Approved:
Date 10-07-04

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 p.m. on February 16, 2004 in Room 241-N of the Capitol.

All members were present.

Committee staff present:
Jill Wolters, Revisor of Statutes Office
Jerry Ann Donaldson, Legislative Research Department
Becky Krahl, Legislative Research Department
Connie Burns, Committee Secretary

Conferees appearing before the committee:
Randy Hearrell
Prof. Richard Levy, KU School of Law
Candy Shively, Deputy Secretary SRS
Randall Hodgkinson
Tim Madden, Dept of Corrections
Stuart Little, KS Community Corrections Association
Patrica Biggs, KSC

Others attending:
See Attached List.

HB 2742 – Child in need of care records, confidentiality

Chairman Loyd opened the hearings on **HB 2742**.

Randy Hearrell introduced Professor Richard Levy, KU School of Law, who spoke in favor of the bill. (Attachment 1) He stated that the Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee considered the confidentiality provisions of the Child in Need of Care Code and was guided by three basic goals:

- Preserve a "need to know"
- Provisions clear and accessible to users
- Practicality was sought for document requestors could promptly work through the process

Candy Shively, Deputy Secretary SRS, appeared as a proponent of the bill. SRS also recommended a change on page 9 line 14 to clearly require the *in camera* inspection prior to ordering release of otherwise confidential information. (Attachment 2)

Denise Everhart, Commissioner Juvenile Justice Authority, provided written testimony with an amendment to the bill. (Attachment 3)

Chairman Loyd closed the hearing on **HB 2742**.

HB 2778 – If the sentence of offender remanded, criminal history is that of original sentence.

Chairman Loyd opened the hearing on **HB 2778**.

Randal Hodgkinson, spoke in favor of the bill. He stated that under the current sentencing guidelines KSA 21-4710(a), a prior conviction is included in criminal history "regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case." The amendment would only affect a small number of cases and would have a small fiscal impact,

it would correct a grave injustice in those cases where persons are punished for attempting to enforce their statutory and constitutional rights. (Attachment 4)

Chairman Loyd closed the hearing on **HB 2778**.

HB 2638 – Amendment to the community corrections act

Chairman Loyd opended the hearing on **HB 2638**.

Tim Madden, Department of Corrections, spoke in favor of the bill. The bill reinstates an eligibility criterion for community corrections placement that was repealed pursuant to passage of **SB 123** last session. It also amends references to various divisions within the Department and community corrections regions; staggered terms of appointment to the advisory committee; and the deadline for the submission of fiscal reports to the Department. (Attachment 5)

Stuart Little, appeared on behalf of the Kansas Community Corrections Association as a proponent of the bill. The bill will clarify the duties of community corrections agencies to include substance abuse and mental health services, as well as employment and residential services. The changes will also bring in line the definition of the community corrections population to include **SB 123** offenders. (Attachment 6)

Patricia Biggs, Executive Director Kansas Sentencing Commission, provided written testimony in support of the proposed extension to the Johnson County Risk/Needs pilot project from July 1, 2004 to July 1, 2005. (Attachment 7)

Chairman Loyd closed the hearing on **HB 2638**.

HB 2639 – Traffic in contraband while inmate is outside the DOC institution

Chairman Loyd opened the hearing on **HB 2639**.

Tim Madden, Department of Corrections, spoke in favor of the bill. The bill expands the criminal prohibition of trafficking in contraband to include specific items provided to a person known to be an inmate in the custody of the department of corrections while the inmate is outside of a correctional facility, even if the items are not intended to be brought into or upon the grounds of a correctional facility. The balloon was provided for additional language. (Attachment 8)

Denise Everhart, Commissioner Juvenile Justice Authority, provided written testimony in support of the bill and various technical amendments to bring juvenile offenders under it's purview. (Attachment 9)

Patricia Biggs provided information on the bed impact for the bill.

Chairman Loyd closed the hearing on **HB 2639**.

HB 2727 – Exercising the state's option to provide an exemption to disqualification for public assistance to certain drug offenders.

Chairman Loyd opened the hearing on **HB 2727**.

