifications to the guidelines and sentencing grids that support the underlying philosophy that incarceration should be reserved for the most violent and chronic offenders. The Subcommittee met several times and drafted a set of recommendations that were presented to the full Commission for review and approval. In January, the Sentencing Commission voted to present its recommendations to the 1999 Legislature.

Senate Bill 131 before you contains a package of comprehensive changes to the sentencing guidelines that promote both public safety and enhanced penalties for our most violent offenders, while at the same time providing a clearer sense of proportionality for all felony sentences. During the past five years numerous changes have been made to sentencing guidelines in a fragmented manner. Although each individual change may have been made with the best of intentions, the cumulative effect of these changes has resulted in some grave inequities with regards to sentencing. All three classifications of offenses under Sentencing Guidelines, Off-Grid, Grid and Non-Grid, were examined and evaluated with respect to public safety and equity in sentencing. The primary purpose of this bill is to address the proportionality issues in sentencing that have arisen since the passage of the sentencing guidelines.

Included in this bill are several sentence enhancements that clearly result in longer sentences for many of the Off-Grid offenses. The Sentencing Commissions believes and supports the premise that this specific offender group, representing the most serious of all offenders whose intentional actions result in the loss of a human life, should remain incarcerated for a considerably long period of time,

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regardless of the number of prison beds required to accommodate these offenders. Of all criminal actions, those that deprive an individual of his or her life must be viewed as the greatest threat to public safety. In addition, the sentence lengths for nondrug severity level III have been increased to address the inequity of sentence lengths between severity level II and severity level III and the seriousness of severity level III offenses.

Specific enhancements contained in this bill included the following recommendations:

(a) Life sentence for Felony Murder and Treason be increased from 15 years to 20 years before parole eligibility. This increase represents an adjustment to the proportionality related off-grid sentences and the seriousness of the actions that would constitute a conviction for this offense.

(b) Increasing the sentence lengths in all criminal history categories on Nondrug severity level III by 20 percent. This recommendation would result in the range of sentences being increased from the current minimum of 3.8 years to 4.6 years and the current maximum from 17.2 years to 20.6 years. The mean sentence for that severity level increases from 6.1 years to 7.3 years. This enhancement is presented because of the seriousness of many of the offenses classified as severity level III crimes, including kidnapping, aggravated robbery, voluntary manslaughter and aggravated indecent liberties with a child. When reviewing the guidelines, it became apparent that there was a great inequity between sentence lengths on severity level II (ranging from 11.3 to 51.3 years) and those on severity level III (ranging from 4.6 to 17.2 years). Given the serious nature of the offenses on severity level III, the Commission believed an across the board increase was warranted and necessary.

(c) Reclassification of Intentional Second Degree Murder from an off-grid offense to a severity level I offense. Although initially this may not appear to be an enhancement since the reclassification designates the offense as a grid crime, the actual sentence length increases on grid. Under current statute, an offender convicted of Intentional Second Degree Murder is parole eligible, regardless of criminal history, at ten years. Severity level I provides a sentence range of 15.3 years to 68 years, depending on criminal history classification. The mean sentence for this severity level is 24.3 years. Even though 15 percent good time credits are available, the offender would still serve as much and, in most cases more time, than under the current off-grid classification.

(d) A new sentencing rule was created that designates a presumptive prison sentence for a conviction of Residential Burglary, when the offender has a prior conviction for either a residential burglary or a non-residential burglary. This recommendation is in response to numerous concerns raised by judges, prosecutors, and the public regarding the number of residential burglary convictions that must occur before an offender is sentenced to prison.

(e) Enhance the penalty for Aggravated Escape from Custody, from a severity level 6 person felony to a severity level 5 person felony, when the offender is in the custody of

the Secretary of Corrections and escapes from a state operated correctional facility. This proposal differentiates the degree of seriousness in escaping from a community corrections facility versus a correctional institution, even though both offenders can be in the custody of the Secretary of Corrections.

The bill also contains several recommendations that reclassify some low level felony offenses and attempt to address the proportionality issues that became very apparent when the Commission examined changes to the Sentencing Guidelines. These recommendations were developed based on two primary guiding principals: (1) Incarceration should be reserved for the most violent and chronic offenders and (2) the length of sentences should increase in proportion to the severity of the offense, with the loss of a human life representing the most severe threat to public safety.

(a) Sentence lengths in all criminal history categories on Nondrug severity levels I and II be reduced by 20 percent. Although this may not be a popular recommendation, there are sound and rational public policy reasons to support the proposed adjustment. This proposal would result in the minimum sentence for severity level I be changed from 15.3 years to 12.2 years and the maximum sentence from 68 years to 54.4 years, with the mean adjusted from 24.3 years to 19.5 years. Even with the proposed change, the lengths of sentences are by no means short. Under Sentencing Guidelines, a conviction for an attempted off-grid murder results in sentencing as a severity level I offense. This has resulted in some offenders pleading up from an attempted murder charge to murder charge because the sentence for an off-grid offense can actually be shorter than for a severity level I offense. This type of action is not reflective of good sentencing policy, which should provide the longest sentences for more serious offenses. The Commission acknowledges the seriousness of the offenses classified as severity level I (rape, aggravated kidnapping and attempted murder) and supports long periods of incarceration for convictions of these offenses. However, in reviewing the proportionality of sentences, the Commission feels that a conviction for the crime of murder should carry the most severe sentence.

