

Approved March 17, 2000
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:12 a.m. on March 16, 2000 in Room 123-S of the Capitol.

All members were present except: Senator Goodwin (excused)

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Representative Richard Reinhardt
Bud Grant, Kansas Chamber of Commerce and Industry (KCCI)
Andy McSorley, Oakley Sunglasses
Kyle Smith, Kansas Bureau of Investigation (KBI)
John Smith, (KCCI)
Charles Simmons, Secretary, Department of Corrections (DOC)
Barbara Tombs, Sentencing Commission

Others attending: see attached list

The minutes of the March 14th and March 15th meetings were approved on a motion by Senator Bond and seconded by Senator Pugh. Carried.

HB 2596—concerning counterfeiting; relating to criminal penalties; concerning civil forfeiture

Conferee Reinhardt, testifying in support of **HB 2596**, briefly explained why this counterfeiting of trademarked goods issue caught his attention and why the bill exists. He stated that the bill is modeled after legislation that has been passed in other states. (no attachment) Discussion followed regarding current laws which cover this issue.

Conferee McSorley testified in support of **HB 2596**. He presented a comprehensive review of his company, its products and service in the State of Kansas and its contribution to the Kansas economy. He further presented an overview of the characteristics of counterfeit products and how they are distributed. He illustrated how counterfeit merchandise sales hurt Kansas and he urged passage of the bill. (attachment 1)

Conferee Smith testified in support of **HB 2596**. He stated that this legislation, which “would criminalize the manufacture, sale and distribution of fraudulent trademark property and services,” provides a deterrent to this type of activity and discussed how the forfeiture provision provides further disincentive as well. He further stated that there would be little impact, if any, on prison overcrowding. (attachment 2) Following discussion, Senator Bond moved to pass the bill out favorably, Senator Donovan seconded. Carried.

HB 2805—relating to theft detection shielding devices; relating to domestic battery

Conferee Grant testified in support of **HB 2805** briefly discussing the issue of retail theft and methods thieves use to prevent detection. He noted photographic examples of several of these methods which were handed out to Committee. (attachment 3)

Conferee Smith testified in support of **HB 2805**. He presented background on the issue of retail theft and expressed his concern with its effect on consumers and retailers. He stated that in 1997, the FBI Interstate Theft Task Force estimated external retail theft at approximately \$26 billion, a cost which is passed on to the consumer through higher prices. (attachment 4)

Written testimony supporting **HB 2805** was submitted by Marlee Bertholf, Executive Director, Kansas Retail Council. (attachment 5)

Conferee Simmons testified in opposition to the domestic battery amendment in **HB 2805**. He discussed a number of issues that the bill raises in regard to the sentencing disposition for persons convicted of felony domestic battery. (attachment 6)

Conferee Tombs testified in opposition to the domestic battery portion of **HB 2805** and discussed how this house amendment to the bill undermines the integrity of the sentencing guidelines. (attachment 7) Following discussion it was decided to take no action on the bill at this time.

HB 2600—concerning jurors; regarding exclusions

The Chair reviewed **HB 2600** and, following discussion, Senator Vratil moved to pass the bill out favorably, Senator Donovan seconded. Carried.

The meeting adjourned at 10:55. The next scheduled meeting is March 17, 2000.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 16, 2000

NAME	REPRESENTING
JOHN P. SMITH	WAL-MARTS STORES INC.
DVD GRANT	KCC
Charles Simmons	KDOC
Sub Jones	KSC
Wynn Gorman	Wy. Co. D.A.
Jessie Powell	ABA
Adam Sells	Oakley, Inc.
Jeff Bottenberg	Kansas Pace officers
Susan D. Bechard	KCDAA
Nora Smith	Intern - Sen Felecciano
Bridget Keckel	St. Rep.
Kyle Smith	KPI
Maree Kettler	KPI
STEVE KEARNEY	KCDAA
Paul Davis	KS Bar Assn.
Kathy Bule	OJA
Whitney Damron	KS Bar Assn.
KEVIN GRAHAM	KSC
Marion Hawver	Hawver's Capitol Report

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
<i>One Della</i>	<i>Magistrate Judges</i>
<i>M. J. ...</i>	<i>Magistrate Judge</i>

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STATE COMMITTEE HEARING

STATE OF KANSAS 2000

HOUSE BILL NUMBER: H2596

16 MARCH 2000

Introduction

Andy McSorley, Sales Representative, Oakley Inc.
One-year resident of Lawrence, Kansas
Testimony regarding the importance of House Bill 2596

About Oakley, Inc.