Tim Madden, Department of Corrections, appeared as a proponent of the bill. The bill allows otherwise eligible persons convicted of a controlled substance related felony to receive Temporary Assistance to Needy Families (TANF) and participate in the food stamp program. This allowance is contingent upon either an assessment by a licensed substance abuse treatment provider that the individual does not require substance abuse treatment, or that the individual is either participating in a licensed substance abuse treatment program or has successfully completed treatment. (Attachment 10)

Candy Shively, Deputy Secretary SRS, appeared in favor of the bill. This proposal by DOC to stabilize families and reduce prison recidivism by allowing former drug felons to receive public assistance upon release from prison, if they are otherwise eligible. (Attachment 11)

Chairman Loyd closed the hearing on **HB 2727**.

Chairman Loyd assigned committee members to the subcommittee on **HB 2320 – Dispositions for children in need of care because of truancy**.

Representative Huntington – Chair
Representative Swenson
Representative Kassebaum
Representative Owens
Representative Pauls
Representative Goodeau

The meeting was adjourned at 3:30 PM. The next scheduled meeting is February 17, 2004.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 2-16-04

NAME	REPRESENTING
Kerrie Bacon	KCDC/KDHR
Richard E. Levy	Ks. Judicial Council
Doug M. Nearrell	K.J.C.
Steve Solomon	The Farm, Inc.
[illegible]	W/A
Ron Sceber	Akin Law Firm
JEFF GINGER	JJA
Tim Madden	KDOC
Kathleen Graves	KDOC
JEREMY S BARCLAY	KDOC
Judy Moler	KAC

(1)

February 16, 2004

JUDICIAL COUNCIL TESTIMONY ON 2004 HB 2742 RELATING TO CONFIDENTIALLY PROVISIONS OF THE KANSAS CODE FOR CARE OF CHILDREN

GENERAL COMMENTS

The Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee considered the confidentiality provisions of the Child in Need of Care Code to be among its most important and difficult provisions, and devoted a number of sessions to reworking these provisions. These general comments provide an overview of the committee's objectives in reworking the confidentiality provisions and a summary of the basic changes proposed by the committee. More specific changes will be discussed in the comments accompanying each section. The committee's consideration of the confidentiality provisions was guided by three basic goals:

- **Need to Know:** The committee sought to protect the privacy rights and interests of children, their families, and others who may be involved in the process, while ensuring that information is available to those who need it in order to make sound decisions concerning children who may be in need of care, provide necessary services to children and their families, or protect the health and safety of children and others.

- **Clear Guidance:** The committee sought to make the provisions as explicit and accessible as possible to provide clear guidance to those in control of or seeking confidential information.

- **Practicality:** The committee also sought to ensure that confidentiality provisions would be workable in practice, would not impose unreasonable burdens on those in control of or seeking information, and would comply with the requirements of federal law.

To further these goals, the committee proposals concerning confidentiality reflect three types of changes:

1. **Organizational changes**. The proposals consolidate related provisions into separate sections in order to make all the confidentiality provisions more "user friendly" and to avoid duplication and overlap. As part of this reorganization, the committee proposes two new sections, K.S.A. 38-1505b and K.S.A. 38-1505c. K.S.A. 38-1505b would contain general provisions that apply to all confidential records. K.S.A. 38-1505c would contain provisions concerning free exchange of information. Proposed K.S.A. 38-1506, K.S.A. 38-1507, and K.S.A. 38-1508, which correspond to existing sections of the code, would each address access to one kind of confidential record.

2. **Clarification.** The committee proposals amend existing language and add new language or provisions that specify the circumstances and scope of access for different types of persons seeking access and to make the responsibilities and standards accompanying disclosure more explicit.

3. **Changes in the scope of access.** The committee reconsidered who would have a "need to know" confidential information and under what circumstances. Although the proposals would generally maintain the current law concerning who has access to different types of confidential records, the committee does propose expanded access to some records for some persons and entities and more limited access for others.

NEW SECTION 1. (Proposed to be K.S.A. 38-1505b)

Proposed K.S.A. 38-1505b contains generally applicable provisions governing confidential child in need of care records and reports, including the requirements of confidentiality for specified types of records, penalties for wrongful disclosure, immunities, and a provision concerning permitting nondisclosure to prevent harm. Proposed K.S.A. 38-1505b was created as a part of the committee's effort to consolidate related provisions. Most of the provisions in section 38-1505b carry forward or restate existing law, with some rewording to accommodate the reorganization of the confidentiality provisions and to increase clarity. Proposed section 38-1505b also would make some additions to or changes in existing law:

Proposed subsection (a) contains the basic requirement of confidentiality for court records, agency records, and law enforcement records, each of which is defined in a separate paragraph. These definitions carry forward existing law except that proposed paragraph (a)(2) would define agency records so as to exclude records held by law enforcement agencies. This change eliminates an overlap under existing law, which includes law enforcement records in the definition of agency records under K.S.A. 38-1507, but also addresses them separately under K.S.A. 38-1508. Under the committee's proposals, access to law enforcement records would be addressed only by K.S.A. 38-1508. The committee proposal also adds language in subsection (a) prohibiting those who properly receive confidential information from disclosing confidential information in violation of the confidentiality provisions. This new language makes explicit what is only implicit in the current statute and ensures compliance with federal requirements.