(b) Felony Driving with a Suspended License and the Habitual Violator statute, both current severity level 9, nonperson felonies be reclassified as Class A, nonperson misdemeanors. Sentencing Guidelines distinguishes offenses by person and nonperson, which differentiates betweens crimes against a person and crimes against property. These specific offenses are basically of the traffic nature and can be more appropriately dealt with at the local level. A severity level 9 felony, for most criminal history categories imposes a presumptive nonprison sentence. Even if the offender violates his or her probation and a revocation occurs, the underlying prison sentence for that severity level only ranges from 5 to 13 months. If the offense is classified as a Class A misdemeanor, the judge may impose up to a 12 month jail sentence upon conviction. If the intent is to stop offenders from driving while their drivers license is suspended, then the offense can be more adequately and effectively dealt with at the local level.

(c) Criminal Deprivation of Property - a Motor Vehicle is reclassified from a non-grid felony to a Class A, nonperson misdemeanor. This statute is commonly referred as the "joy riding" statute and the current classification as a non-grid felony sets forth that

incarceration be at the local level. In attempting to attain consistency in sentencing policy, the reclassification would address the proportionality issue.

(d) Amendment to K.S.A. 21-3520, Unlawful Sexual Relations, which would create a new sentencing structure for what is commonly referred to as the "Romeo and Juliet" situations. The new section would allow for a severity level VIII, person felony conviction, when the offender is less than three years older than the victim and the victim is greater than 14 years of age but less than 16 years of age and the sexual activity is voluntary. Numerous concerns have been raised by judges on the sentencing when the parties are in a mutual relationship and the parents or other parties initiate prosecution. This would allow for the sanctioning of the activity as a person felony, but would designate a presumptive nonprison sentence. In addition, a conviction under this new section would not require the offender to register as a sex offender, which may result in long term consequences.

(e) Designates the location of incarceration for a Third or Subsequent Felony Domestic Battery Conviction, a nongrid felony, to be at the local level to provide consistency with other nongrid felonies, such as DUI. Nongrid felonies are not assigned a severity level nor a determinate period of incarceration. As with felony DUI, the Commission believed incarceration should occur at the local level.

In addition to the above enhancements and proportionality adjustments, the Commission reviewed several procedural issues in which recommendations for change are included in this bill. One issue relates to procedures surrounding postrelease revocation hearings. Under current law, when an offender violates the conditions of postrelease supervision, the offender must wait until the revocation hearing before the Parole Board occurs, to start serving the appropriate sentence for the violation. The change proposed would allow the offender to waive his/her right to a revocation hearing and begin to immediately serve the appropriate period of incarceration. The offender would still have the right to request a hearing and wait until the hearing takes place to begin serving, if warranted, the incarceration period. However, if the offender voluntarily chooses to waive the right to a hearing, the offender could begin his sentence immediately.

This bill also contains a section which recommends that misdemeanor Pre-Sentence Investigation Reports be part of the official court record and accessible to the public in the same manner as current law allows for felony Pre-Sentence Investigation Reports. This would allow for consistency in sentencing and providing reliable data.

Finally, this bill contains a proposal, which is very similar to SB 435, which was introduced by the Sentencing Commission during the 1998 Legislative Session. The proposal requests that when an offender commits a new felony while released on felony bond, that the judge shall impose consecutive sentences upon a conviction.

In the past, the Sentencing Commission has limited introduction of bills to either technical or clarification issues surrounding the Sentencing Guidelines Act. In a perfect world, the Guidelines would have been implemented in 1993 and allowed to operate for a period of time before amendments were introduced and changes imposed. However, we do not operate in a perfect world.

The Sentencing Commission is mandated by statute to monitor the Sentencing Guidelines and recommend changes to the Legislature. Senate Bill 131 represents a comprehensive review of the Sentencing Guidelines after five years of enactment.

Senate Bill 131 contains a mix of recommendations that support the underlying goals of the Sentencing Guidelines and support public safety. For the past ten years the consensus of the criminal justice community has been to get tough on crime and we have. Violent offenders are serving much longer sentences than they had prior to sentencing guidelines. Offenders are now being held more accountable for their actions. However, in developing good sentencing policy, we need to be both tough and smart about crime. Distinguishing between criminals we are afraid of and criminals we are mad at, is often necessary but difficult to do at times. Senate Bill 131 represents this effort by the Sentencing Commission. Good public policy should not only be concerned with addressing current issues but also anticipating future consequences.

For Additional Information Contact:

Barbara Tombs
Executive Director

Testimony in Support of Senate Bill 131

Presented by: Paul J. Morrison
03/16/99

As a public official, one of the most important things we can do for the people of this State is help ensure their safety. This is primarily accomplished through the operation of our criminal justice system. Our primary goal has always been to protect the public and punish those who break the law. Overall, I have been very impressed over the years with how the legislature has handled these issues. We must never forget that the primary goal of the criminal justice system is to provide justice.