Oakley: a world brand, driven to ignite the imagination through the fusion of art and science. Building on its legacy of innovative, market-leading, premium sunglasses, the company also offers an expanding line of premium performance footwear, apparel, accessories, watches and prescription eyewear to consumers in more than 70 countries. Corporate headquarters are in Foothill Ranch, California.

Oakley sunglasses are manufactured in the United States.

Carefully selected retailers sell Oakley products worldwide. Sunglasses range from \$60 to over \$300 at retail. Total annual sales for Oakley, Inc. are approx. \$250 million.

Oakley in Kansas

- Currently 146 authorized dealers statewide.
- 124 of those accounts are locally owned and operated "mom and pop" businesses, including but not exclusive to: Optometric offices, golf courses, hunting lodges, sports specialty retailers, and motorcycle shops.
- Total Oakley sales within the state exceed \$2 million dollars annually at the retail level.

Product specifics

- 100% UVA, UVB, UVC, and blue light protection.
- American National Standards Institute (ANSI) approved for impact resistance and optical quality, exceeding industrial standard Z87.1 for all eyewear.
- Patented, proprietary technology allowing a wrapped (curved) lens that maintains near perfect visual acuity at all angles.
- Oakley has secured over 400 patents and 600 trademarks.
- Distinctive styling.

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Counterfeit product overview

- Foreign production.
- Deplorable product quality.
 1. Optics so poor they actually cause headaches and eye problems!
 2. Lenses shatter like glass upon impact.
 3. Fragile construction throughout.
 4. Cosmetic deformations.
- Out of state “fly-by-night” operations sell/distribute product. Counterfeiters travel throughout Kansas with trucks, vans, and trailers pawning off their inferior products as “genuine Oakley sunglasses”.
- These operations peddle many other bogus products beyond “Oakley” sunglasses.

How counterfeit merchandise sales hurt Kansas, illustrated:

- Counterfeiters in Houston receive a load of bogus merchandise by boat from Asia. They load up the van and trailer and head north, bypassing Oklahoma due to anti-counterfeiting penal codes. Once in Kansas they travel from town to town selling fraudulent merchandise as they go. Once the supply is exhausted they leave the state, cash in pocket. No state sales taxes have been paid. Kansas loses money.
- A customer unknowingly purchases counterfeit merchandise. Upon the products near-immediate failure (hopefully **not** catastrophic) he/she sends it off to Oakley for warranty replacement, only to be told that it is, in fact, a forgery. The product is worthless and the money is long gone. The Kansas citizen loses money.
- A customer walks into an authorized Oakley retailer to buy sunglasses. The customer claims that they saw the “exact same” item at the county fair last week for ten dollars, a fraction of the price the retailer is asking. The customer walks out of the store without buying anything because the product has been de-valued by phony look a likes. The Kansas businessperson loses money.

In conclusion

- A tremendous amount of local money is lost each year due to this problem.
- Legitimate business owners are begging for help to fight against counterfeit sales.
- Honest citizens are being taken advantage of.
- Health and safety risks.
- Moral issues.

Passage of House Bill 2596 will greatly assist in eradicating the enormous problem of fraudulent merchandise from our state.

On behalf of the authorized Oakley dealer base in Kansas, I thank the committee for the opportunity to submit this testimony.

**Andy McSorley, Oakley Sales Representative
742 New York St.
Lawrence, KS 66044
785-841-0545**

BILL NUMBER: H2596

Year of Introduction: 2000

Description:

An act concerning counterfeiting; relating to criminal penalties; concerning civil forfeiture; amending K.S.A. 60-4104, 60-4105 and 60-4116 and repealing the existing sections.