Proposed subsection (b) addresses penalties for willful or knowing violation of the confidentiality provisions and would increase penalties in two ways. First, the offense level would be increased from a class B to a class A misdemeanor. Second, the court in a child in need of care proceeding is authorized to impose a civil penalty of up to $1000. These penalties were considered to be more proportional to the seriousness of wrongful disclosure that is willful or knowing and to be a more effective deterrent.

Proposed subsection (c) addresses immunities for the disclosure of confidential information. The provision would incorporate current K.S.A. 38-1507b, which exempts disclosure of records by SRS personnel from administrative oversight by the state's social worker licensing agency in the performance of their official duties. That provision would therefore be eliminated under the committee's proposals.

Proposed subsection (d) would add a provision permitting the nondisclosure of otherwise accessible information if disclosure would lead to harm to a child or other person. This new language is intended to prevent the abuse of any right of access to information and provide a safety valve to prevent harm.

NEW SECTION 2. (Proposed to be K.S.A. 38-1505c)

The committee proposes the creation of a new section, K.S.A. 38-1505c, which would address the free exchange of information between agencies responsible for investigating reports of abuse and neglect and providing services for children who may be in need of care and their families. Proposed K.S.A. 38-1505c would carry forward current K.S.A. 38-1507(c), with a few changes. The committee considered a separate provision to be desirable because this form of interagency cooperation is distinct from the question of "access" to specific records. Free exchange of information incorporates an affirmative obligation to share that includes broad and unrestricted access to sensitive information, an expectation that information would be forwarded on an agency's own initiative, and the movement of information in both directions. In contrast, the access provisions contemplate a request for records, may incorporate substantive standards or restrictions, and operate only in one direction.

The provision incorporates two changes that reflect the committee's concern for the distinctive character of free exchange of information. First, proposed K.S.A. 38-1505c incorporates general language relating to the purposes of free exchange and interagency cooperation: to facilitate investigation and ensure the provision of needed services. This language is intended to provide guidance to agencies and focus the exchange of information on investigating reports of abuse or neglect and assisting children who may be in need of care and their families. Second, the committee proposes the removal of the guardian ad litem (current K.S.A. 38-1507(c)(9)) from the list of those involved in free sharing of information. The committee was primarily concerned that the relationship between the child and the guardian ad litem counseled against their participation in a free exchange of information that worked both ways; i.e., that might require them to share information. The committee recognized that the guardian ad litem requires access to information, and provided for this access in proposed K.S.A. 38-1507(c)(1) and (c)(13).

SECTION 3. (Amends K.S.A 38-1506)

Proposed K.S.A. 38-1506, like the current provision, would address access to court records. There are two principal changes in the proposed provision. First, the definitions of court records, the official file, and the social file would be moved to proposed K.S.A. 38-1505b(a)(1) in accordance with the broader organizational changes described in the general comments to the confidentiality provisions. (*See also* Comment to proposed K.S.A. 38-1505b.) Second, access to court records would be expanded to include persons and entities with a need to know who are currently excluded from access. Under proposed subsection (a), a court appointed special advocate for the child and a citizen review board would have access to the official file. Under proposed subsection (b), a court appointed special advocate for the child, a citizen review board, and the secretary of social and rehabilitation services (and authorized agents) would have access to the social file. The committee considered this additional access as likely to further the best interests of the child and to be necessary and appropriate to the functions of those given access.

SECTION 4. (Amends K.S.A. 38-1507)

Proposed K.S.A. 38-1507 would address access to agency records, which have been defined under proposed section 1505b(a)(2) to include records held by the Secretary, as well as those held by juvenile intake and assessment agencies, but to exclude law enforcement records. Law enforcement records would be governed exclusively by K.S.A. 38-1508, thus eliminating the overlapping and conflicting directives to law enforcement agencies under current law. The section has been restructured and reworded for purposes of clarity and incorporates a few relatively minor substantive changes.