Since the Guidelines were passed in 1993, we have seen many modifications to the sentencing grid. Most of these modifications involved lengthening of sentences for career and violent offenders. They have been good, necessary changes that have received a lot of support from the criminal justice community. For example, some offenders who commit severity level 1 and 2 type crimes have had their sentences quadrupled in the last few years. For the most part, this has been great news for the people of Kansas. However, there have been some unintended consequences. One of those consequences has been the fact that some inequities have been created within the sentencing grid. For example, many severity level 1 crimes now carry much lengthier sentences than their more severe off-grid counterparts. As a specific example, many times a failed attempt to commit a homicide will carry a much lengthier prison sentence than a completed murder. Rapes and aggravated kidnappings now many times carry much lengthier sentences that first degree murder. The list goes on and on. I do not believe that these inequities were created intentionally. I believe that they often occur as a result of "patchwork" type amendments to the grid.

The reason I am supportive of Senate Bill 131 is that it attempts to address much of the proportionality problems within the guidelines. Many, many sentences are increased under this bill. A few are reduced. The reductions are modest and more importantly are an attempt to establish a greater parity within the grid.

SENTENCING RANGE - NONDRUG OFFENSES

Category=>	A	B	C	D	E	F	G	H	I
rity Level ⇓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	816 776 740	772 732 692	356 340 322	334 316 300	308 292 276	282 268 254	254 244 230	232 220 208	206 194 184
II	616 584 552	576 548 520	270 256 242	250 238 226	230 218 206	210 200 190	192 182 172	172 164 154	154 146 136
III	206 194 184	190 180 172	89 85 80	83 78 74	77 73 68	69 66 62	64 60 57	59 55 51	51 49 46
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

Recommended probation terms are:

36 months for felonies classified in Severity Levels 1 - 5

24 months for felonies classified in Severity Levels 6 - 10

Postrelease terms are:

For felonies committed before 4/20/95

24 months for felonies classified in Severity Levels 1 - 6

12 months for felonies classified in Severity Level 7 - 10

For felonies committed on or after 4/20/95

36 months for felonies classified in Severity Levels 1 - 6

24 months for felonies classified in Severity Level 7 - 10

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
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Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

DATE: March 16, 1999

TO: House Judiciary Committee

FROM: Charles E. Simmons
Secretary of Corrections

RE: SB 131 As Amended by the Senate Committee of the Whole

SB 131 is a legislative initiative of the Kansas Sentencing Commission. SB 131 contains a number of amendments to the definitions of crimes and criminal penalties, some of which involve proposals raised by the Department of Corrections. The Department supports the provisions of SB 131 with the exception of the reduction of the presumptive prison sentences established for nondrug Severity Levels I and II offenses. The Department also recommends amendments to SB 131 to achieve conformity with other statutory provisions and to correct technical errors. These recommended amendments are reflected included in the balloon amendment attached to this testimony.

The Kansas Sentencing Commission has estimated that the cumulative impact of the various sections of SB 131 will increase KDOC capacity needs by 113 beds over a ten year period. Our initial impression is that there will be a reduction in the number of minimum custody inmates due to the reclassification of some felony offenses to misdemeanors and possibly an increase in the number of medium custody inmates as a result of longer sentences or changes in sentencing presumptions. The Department, however, is not able at this time to project a numerical impact of SB 131 on the custody classifications of the inmate population.

This testimony will comment on several specific provisions of SB 131:

- Amendment of unlawful sexual relations to include consensual lewd fondling or touching by both employees of the Department and the Department's contractors.

Current law prohibits consensual sexual intercourse and sodomy between corrections personnel and offenders. The Department believes that it is inappropriate and should be unlawful for any form of

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sexual activity to occur between offenders and those with a custodial responsibility for supervision of them. True consent cannot be given under these circumstances. Moreover, sexual relations between offenders and employees leads to a number of operational and security problems.

- The crime of criminal deprivation of a motor vehicle is reduced to a class A nonperson misdemeanor from an unclassified felony. The penalty for that offense would stay the same.

This amendment is consistent with the law, codified at K.S.A. 21-4704, that offenders convicted of "joy riding" not be confined in a state correctional facility. However, since K.S.A. 21-4704 characterizes violations of K.S.A. 21-3705(b) as a felony, subject to local sanctions, K.S.A. 21-4704 should be amended to delete the classification of 21-3705(b) as a felony. This would bring section 13 into conformity with the provisions of section 9 at page 5 of SB 131 as amended by the Senate.

- The Department recommends an additional amendment of section 13 at page 16 regarding the reference to felony domestic battery at lines 23-24 and 29-30. That reference should be changed from "subsection (b)(3) of K.S.A. 21-3412" to "subsection (c)(3) of K.S.A. 21-3412".

The citation to "subsection (b)(3)" is erroneous since that subsection does not exist. Additionally, the felony definition for K.S.A. 21-3412 is at subsection (c)(3) of that statute.