Author(s): Representative Richard R. Reinhardt

Subjects:

Procedure, Criminal

Creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Crime and Criminals

Creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Punishment

Creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Forfeitures

Creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Seizure and Forfeiture

Creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Fraud

Creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Criminal Code, Kansas

As it relates to creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Trademark and Trade Names

Creating the crime of counterfeiting; property subject to forfeiture (Amended H. Comm. Trademark definitions outlined; penalties listed)

Trademark Act, Kansas

Enacted



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Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE SENATE JUDICIARY COMMITTEE
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
IN SUPPORT OF HB 2596
MARCH 16, 2000

Mr. Chairman and Members of the Committee:

I am Kyle Smith, Assistant Attorney General and Special Agent with the Kansas Bureau of Investigation (KBI), and appear today in support of HB 2596. This legislation would criminalize the manufacture, sale and distribution of fraudulent 'trademark' property and services. In everyday parlance this is designed to attack the 'knockoff trade' where illicit manufacturers make cheap copies of designer jeans or Oakley sunglasses and sell them to consumers who think they are buying quality items.

This is not a major problem in Kansas, but I have personally observed a vendor at a gun show selling knockoffs of Oakley sunglasses, carrying the trademark and appearing to be Oakleys. But, given the price \$10.00, I strongly doubt, in fact, that they were real.

These are economically motivated crimes and the provisions of HB 2596 making the manufacture, distribution and sale of these items a crime will probably be sufficient to deter that type of activity. These businessmen will not wish to take that kind of risk.

In addition, the bill has been drafted to incorporate the offense within the Asset Forfeiture Act which provides additional economic disincentive to commit this activity in Kansas, as the proceeds, inventory and other property involved in the violation would be subject to forfeiture.

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Due to the fact that there are relatively few of these offenses committed each year, the severity level of the penalties are fairly low with presumptive probation, and the ability of such criminal penalties to dissuade economically motivated crimes, I do not believe this legislation would have significant, if any, impact on prison overcrowding. However, it would address a gap in the current Kansas criminal code. I would be happy to answer any questions.

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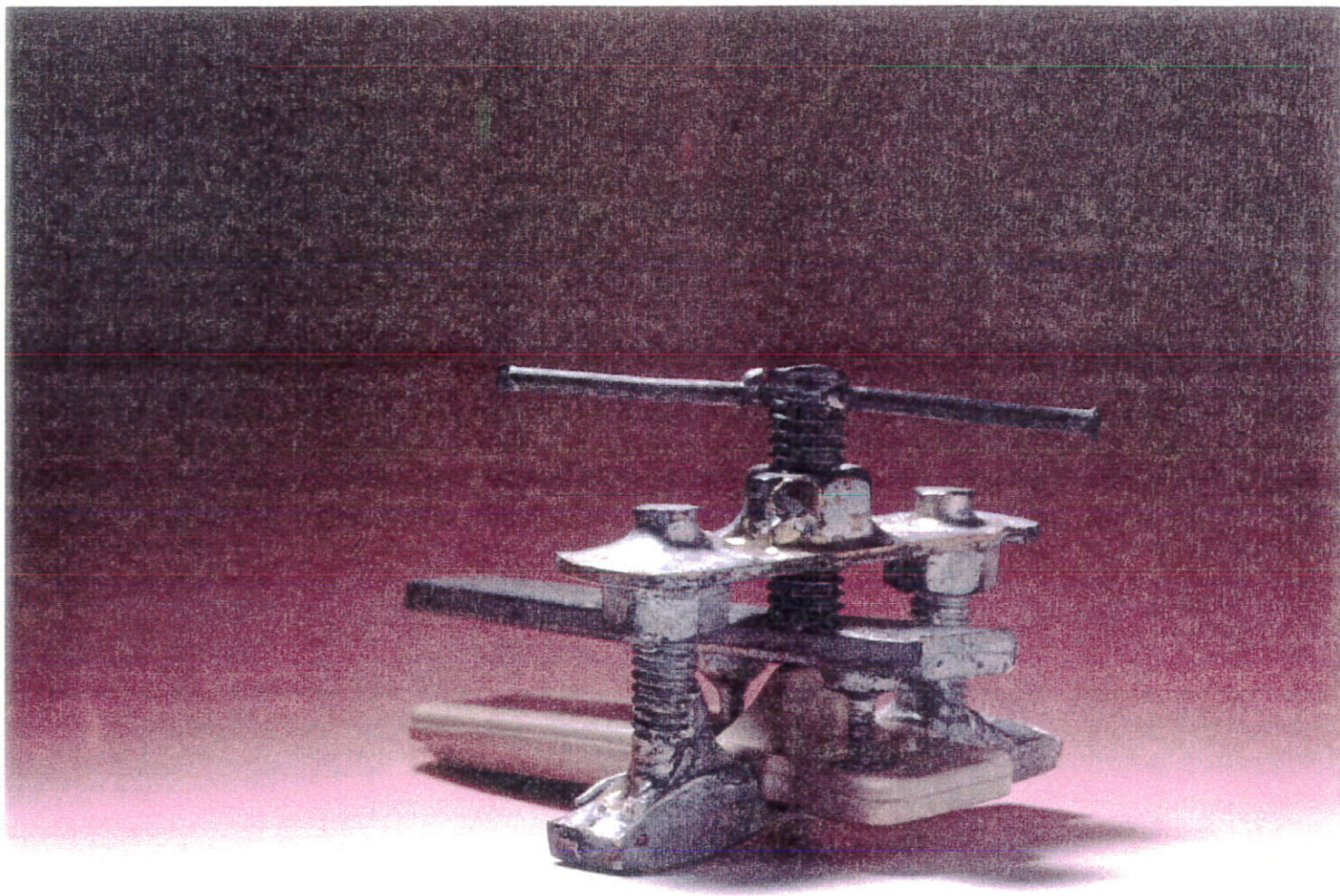