Proposed subsection (a), which would authorize access to agency records by persons and entities as provided in the section, would also incorporate a general statement of principle of access for those who need it. This statement, which is not mandatory, reflects the committee's view that under current law, concerns about confidentiality sometimes prevent the timely and effective transfer of information to those who need to know.

Proposed subsection (b) is a new provision that would cross-reference proposed K.S.A. 38-1505c (free sharing of information) in order to clarify the relation between the two sections.

Proposed subsection (c) corresponds to current subsection (d), and carries forward its provisions with the following changes:

1. This provision would incorporate language from current subsection (*i*) preventing the disclosure of the identity of a person reporting abuse or neglect.

2. This provision would add the following persons or entities to those who have access to agency records: The child's guardian ad litem or an attorney for the child (added to proposed (c)(1)); an attorney for a private party who filed a child in need of care petition (proposed (c)(4)); and other federal state, or local agencies with a need to know (proposed (c)(13)). The guardian ad litem was removed from the free exchange of information and included here for reasons discussed in the comment to proposed K.S.A. 38-1505c. The child's attorney was added because children in these cases are increasingly represented by attorneys of their own who require access. The attorney for a private petitioner was added because the committee considered access to be necessary and appropriate for such a party to the proceedings. On the other hand, the committee was concerned that the petition process might be abused by people to gain access to information, and therefore provided access for the party's attorney, but not direct access. The general provision was added to comply with recent amendments to federal law which require the state to make information available to these entities on a need to know basis. *See* 42 U.S.C. § 5106a(b)(2)(A)(ix) (added by Safe Children and Families Act of 2003).

3. A number of persons and entities currently listed as having access to agency records were removed from this provision because they participate in free sharing of information and therefore do not require a separate provision granting access. These include the persons and entities listed in current K.S.A. 38-1507(d)(9), (14), (15), and (16).

4. Paragraph (c)(9) was expanded to include the obligation of ongoing affirmative disclosure requirements of current K.S.A. 38-134. The list of those entitled to this information has been expanded to include not only foster parents (and prospective foster parents), but also permanent custodians and adoptive parents (and prospective permanent custodians and adoptive parents). The committee considered that these care-givers and prospective care-givers have an ongoing need for such information concerning a child who may be in need of care.

Proposed subsection (d) would combine several subsections of current law granting access to particular persons or entities for specific purposes, including the legislative committees, persons who report abuse and neglect, and the general public (current subsections (e), (f), (g), and (h)). Some of the provisions have been reworded for increased clarity and to provide further guidance. Access would continue to be subject to the requirement that the identity of a person reporting abuse or neglect is not be disclosed

Proposed subsection (e), which would authorize a court to provide for further disclosure under some circumstances, carries forward existing law with some changes in wording. (Current subsection (a)(2)). The committee considered specific language concerning the privacy interests of those involved to be unnecessary in view of the incorporation of general standards for ordering disclosure that would encompass privacy considerations.

Proposed K.S.A. 38-1507 would not incorporate current subsections (j), (k) and (l), which would be relocated to the general provision on confidential records, proposed K.S.A. 38-1505b. (*See* Comments to proposed K.S.A. 38-1505b.)

SECTION 5. (Amends K.S.A. 38-1508)

Proposed K.S.A. 38-1508 would address law enforcement records (as defined in proposed K.S.A. 38-1505b) and carries forward the current provision without major changes in existing law. The committee does propose a significant reorganization of the provision and a few substantive changes.

1. Proposed subsection (a) would provide that access to law enforcement records is available to persons and entities listed in the section and would contain a general statement of principle that access to law enforcement records should be limited to those with a need to know. This statement, which is not mandatory, is intended to provide guidance to law enforcement agencies. Whereas the general principle in proposed K.S.A. 38-1507 is designed to promote necessary access, the committee considered that access should be somewhat more selective in the case of law enforcement records.

2. Proposed subsection (b) is a new provision that would cross-reference proposed K.S.A. 38-1505c (free sharing of information) in order to clarify the relation between the two sections.