- Increasing the penalty for the crime of escaping from a Department facility from a severity level VIII or Severity Level VI offense to a Severity Level V offense.

The Department has the concern that the Sentencing Guidelines Act does not take into account the entire criminal history of an inmate who escapes when applying the sentencing grid matrix. In fact, since a felony conviction is a necessary element of the crime, the KSGA prohibits the use of the current convictions in determining the criminal history of a person convicted of escape. Thus, first time offenders who escape from confinement have a criminal history classification of "I". (1 misdemeanor conviction or no record). Rather than create a special rule relative to criminal history for escape, the Sentencing Commission determined that increasing the severity level for the offense would be the preferred course of action. The Department supports this proposal.

- Finally, the one provision of SB 131 that the Department does not support is the 20% reduction in the presumptive prison sentences for nondrug Severity Level I and II offenses as set out in section 13.

Recent reports indicate that crime rates for violent crimes are down. A reduction in sentences at this time for the most severe offenses is the wrong message to be sending to the citizens of this state, to crime victims, and to criminals.

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cc: Legislation file w/attachment

promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence if the offense is classified in grid blocks 5-H, 5-I or 6-G shall not be considered a departure and shall not be subject to appeal.

(g) The sentence for the violation of K.S.A. 21-3411, aggravated assault against a law enforcement officer or K.S.A. 21-3415, aggravated battery against a law enforcement officer and amendments thereto which places the defendant's sentence in grid block 6-H or 6-I shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence, if the offense is classified in grid block 6-H or 6-I, shall not be considered departure and shall not be subject to appeal.

(h) When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

(i) The sentence for the violation of the felony provision of K.S.A. 8-1567 ~~and, subsection (b) of K.S.A. 21-3705~~, *and subsection* ~~(b)~~*(3) of K.S.A. 21-3412* and amendments thereto shall be as provided by the specific mandatory sentencing requirements of that section and shall not be subject to the provisions of this section or K.S.A. 21-4707 and amendments thereto. Notwithstanding the provisions of any other section, the term of imprisonment imposed for the violation of the felony provision of K.S.A. 8-1567 ~~and, subsection (b) of K.S.A. 21-3705~~, *and subsection* ~~(b)~~*(3) of K.S.A. 21-3412* and amendments thereto shall not be served in a state facility in the custody of the secretary of corrections.

(c)

(c)

(j) The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. Except as otherwise provided in this subsection, as used in this subsection, "persistent sex offender" means a person who: (1) Has been convicted in this state of a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto; and (2) at the time of the conviction under subsection (1) has at least one conviction for a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto in this state or comparable

3-4

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MEMORANDUM

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

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

RE: **SB 131**
Waiver of Final Revocation Hearing

DATE: **March 16, 1999**

Under the current law, all offenders must have a personal interview with a Board member in order to revoke a period of post release, parole, or conditional release supervision. SB 131 would allow offenders under the determinate sentences to waive their appearances at the final hearings, if they admit guilt to all of their violations. The Board would then make an administrative decision regarding the revocation. Responsibility for oversight and review of all cases to ensure due process would continue to rest with the Board. If deemed necessary, the Board could set a hearing regardless of the waiver. If there are pending charges, the offender will not be eligible to waive the final hearing. The Department of Corrections would be responsible for the timing of the waiver and the full explanation of the rights waived and the consequences thereof.

At this time, offenders serving indeterminate sentences whose releases are governed by the Kansas Parole Board, will not be given the opportunity to waive their final hearings. Wide discretion exists for setting penalties and planning release in those cases. Therefore, it is felt that personal interviews are needed in order to determine the length of pass and recommendations for programs and treatment.

Benefits of the waiver of the final revocation hearing for post release violators are:

- Time (90 or 180 days) would start with the signing of the waiver rather than the appearance before the Board. This would be more in keeping with the legislative intent for violators.
- Use of the waivers will result in a reduction of the average daily population. It is difficult to project a reduction in actual bed space using the Prophet Model, due to the data format. However, it is reasonable to project some impact for a reduction.
- This is an efficient use of the Board's time. The Board has limited or no discretion for penalties if the offender admits guilt to the violations or has a new conviction. Personal interviews cannot change the options for final decisions.
- Since it is the offender's decision to waive, there will be fewer appeals to process.

Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR, JAMES W. CLARK

March 16, 1999

TO: House Judiciary Committee

FROM: Kansas County and District Attorneys Association

RE: **SB 131**

The Kansas County and District Attorneys Association is generally supportive of the provisions in SB 131, and is appreciative of the deliberation that went into the suggested changes to Kansas criminal law.