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LEGISLATIVE TESTIMONY



The Unified Voice of Business

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HB 2805

March 16, 2000

Testimony Before the
Senate Judiciary Committee

By

John Smith

Honorable Chair and Members of the Committee:

My name is John Smith and I currently work in special investigations regarding retail theft and the sale of stolen merchandise. I work closely with several retail organizations, as well as federal, state, and local law enforcement officials across the country. My purpose here today is to give you some background on this issue and to express my concern with retail theft and its effects on consumers and retailers.

The proposed Theft Detection Shielding Devices legislation deals with a type of fraud that is growing in frequency and sophistication. Retail theft offenses committed in mercantile establishments are increasing at an alarming rate. Many retailers are combating these increases in retail theft offenses by installing complex and expensive electronic article surveillance (EAS) systems. Manufacturers are spending millions of dollars through source tagging. That is where the EAS tag is placed inside the product container, invisible to the consumer.

A large number of individuals involved in retail theft crimes are very sophisticated and are organized "professionals" who travel city-to-city and state-to-state committing

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these offenses. This stolen merchandise is then being sold to property fences (persons who knowingly buy stolen property). A vast majority of the individuals committing retail theft are using the monies gained to support their involvement with illegal drugs. Retail theft has become a high profit low risk avenue of crime.

Many of these individuals wear special clothing or have home-made tools and devices for retail theft including metal or foil-lined shopping bags which override and evade these electronic article surveillance systems. When property is placed inside the shielding device, an individual is able to defeat the electronic article surveillance system. The individuals also have devices to remove security sensors and tags affixed to some expensive apparel and other products. They often steal large numbers of the same items.

The thought process behind this is that the person using the Theft Detection Shielding Device has *planned* the crime...rather than a person in a store as an *opportunist* for Theft. In other words, a person who is a *Sometimes Shoplifter*, and is in a Retail Store, *sees the opportunity to steal something* and he does. Versus...*premeditated theft*. When that person *leaves his house* with a Theft Detection Shielding Device, they are on the way to Commit a Theft. That person will not stop with just One Store and One Theft.

The FBI Interstate Theft Task Force estimated that in 1997, external retail theft accounted for approximately \$26 Billion. The losses from these thefts are not absorbed by the retailer, but are passed on to the consumer through higher prices. Two to four cents of each dollar spent by a consumer at a retail establishment goes to cover theft.

Thank you for your time. I will be happy to answer any questions you may have.

LEGISLATIVE TESTIMONY



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HB 2805

March 16, 2000

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Written Testimony Before the

Senate Judiciary Committee

by

Marlee Bertholf

Executive Director, Kansas Retail Council

Mr. Chair and members of the Committee:

My name is Marlee Bertholf and I am providing written testimony on behalf of the Kansas Retail Council and the Kansas Chamber of Commerce and Industry. We are here today in support of HB 2805. This bill will create a new section and a new felony for the possession of retail theft tools.