3. Proposed subsection (c) would provide access for government agencies and officials whose responsibilities require it. This subsection carries forward the access provisions of current K.S.A. 38-1508(a) for courts and court personnel, 1508(c) for SRS, 1508(e) for law enforcement and prosecutorial personnel, and 1508(g) for intake and assessment workers. Proposed subsection (c) would add access provisions for the juvenile justice authority, members of a court-appointed multi-disciplinary team, and other agencies with a need to know. The committee considered these persons and entities as requiring access and the catch-all provision ensures compliance with federal law.

4. Proposed subsection (d) would provide necessary access to persons or entities providing medical care or treatment and to school administrators, incorporating provisions in current subsection (d) with some changes. Access for these persons or entities would be subject to a general requirement of necessity and to a requirement that the identity of a person reporting abuse or neglect may not be disclosed. The committee also proposes eliminating direct access to law enforcement records by individual teachers and paraprofessionals, as provided in current law, because it considered such access to be unnecessary and potentially undesirable. The proposal authorizes access by administrators, who may pass necessary information along to teachers or paraprofessionals as needed to meet the educational needs of a child in need of care or to protect the health and safety of students and school personnel.

5. Proposed subsection (e) would provide for legislative access. The provision corresponds to current subsection (f), but has been redrafted to track the language of legislative access to agency

records under proposed K.S.A. 38-1507. Currently the two sections provide for legislative access under different scope and conditions, which adds unnecessarily to confusion and uncertainty.

6. Proposed subsection (f) authorizes disclosure by court order, and parallels the similar provision of proposed K.S.A. 38-1507. Current K.S.A. 38-1508 does not contain such a provision, but law enforcement records are included in the definition of agency records in current K.S.A. 38-1507 and therefore subject to release by court order under current K.S.A. 38-1507(a)(2). Thus, this provision does not reflect a change of substantive law.

7. Under the committee proposals, a guardian ad litem would no longer have direct access to law enforcement records; i.e., would no longer be included in proposed K.S.A. 38-1508. The guardian ad litem would continue to have access to agency records, which would provide indirect access (via the secretary), who would participate in a free exchange of information with law enforcement agencies. The committee considered separate and direct access to law enforcement records for the guardian ad litem to be unnecessary and potentially problematic given the changing role of the guardian ad litem.

SECTION 6. (Amends K.S.A 75-4319)

Contains technical changes required by amendments to the previous sections.

Kansas Department of

Social and Rehabilitation Services

Janet Schalansky, Secretary

House Corrections and Juvenile Justice
February 16, 2004

Access to Official Files

Integrated Service Delivery
Candy Shively, Deputy Secretary
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Kansas Department of Social and Rehabilitation Services
Janet Schalansky, Secretary

House Corrections and Juvenile Justice
February 16, 2004

Access to Official Files

Mr. Chairman and members of the committee, I am Candy Shively, Deputy Secretary of SRS. Thank you for the opportunity to appear today to discuss House Bill 2742, which revises the provisions of the Kansas Code for Care of Children related to the sharing of information and confidentiality.

The bill balances the sometimes competing interests when sensitive information concerning children and their families becomes part of an agency or court record. Information must be made available to those who need it in order to make sound decisions, provide services, or protect the health and safety of children. At the same time the privacy of individual children and families who are in need of services must be respected.

Historically, it has been difficult to provide the statutory framework most likely to support this balance. The current statute has been amended many times and, as a result, actually adds confusion for those attempting to work together in service of children who may be in need of care. House Bill 2742 provides clear guidance and organizes the provisions to facilitate practical application. SRS appreciates the efforts of the Judicial Council and the opportunity to work with the subcommittee on this proposal. It is a significant improvement in a difficult-to-navigate area.

We would recommend a change to clearly require the *in camera* inspection prior to ordering release of otherwise confidential information. The court must have an understanding of the contents to determine that disclosure is in the best interests of a child as well as when determining disclosure is necessary for judicial proceedings. Please see the attached balloon.

Thank you for the opportunity to present; I would be happy to stand for questions.

~~without malice under the provisions of this section shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceedings resulting from providing or receiving information.~~

~~(l) No individual, association, partnership, corporation or other entity shall willfully or knowingly disclose, permit or encourage disclosure of the contents of records or reports concerning a child in need of care received by the department of social and rehabilitation services, a law enforcement agency or a juvenile intake and assessment worker except as provided by this code. Violation of this subsection is a class B misdemeanor.~~

(e) Court order. Notwithstanding the provisions of this section, a court of competent jurisdiction may order disclosure of confidential agency records pursuant to a determination that the disclosure is in the best interests of the child who is the subject of the reports or that the records are necessary for the proceedings of the court and otherwise admissible as evidence.