However, we are opposed to the provisions that distinguish sex crimes based on the offender's age on two grounds:

1. POLICY. A crime is a crime, whether committed by a 19-year old or a 22-year old, and, historically, the offender's age has only determined whether the case is filed in juvenile or adult court. As the attached testimony submitted by the Reno County Attorney there is a strongly-held belief that there are predatory relationships out there, regardless of the proximity in age between predator and victim. Those cases truly involving Romeo and Juliet are better left to prosecutor discretion; or more correctly victim and police discretion, since the prosecutor rarely hears about true Romeo and Juliet situations. Likewise, the bundling of the various consensual sex acts between Romeo and Juliet into a single crime is indicative that the State makes no distinction between heavy petting, sodomy or intercourse. Those of involved in the problem of teen pregnancy would beg to differ with that decision.

2. LEGAL. Removing offenders from certain sex crime statutes based on the proximity of age to the victim spawns at least two legal issues. First is the problem of pleading and proving the age issue. Must the state now allege in every rape case that the offender is more than 3 years older than the victim; or is the age issue an affirmative defense? Adding to the difficulty of Romeo and Juliet cases, with recanting or at least reluctant victim testimony and jury nullification by requiring the State to prove additional elements of the offender's age in relation to the victim's simply compounds the difficulty of such cases. Second is the constitutional question of the equal protection clause? What is the state interest in making a distinction based on the difference in age? Is the victim less fondled or, in the extreme case, made less pregnant, simply because a defendant is near her own age? Does a long-time boyfriend who is two days over the three-year period have a valid equal protection claim when he is sentenced as a severity level 3 and required to register as a sex offender, while the one-time or predatory suitor within the grace period is sentenced only to a level 8 and not required to register?

Conclusion: If the Legislature sees fit to treat all forms of sexual activity by Romeo and Juliet the same, and wishes to avoid the consequences of harsher penalties and registration, we would suggest treating the issue as a matter of sentencing and inserting a Romeo and Juliet exception in each of the sex offense statutes and in the sex offender registration statutes. There is much less scrutiny in sentencing procedures than in pleading and proving the crime itself.

COUNTY ATTORNEY
Timothy J. Chambers

ASSISTANT COUNTY ATTORNEYS
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Testimony of Timothy J. Chambers, Reno County Attorney
Prepared For The
Committee on Judiciary of the Kansas Senate regarding
Senate Bill 131, February 11, 1999

I appreciate the opportunity to appear before this committee to speak regarding changes in the Kansas Criminal Code and Code of Criminal Procedures contained within Senate Bill 131.

The proposed legislation will eliminate felony offenses of Driving While Suspended and Driving as an Habitual Violator and relegate those offenses to misdemeanor status. I assume the impetus behind these amendments to current law is to prevent the incarceration of what is perceived as non-violent offenders within the state penal system.

Last year in Reno County, one hundred and seventeen (117) felony driving while suspended or habitual violator cases were filed.

By the time an individual is charged with a felony driving offense, they have exhibited a continued disregard for the driving laws of this State and the court system. Our court services chief has indicated to me a Supreme Court study has shown a non-violent offender on the average will be allowed six technical violations of probation before incarceration is a serious option.

The experience in Reno County has shown incarceration within the Department of Corrections occurs only with extreme cases and if it does occur, because of the commission of new offenses.

Twenty-eight felony D.U.I.'s were filed in Reno County last year. The majority committed the offense while their driving privileges were suspended or while declared to be habitual violators. Third time D.U.I.'s presently are listed as felonies, but in actuality are misdemeanors. At least with felony status for driving while suspended offenses and habitual violator offenses, some effective punishment is allowed to deal with the repeat driving offender.

I personally consider felony driving offenders to be violent. As a prosecutor, I have spent twenty years going to the scene of fatality accidents. Individuals who face incarceration in the state penal system for driving offenses are a danger to the people of this State. They have exhibited a continued pattern of dangerous driving patterns and a complete disregard for the laws of this State. Prosecution and law enforcement should not be further restricted in their efforts to combat this problem.

The second concern I wish to express concerning Senate Bill 131 deals with the so called "Romeo and Juliet" provisions. Sexual offenses involving fourteen and fifteen year old females where the perpetrator is within three years or less in age of the victim are proposed to be reclassified as "unlawful sexual relations". The new offense is a level eight offense and most generally will result in a minimal presumptive probation sentence.

Such a change in Kansas law will send a dangerous message to the young men and women of this State. I would urge the committee to reject this proposed statutory amendment. You are no less of a sexual predator because you select a victim who is near to you in age.

Before such a message is sent to the people of the State of Kansas, please contact the juvenile authorities across the State to learn their views concerning the problem that presently exists in sexual crimes against fourteen and fifteen year old females. Please contact police officers, juvenile prosecutors, judges, school officials, sexual assault centers and parents to become aware of the problem that presently exists.

Granted, a relationship can exist between a high school freshman female and a high school senior male. Prosecutor discretion and the courts exist to handle that situation. I submit that it is far too common where high school seniors pray on a particularly vulnerable segment of society, the younger female, when it is not a romantic relationship. That situation exists, and will continue to exist. I urge upon you, do not send a message that fourteen and fifteen year old girls are entitled to less protection and it is somehow less of an offense if the perpetrator happens to be near them in age. Thank you.