Many retailers are combating increased retail theft offenses by installing electronic article surveillance systems. The subjects committing these retail crimes have very sophisticated tools and devices for retail theft including metal or foil-lined bags which override and evade security devices and devices to remove security sensors and tags affixed to some apparel and products.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 2,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 48% of KCCI's members having less than 25 employees, and 78% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

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The pictures provided to the committee are a good example of tools used in retail theft today.

On behalf of the Kansas Retail Council and the Kansas Chamber of Commerce and Industry, we thank you for your consideration of these changes to current law that will deter theft and shoplifting and protect retailers within the State of Kansas.



DEPARTMENT OF CORRECTIONS
 OFFICE OF THE SECRETARY
Landon State Office Building
 900 S.W. Jackson — Suite 400-N
 Topeka, Kansas 66612-1284
 (785) 296-3317

Bill Graves
 Governor

Charles E. Simmons
 Secretary

MEMORANDUM

Date: March 16, 2000

To: Senate Judiciary Committee

From: Charles E. Simmons
 Secretary of Corrections

Re: HB 2805

HB 2805 amends the law governing theft detection shielding devices and where persons convicted of felony domestic battery are to be confined. The Department of Corrections wishes to bring to the Committee's attention a number of issues that HB 2805 raises in regard to the sentencing disposition for persons convicted of felony domestic battery. These concerns caused the Department of Corrections to support the domestic battery provisions contained in SB 149 during the 1999 Legislative session, which were enacted into law at L.1999 ch. 164 §17(i).

The department's concerns involve the ability of sentencing courts and local jails and community corrections programs to more efficiently and effectively execute the unique sentencing provisions for the non grid offense of felony domestic battery as well as the uncertainties and conflicts that would be created by removing the exclusion of this non grid offense from the provisions of the Kansas Guidelines Sentencing Act (KSGA). These concerns are not addressed by HB 2805.

Felony domestic battery, K.S.A. 21-3412(c)(3) under both current law and HB 2805 is a "non grid" person felony. The sentencing disposition for offenders convicted of felony domestic battery is controlled by the penalties specified by K.S.A. 21-3412(c)(3). The penalties for felony domestic battery are:

- A sentence of not less than 90 days nor more than one year's imprisonment;
- A fine of not less than \$1,000 nor more than \$2,500;
- Probation, suspension or reduction of sentence or parole is not available until the person has served at least 90 days imprisonment;

- As a condition of parole, the court may require the person to complete a domestic violence treatment program;
- The mandatory 90 days imprisonment may be served in a work release program after such person has served 48 consecutive hours imprisonment.

In contrast, the Sentencing Guidelines Act establishes determinate sentences that are not subject to parole, consist of a prison portion and a postrelease supervision period, and are subject to the awarding of good time credits by the department. Conflicts and ambiguities between the specific sentencing provisions of K.S.A. 21-3412(c)(3) and the KSGA are avoided by the provisions of K.S.A. 21-4704, which excludes the application of the KSGA to felony domestic battery sentences. HB 2805 removes that exclusion and creates a conflict between every aspect of the unique sentencing provisions of this non grid crime and the KSGA. The sentencing conflicts created by HB 2805 include whether an offender sentenced to 90 days of imprisonment is eligible for an early release due to the award of good time credits provided for by the KSGA; the amount of time an offender is to remain under supervision upon release from incarceration, and whether the sentencing court loses its jurisdiction to modify, suspend or grant probation once the offender is sentenced to the department's custody. The non grid sentencing provisions of K.S.A. 21-3412(c)(3) and the Sentencing Guidelines Act provide inconsistent answers to these questions.

The department's second area of concern is derived from the ability of the sentencing court and the local jails and community corrections programs to more efficiently and effectively execute the non grid sentencing provisions of K.S.A. 21-3412(c)(3). K.S.A. 21-3412(c)(3) authorizes work release after the offender has served 48 consecutive hours of confinement. It is expected that most offenders who would be participating in work release programs would return to their pre conviction employment or at least have a better opportunity to obtain new employment in the community with which they are familiar. In contrast the department has work release facilities in only two counties, with a total of 246 beds. The population targeted by the department for placement into the department's work release program is substantially different from the population that is served by work release for domestic battery offenders.