, after in camera inspection,

The court shall specify the terms of disclosure and impose appropriate limitations.

~~*(1) If the court determines that disclosure is in the best interests of the child, the court shall impose appropriate limitations.*~~

~~*(2) Upon application of a party for access to confidential records the court shall conduct an in camera inspection and if the court finds the records are necessary for the proceedings the court shall issue an order specifying the terms of disclosure.*~~

Sec. 5. K.S.A. 38-1508 is hereby amended to read as follows: 38-1508. ~~All records and reports concerning child abuse or neglect received by law enforcement agencies shall be kept separate from all other records and shall not be disclosed to anyone except:~~

~~(a) The judge and members of the court staff designated by the judge of the court having the child before it in any proceedings;~~

~~(b) the guardian *ad litem* and the parties to the proceedings and their attorneys, subject to the restrictions imposed by subsection (a)(2)(C) of K.S.A. 38-1507 and amendments thereto;~~

~~(c) the department of social and rehabilitation services;~~

~~(d)~~ *(a) Principle of limited disclosure. Information contained in confidential law enforcement records concerning a child alleged or adjudicated to be in need of care may be disclosed as provided in this section. Disclosure shall in all cases be guided by the principle of providing access only to persons or entities with a need for information that is directly related to achieving the purposes of this code.*

(b) Free exchange of information. Pursuant to section 2, and amendments thereto, a law enforcement agency shall participate in the free exchange of information concerning a child who is alleged or adjudicated

(3)

KANSAS

DENISE L. EVERHART
COMMISSIONER

JUVENILE JUSTICE AUTHORITY

KATHLEEN SEBELIUS, GOVERNOR

Memorandum

DATE: February 16, 2004

TO: State Representative Ward Loyd, Chair
House Corrections & Juvenile Justice Committee

FROM: Denise L. Everhart, Commissioner

SUBJECT: House Bill 2742 – JJA Testimony

Chairman Lloyd and Members of the House Corrections and Juvenile Justice Committee, the Juvenile Justice Authority provides this written testimony on HB 2742 as neither a proponent nor opponent of the measure. HB 2742 proposes modification to existing law pertaining to confidentiality of records, reports and documents regarding child in need of care cases pursuant to Chapter 38, article 15 of the Kansas Code.

The Commissioner of the JJA is vested with certain statutory roles and responsibilities that either explicitly or implicitly require access to the records, reports and other documents that are governed by the bills provisions. For example: Pursuant to KSA 75-7024 the Commissioner is required to operate the juvenile intake an assessment system for juvenile offenders and pursuant to a memorandum of agreement between the Commissioner an Secretary of SRS as authorized by statute, also operates intake and assessment for child in need of care cases in most judicial districts.

In addition, offenders in the care and custody of the Commissioner of the JJA have often also been under the care and custody of the Secretary of SRS. The free exchange of information is important to efficiently and effectively carry out these responsibilities.

With those considerations in mind, the following suggestions for amendment to HB 2742 are offered.

1. Section 3, page 3, beginning at line 14, add the following to the existing list of seven (7) of those who shall have access to the official file:
(8) Commissioner, Juvenile Justice Authority, or designated agents.

2. Section 3, page 3, beginning at line 41, add the following to the existing list of seven (7) of those who shall have access to the social file:
(8) Commissioner, Juvenile Justice Authority, or designated agents.

3. Section, 5, page 10, line 9, insert the "Commissioner " between the word "the" and the word "juvenile."

Thank you for the opportunity to present this information.

JAYHAWK WALK, 714 SW JACKSON ST, STE 300, TOPEKA, KANSAS 66603
VOICE: 785-296-4213 FAX: 785-296-1412 HTTP://JJA.STATE.KS.US

House Corr & JJ
Attachment 3
2-16-04

(4)

700 Jackson, Suite 900
Topeka, KS 66606

Testimony of

Randall L. Hodgkinson, Deputy Appellate Defender[1]

Before the House Committee on Corrections and Juvenile Justice

RE: HB 2778

February 16, 2004

Chairman Loyd and Members of the Committee:

I am testifying in support of House Bill 2778 ("HB 2778"). My name is Randall Hodgkinson and I am a Deputy Appellate Defender here in Topeka. I am not testifying in my capacity as Deputy Appellate Defender and I have no authority to speak on behalf of any organization or agency; but my experience in the criminal justice system has caused me to have some personal observations regarding this subject.