Timothy J. Chambers

Kansas Peace Officers' Association

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MEMORANDUM

TO: Representative Mike O'Neal, Chair
House Judiciary Committee

FROM: William W. Sneed
Kansas Peace Officers Association

DATE: March 16, 1999

RE: SB 131

Mr. Chairman, members of the committee, my name is Bill Sneed and I appear today on behalf of the Kansas Peace Officers Association ("KPOA"), Kansas' largest professional law enforcement organization, with more than 3,500 members statewide. We thank you the opportunity to appear today and express our views concerning Senate Bill 131.

The language of this Bill concerns us. The legislation would lessen the penalties for certain persons who are convicted of certain sex crimes against children.

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Specifically, relevant portions of Sections 4, 5, 6 and 7 prohibit prosecution of persons who are less than three years older than the victim for indecent liberties with a child; aggravated indecent liberties with a child; criminal sodomy; and indecent solicitation of a child, respectively. While we recognize that Section 8 amends the crime of Unlawful Sexual Relations to essentially allow

prosecution of persons who are less than three years older than the victim for acts encompassing the aforementioned crimes, *this amendment also decreases the severity of the penalties for those offenders.*

The Legislature created the original crimes, and the original penalties, to protect children. It is unwise to dilute that protection, especially when the effect is based on the fortuitous circumstance that the suspect is not sufficiently older than the victim.

We recommend leaving these laws intact, and appreciate the opportunity to express our concerns with this legislature.

Very truly yours,

William W. Sneed

WWS/pk

TESTIMONY OF THE
KANSAS DISTRICT JUDGES' ASSOCIATION
IN SUPPORT OF SB 98
BEFORE HOUSE JUDICIARY COMMITTEE
MARCH 16, 1999

The Kansas District Judges' Association supports the enactment of Senate Bill 98. The bill proposes an amendment to K.S.A. 21-4603d. The amendment would allow a sentencing judge to impose a sentence a defendant to prison to serve a sentence consecutive to another sentence if an offender commits a felony while released on bond before trial or sentencing in another case.

K.S.A. 21-4603d provides for the sentencing options and defines when sentences may or shall be imposed for consecutive or concurrent terms when multiple crimes are involved. When sentencing guidelines were enacted, the K.S.A. 21-4603d included a sentence which allowed the court to sentence an offender to prison for consecutive sentences even if the new crime was presumptive probation if the new crime was committed while the offender was on probation, assignment to a community correctional services program, parole, conditional release, or postrelease supervision for a felony. Some trial courts interpreted "conditional release" to mean while released on bond conditions. In *State v. Arculeo,* 261 Kan. 286 (1997), the Supreme Court held that conditional release did not include release on bond pending sentencing. Focusing on the statutory scheme of K.S.A. 21-4603d, the Court noted each of the other five categories under that statute designated a status in which the offender was under sentence for a felony when the new felony was committed. The Court held that expanding "conditional release" under K.S.A. 21-4603d to include an offender not yet sentenced was inconsistent with the statutory scheme and contrary to the definition of the term in K.S.A. 22-3718.

Kansas district judges have experienced cases where the judge felt that a prison sanction was appropriate when the defendant committed a new crime while on bond awaiting sentencing in another case. A defendant's conduct while on bond is often a good indicator of the defendant's ability to abide by the conditions of probation. However, there are also circumstances where the nonprison sanction remains inappropriate. Thus, the Kansas District Judges urge your support for the language which states that a defendant **may** be sentenced consecutively for a new crime committed while on bond. The Kansas District Judges also support the amendment which would allow the imposition of a prison sanction even if the crime might otherwise be presumptive probation.

In summary, the Kansas District Judges Association urges your support of S.B. 98.

State of Kansas
Office of the Attorney General
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ATTORNEY GENERAL

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March 16, 1999

Representative Michael O'Neal, Chair
House Judiciary Committee
State Capitol
Topeka, Kansas 66612-1504

Dear Chairman O'Neal and Members of the House Judiciary Committee:

Senate Bill 98 will allow a judge the discretion to impose imprisonment on a criminal defendant who commits a new felony while on bond for a felony offense. It is important to note that this discretion is already granted to judges in K.S.A. 21-4603d if the criminal defendant commits a new felony while he or she is incarcerated and serving a sentence for a felony or while the criminal defendant is on probation, assignment to a community correctional services program, parole, conditional release, or post release supervision for a felony. This bill simply provides the court with discretion to impose a sentence of imprisonment on a defendant who commits a new felony while on bond for committing a felony, with the result that the sentence is not considered a departure.

Adding individuals on bond to K.S.A. 21-4603d is important because, as it is currently codified, a criminal defendant can commit a string of property crimes, i.e., nonperson felonies, and still be presumptive probation. For instance, in State v. Arculeo, 261 Kan. 286 (1997), the defendant was convicted of an attempted felony auto theft in Lyon County. These crimes were considered presumptive probation because the defendant had less than two person felonies on his criminal record. At the time he committed the attempted felony auto theft, the defendant was on a bond awaiting a sentence for another felony in Lyon County. Moreover, he was also on bond awaiting a sentence for two other felonies in Butler County and one felony in Coffey County when he committed the attempted felony auto theft.