The department utilizes its work release program as a bridge from incarceration to release back into the community. The department's work release program is a resource that aids offenders who need a transition back into the community due to their either not having significant work skills or experience; or who due to the length of incarceration need to reestablish work skills in the community. In contrast, K.S.A. 21-3412(c)(3), which allows for work release placement after service of 48 consecutive hours of confinement, is well suited for those persons who could continue with the same employment that they had prior to being sentenced, enabling them to continue to meet family or treatment financial obligations. The ability to provide a continuation of employment through work release after service of 48 hours of confinement would be lost if confinement of those offenders were transferred from local officials to the department.

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Finally, the department believes sentencing courts retaining jurisdiction over offenders in local jails or community corrections programs are better able to respond in a timelier manner to information regarding an offender's behavior, which may justify modification of a sentence. Transfer of felony battery offenders from local jails to the department when such offenders are eligible for work release after two days, and release after 90 days, is not an efficient use of correctional resources.

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State of Kansas
KANSAS SENTENCING COMMISSION

Honorable Richard B. Walker, Chair
District Attorney Paul Morrison, Vice Chair
Barbara S. Tombs, Executive Director

**Testimony on House Bill 2805
Senate Judiciary Committee
March 16, 2000**

The Kansas Sentencing Commission is testifying in opposition to the passage of HB 2805, as amended by the House Committee of the Whole. The Commission has no specific opposition to the original provisions of the HB 2805 regarding the penalties for use of theft detection shielding devices. However, the Sentencing Commission does not support the domestic battery provision that was amended into the original bill.

During the 1999 legislative session, SB 149 was passed and enacted into law. This bill contains numerous adjustments to the Sentencing Guidelines Act that addressed issues of proportionality and consistency in sentencing under the sentencing guidelines, which were passed into law in 1993. The changes proposed by the Sentencing Commission were guided by the underlying goal of the guidelines that incarceration in a state correctional facility should be reserved for the most violent and chronic offenders and that sentences imposed are determinate in nature. SB 149 included a provision that specifically designated local or county correctional facilities as the place of incarceration for offenders convicted of felony domestic battery.

It should be clarified that the Sentencing Commission's opposition to the domestic battery amendment is not based on the premise that domestic violence is not a serious offense or that victims of domestic violence do not suffer both great physical and emotional harm. There is consensus among all Commission members that domestic battery offenders should be held accountable for their crime. The Commission's opposition is based on the structural nature of the amendment.

Felony domestic battery is classified as a Nongrid Felony offense under Sentencing Guidelines. Nongrid felonies are not assigned a specific severity level on the sentencing grid nor are they designated a period of postrelease supervision, as is the case with all other felony offenses. Felony DUI is the only other nongrid felony under Sentencing Guidelines and sentences for that offense designate incarceration at the local or county level, not a state correctional facility. In addition, all felonies sentenced under the Sentencing Guidelines Act are determinate in nature, meaning the designated severity level and criminal history of the offender determines the exact length of sentence. The enactment of the Sentencing Guidelines Act changed the sentencing structure in the state

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of Kansas from an indeterminate to a determinate model to ensure that offender would serve the full sentence imposed.

The amendment to HB 2805 regarding felony domestic battery states that the offender shall be placed in the custody of the secretary of corrections to serve a sentence of “not less than 90 days or more than one year.” The first issue is the indeterminate nature of the sentence for a conviction of felony domestic battery, which is direct opposition to the determinate structure of the sentencing guidelines. The second issue is the placement in the custody of the secretary of corrections does not comply with the place of incarceration designated for nongrid felonies, which is a local or county correctional facility. Finally, there is no designated mandatory period of postrelease supervision that is applicable for all other felony offenders sentenced to the custody of the secretary of corrections.

If a conviction for felony domestic violence is to result in placement in the custody of the secretary of corrections, then the offense should be designated as a grid offense, assigned a specific severity level and designated a period of postrelease supervision, as is done with all other felony grid offenses. Failure to follow this procedure undermines the integrity of the Sentencing Guidelines Act and ignores the determinate sentencing model adopted by this state.

As stated previously, the Sentencing Commission is not in opposition to holding offenders of domestic violence accountable for their actions and imposing the appropriate sentence. However, the manner in which that sentence is imposed under this amendment is in direct conflict with the structure and the underlying goals of the Sentencing Guidelines Act and with legislation enacted during the previous legislative session.

For more information contact:

Barbara Tombs
Executive Director