Under the current sentencing guidelines scheme, pursuant to K.S.A. 21-4710(a), a prior conviction is included in criminal history "regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case." This provision appears to reflect the Legislature's intent to be quite inclusive regarding criminal history and to avoid litigation regarding the order of convictions.

But this provision, as interpreted by the Kansas Supreme Court, has had what I hope is an unintended chilling effect on the right to appeal. In *State v. Patry,* 266 Kan. 108, 967 P.2d 737 (1998), the offender received an upward durational departure. As authorized by K.S.A. 21-4721, Patry appealed and the appellate court reversed the upward durational departure and remanded for resentencing. While his case was on appeal, Patry pleaded guilty to another nonperson offense. When his case was remanded after his successful appeal, the district court included this new offense in Patry's criminal history, causing him to have a higher criminal history than when he was originally sentenced. The Kansas Supreme Court cited K.S.A. 21-4710(a) and held that its plain language meant that the prior conviction must be included in criminal history and that such inclusion did not violate the United States Constitution.

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[1]This testimony is not necessarily the position of the Kansas Appellate Defender Office or of the Kansas Board of Indigent Defense Services. This testimony constitutes the personal opinions and conclusions of the witness.

But the practical effect of this rule is to punish some persons with meritorious claims on appeal. For example:

> In 1997, Jerry Osborne was convicted by a Reno County jury of one severity level three nondrug felony. At sentencing, the court determined that Osborne fell into criminal history category I, which resulted in a sentencing range of 46-51 months. The court found that substantial and compelling reasons for departure existed and imposed the maximum upward durational departure sentence–102 months. As authorized by K.S.A. 21-4721, Osborne appealed the departure sentence and the Court of Appeals reversed the departure sentence. Appeal No. 79,099. After remand, however, the district court included two Sedgwick County person felony convictions that the state had obtained during the appeal in the Reno County case. Using criminal history B, on resentencing, the court imposed a presumptive sentence of 180 months. By operation of K.S.A. 21-4710(a), as interpreted in *Patry*, Osborne's **successful** exercise of his right to appeal cost him 78 months in prison.
>
> In 1999, Larry Feathers was convicted after a plea to felony charges. As authorized by K.S.A. 21-4721, Mr. Feathers appealed claiming that the district court improperly classified certain prior convictions as felonies for criminal history purposes. On June 2, 2000, the Kansas Court of Appeals agreed and filed a decision vacating Mr. Feather's sentence and remanding for resentencing. Appeal No. 83,215. But because, under *Patry*, Mr. Feathers would necessarily have been subject to a higher sentencing range on remand, Mr. Feathers voluntarily dismissed his **successful** appeal to avoid a remand.

What these cases have in common is that person were either punished for pursuing meritorious claims or had to give up the right to seek a lawful trial proceeding in fear of a larger sentence. As a result of cases like this, we sometimes have to tell clients: you may have a viable claim on appeal, but in order for you to attempt to litigate the claim, you will be subject to an increase in your controlling sentencing range.

Many persons both in and out of the judicial system bemoan "frivolous" criminal appeals. But the effect of K.S.A. 21-4710(a), as interpreted in *Patry*, on persons being resentenced after an appeal, **only effects persons with meritorious claims who pursue those claims as authorized by law**. Persons who do not have meritorious claims do not receive higher sentences, only persons who successfully litigate a claim that something is wrong with their convictions and/or sentences.

This proposed amendment would put persons who pursue successful claims as authorized by the Legislature in the same position they had been in before the error occurred. It in no way affects the original calculation of criminal history–it simply provides a level of finality for purpose of a criminal history finding in a given criminal case. And it simply would allow the defendant to receive the sentence he or she should have received in the first place.

Although this amendment would only affect a small number of cases and would not have much of a fiscal impact, it would correct a grave injustice in those cases where persons are punished for attempting to enforce their statutory and constitutional rights.

Thank you for this opportunity to provide some input in this process. If any of the Committee members would like to follow up on this information, please feel free to contact me.

No. 80,258

STATE OF KANSAS, *Appellee*, v. JOHN G. PATRY, *Appellant*.