The district court equated conditional release, as it appears in K.S.A. 21-4603d, to being on a bond and sentenced the defendant to prison. This decision was reversed by the Kansas Supreme Court. In its opinion, the Kansas Supreme Court stated that had the legislature intended a different result, it would have added specific language that authorized imposition of a prison

sentence if a new crime was committed while on bond. The defendant, therefore, was able to commit a string of property crimes and not be sentenced to prison.

This bill merely grants the court the discretion to impose a prison sentence without it constituting a departure in a clearly essential situation.

Thank you for your consideration and support for Senate Bill 98.

Sincerely,

Carla J. Stovall
Attorney General

State of Kansas
KANSAS SENTENCING COMMISSION
Honorable Richard D. Walker, Chair
District Attorney Paul Morrison, Vice Chair
Barbara S. Tombs, Executive Director

TESTIMONY ON SENATE BILL 181
HOUSE JUDICIARY COMMITTEE
March 16, 1999

The Kansas Sentencing Commission is testifying today in support of Senate Bill 181. The proposed bill amends K.S.A. 1998 Supp. 21-4711, which relates to determining an offender's criminal history, specifically dealing with prior adult convictions or juvenile adjudications for the crime of assault.

Under current law, every three convictions or adjudications for assault, a misdemeanor offense, within a three year period shall be counted as one prior person felony for the purpose of determining an offender's criminal history. SB 181 seeks to define that only those assault convictions occurring within the period commencing three years prior to the date of conviction for the current crime would be included in the determination of the offender's criminal history.

The bill merely attempts to clarify the calculation procedure for determining an offender's criminal history score, which is used in conjunction with the statutorily defined severity level to determine an offender's length of sentence under the Sentencing Guidelines. The Sentencing Commission supports the proposed change which will allow for more consistency in the manner in which criminal history are calculated.

For additional information contact:

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Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF SENATE BILL 206
MARCH 16, 1999

Mr. Chairman and Members of the Committee:

I am Kyle G. Smith, Assistant Attorney General, assigned to the Kansas Bureau of Investigation (KBI), and appear today in support of SB 206. Originally, SB 206 restored the status of search and seizure law in Kansas to what it was before a recent interpretation by the Kansas Supreme Court. The purpose was to protect the law enforcement officers from the criminals they arrest and keep the statutory law current with recent U.S. Supreme court decisions. Given that the Supreme Court controls as the ultimate authority what the law of search and seizure is under the Fourth amendment, the Senate Judiciary decided that rather than going in and modifying the statute after each decision, they would rather just repeal the statute and let the court decisions control. The version of SB 206 before you is this repealer.

The specific problem addressed here is that in previous interpretations by both the Kansas Supreme Court and the U.S. Supreme Court held that when a criminal was arrested, in order to protect the officers and to preserve evidence, law enforcement officers were entitled to conduct a search of the immediate area around the arrested criminal, sometimes called a "wingspan" search.

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> In *Robinson*, we held that the authority to conduct a full field search as incident to an arrest was a "bright-line rule," which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern.
>
> *Knowles v. Iowa*, U.S. Supreme Court 97-7597 (12/8/98)

However, in *State v. Anderson,* 259 Kan. 16 (1996), the Kansas Supreme Court narrowly interpreted the statutory language, not the constitutional language, to limit the scope of searches when there has been an arrest. Since the current statute says that officers may search for evidence of "the" crime, the court determined that searches incident to arrest would be limited to only those cases where the officers were searching for evidence of the underlying offense for which the individual was arrested.

In the *Anderson* case itself, the defendant was arrested for driving while suspended. This interpretation resulted in the suppression of a methamphetamine laboratory found as a result of the search, since the officer freely admitted he was not searching for evidence of the driving while suspended. While the search was constitutional, it was held to violate the statutory language.

The primary concern of this interpretation is that it puts officers at risk. It makes little difference to the safety of an officer that a hidden gun under the seat was found after a DUI arrest or a robbery arrest. Again, there is a substantial risk that the person or associate might be able to access a weapon that might otherwise have been found.

The *Knowles* case cited above, makes it clear that the search is not authorized for traffic infractions, but only for real arrests. This ruling should provide some reassurance that officers will not be able to abuse this power.

The other possible consequence is that officers will become "creative" in finding reasons for conducting wingspan searches to thus protect themselves. I strongly feel that any laws that

reward the creation of legal fiction serve to undermine the trustworthiness and integrity of the entire criminal justice system. The original change in SB 206 would have merely restore the law to what it was prior to the *Anderson* decision, and have the additional benefit of keeping Kansas consistent with the other states and federal law regarding search and seizure. Thus limiting the need to retrain approximately 6,000 law enforcement officers in the state of Kansas as to this unique, statutory quirk. .

By repealing the statute we remove this conflict between statutory and case law. Given the improvements in training and electronic communications I believe the repeal is the best solution.

I would be happy to answer any questions.

Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR, JAMES W. CLARK

March 16, 1999

TO: House Judiciary Committee

FROM: Kansas County and District Attorneys Association

RE: Testimony in Support of **SB 206**

The Kansas County and District Attorneys Association is in support of Senate Bill No. 206, which originally attempted to amend the statute allowing a search incident to arrest, K.S.A. 21-2501(c) by replacing the definite article "the" with the indefinite "a".

The bill is identical to HB 2229, introduced at our request in 1997. The purpose of both bills is to allow search of areas incident to arrest for fruits of any crime, not just the crime for which the arrest was made. The bills are a result of a decision by the Kansas Supreme Court, State v. Anderson, 259 Kan. 16, in which the Supreme Court ruled that because of the wording in K.S.A. 22-2501, evidence of a meth lab operation seized from a vehicle must be suppressed. The Court's ruling created an interesting anomaly in the doctrine of independent state grounds. This doctrine, which became much discussed in the 1970's with the swing toward a more conservative U.S. Supreme Court, generally emerges when a state's highest court finds its state constitution more restrictive than the federal one. The Kansas Supreme Court has resisted this constitutional trend and has repeatedly held that Section 10 of the Kansas Constitution is not more restrictive than the Fourth Amendment. However, the result in Anderson serves the same end. While the Kansas Court acknowledged that recent United States Supreme Court cases would allow such a search as reasonable within the Fourth Amendment, i.e. New York v. Belton, 453 U.S. 454 (1981); it nevertheless held that codification of the earlier U.S. Supreme Court decisions, i.e. Chimel v. California, into the statute resulted in greater restrictions on searches incident to arrest in Kansas. In so doing, the Court declined to allow the U.S. Supreme Court to modify the effects of a Kansas statute, placing that duty on the Legislature itself. Hence, our appearance before you today.

There was some concern in this committee two years ago that such a bill would allow full search of a citizen's vehicle upon a stop for a minor traffic infraction. Since HB 2229's introduction, and death in House Judiciary Committee, the U.S. Supreme Court has considered the issue of search incident to a traffic citation. In Knowles v. Iowa, 97-7597 (12/8/98) a unanimous Supreme Court held that the two rationales for the search incident to arrest doctrine: 1) officer safety, and 2) the need to discover and preserve evidence; are not present in a stop for a minor traffic offense. While that decision specifically concerned Iowa's "search incident to citation" statute, there is no question that it applies to an infraction stop in Kansas. In the Anderson case, however, the driver of the vehicle had an outstanding warrant unrelated to the infraction, and was subsequently arrested; hence the Knowles decision would not preclude a search incident to the arrest. Only the present statute has that prohibition, and should be changed, as the original bill attempted, or repealed, as the Senate has done.

Kansas Peace Officers' Association

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MEMORANDUM

TO: Representative Mike O'Neal
House Judiciary Committee

FROM: William W. Sneed
Kansas Peace Officers Association

DATE: March 15, 1999

RE: SB 206

Mr. Chairman, members of the committee, my name is Bill Sneed and I appear today on behalf of the Kansas Peace Officers Association (KPOA). KPOA, the largest professional law enforcement organization in Kansas, thanks the Committee for the opportunity to testify in support of Senate Bill 206.

As amended, SB 206 would repeal K.S.A. 22-2501, which prescribes a law enforcement officer's ability to conduct certain searches at the time a person is arrested.

KPOA believes the Senate acted appropriately when it voted, unanimously, to repeal this statute. A series of United States Supreme Court decisions established the law in this "search incident to arrest" area before the Legislature attempted to codify those decisions in K.S.A. 22-2501. Indeed, and perhaps even unintentionally, the Legislature's codification conflicted with the Supreme Court decisions and gave our state's officers less ability to make searches for evidence at the time of arrest than did the US Supreme Court. The repeal of this statute would bring Kansas into line with Supreme Court jurisprudence, promote the safety of our officers, and eliminate the confusion many officers have experienced in this area.

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KPOA urges the Committee to report SB 206 favorably to the House and, of course, urges the House to pass the legislation.

Very truly yours,

William W. Sneed

WWS/pk

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF SENATE BILL 207
March 16, 1999

Mr. Chairman and Members of the Committee:

I am Kyle Smith, Assistant Attorney General assigned to the Kansas Bureau of Investigation (KBI), and appear today in support of SB 207. This legislation amends the Kansas statute designating the duties of the KBI in order to facilitate background investigations conducted on behalf of the Governor's Office.

The FBI operates numerous databases regarding criminal records which are primarily for use in criminal investigations. To keep the databases from being overtaxed by administrative inquiries the FBI allows such inquiries only when mandated by state law.

The proposed amendments to KSA 75-712 would mandate such background investigations for all gubernatorial appointments subject to confirmation of the Senate and all judicial appointments, thus allowing access to the Triple I (Interstate Identification Index) and other databases. The original language had been approved by the Governor's Office and the FBI. The Senate modified the language to clarify that the Governor had the choice as to when backgrounds would be run. The FBI has approve the changes. Passage of this bill would expedite an improved quality of the background investigations the KBI is able to provide to the Governor's Office.

I would be happy to answer any questions.

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3-16-99
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