(967 P.2d 737)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Application of Sentencing Guidelines Act for Criminal Acts Committed on or after July 1, 1993.* The Kansas Sentencing Guidelines Act, K.S.A. 21-4701 *et seq.*, is applicable to sentencing for criminal acts committed subsequent to July 1, 1993.
2. SAME—*Sentencing—Criminal History.* K.S.A. 21-4703(c) defines criminal history as utilized in sentencing to include "adult felony, class A misdemeanor, class B person misdemeanor, or select misdemeanor convictions and comparable juvenile adjudications possessed by an offender at the time such offender is sentenced."
3. SAME—*Sentencing—Criminal History—Prior Convictions.* K.S.A. 21-4710(a) provides that criminal history is based on prior convictions defined as "any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203 and amendments thereto, which occurred prior to sentencing in the current case regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case."
4. SAME—*Sentencing—Criminal History—Consideration of Convictions That Occurred Subsequent to Initial Sentencing But Prior to Resentencing.* Under the facts of this case, criminal convictions occurring in a separate case subsequent to the initial sentencing in this case are to be utilized in determining criminal history when a resentencing results from the ruling of an appellate court.
5. SAME—*Sentencing—Increased Sentence on Resentencing Not Due Process Violation When Based on New Convictions.* It is not a due process violation for a sentence to be increased upon resentencing where an increase in criminal history results from the interim convictions of the defendant in a separate case.
6. SAME—*Sentencing—Criminal History—Consideration of New Facts at Resentencing Does Not Constitute Double Jeopardy Violation.* Utilizing facts that are existing at the time of a resentencing to compute the criminal history score is not a violation of the Double Jeopardy Clauses of the Kansas and United States Constitutions.

Appeal from Sedgwick district court; DAVID W. KENNEDY, judge. Opinion filed October 30, 1998. Affirmed.

Thomas J. Weilert, of Wichita, was on the brief for appellant.

Michelle M. Sehee, assistant district attorney, *Nola Foulston*, district attorney, and *Carla J. Stovall*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

LARSON, J.: John G. Patry appeals the trial court's decision at a resentencing hearing to use additional convictions which occurred after his original sentence to calculate his criminal history score. The additional convictions raised Patry's criminal history from a "D" to a "C," resulting in an increased sentence.

Patry argues the trial court (1) was limited at the resentencing hearing to the same facts, conditions, and circumstances which existed at the time he was first sentenced, (2) the sentence imposed at resentencing violated his Fourteenth Amendment due process rights, and (3) the imposed sentence violated the Double Jeopardy Clauses of the Kansas and United States Constitutions.

On December 5, 1995, Patry was convicted of possession with intent to sell cocaine, possession with intent to sell methamphetamine, two counts of no tax stamp, possession of drug paraphernalia, and attempting to elude a law enforcement officer in case No. 95 CR 1325. The charges arose out of acts committed on May 25, 1995. The court calculated Patry's criminal history as a "D" but upwardly departed as allowed in the Kansas Sentencing Guidelines Act (KSGA). Patry's appeal of his convictions and departure sentence resulted in a Court of Appeals unpublished opinion issued August 1, 1997, affirming the convictions but holding the trial court did not have substantial or compelling reasons for departure and remanding for resentencing.

While his appeal was pending in this case, on June 5, 1997, Patry pled guilty to separate charges of conspiracy to possess cocaine with intent to sell, conspiracy to possess methamphetamine with intent to sell, and theft in case No. 96 CR 1597. These charges arose out of acts committed by Patry on November 3, 1995. When the trial court sentenced Patry in case No. 96 CR 1597 on July 15, 1997, it included his convictions in case No. 95 CR 1325 in determining his criminal history score was "C."

When Patry was resentenced in this case on October 24, 1997, his criminal history score was "C" because of the June 5, 1995,

convictions in case No. 96 CR 1597. Patry objected to utilizing the June 5 convictions in calculating his criminal history at the resentencing, contending the "D" classification of the original sentencing hearing must be used again. The trial court overruled his objection and sentenced him accordingly. Patry appeals.

Resolution of criminal history issues requires the interpretation of sentencing guidelines provisions, which are questions of law over which our scope of review is unlimited. *State v. Roderick*, 259 Kan. 107, 110, 911 P.2d 159 (1996).

The general rule is that criminal statutes must be strictly construed, but this rule is subordinate to the determination that judicial interpretation must be reasonable to effect legislative design and intent. It is a fundamental rule of statutory construction that the intent of the legislature governs when that intent can be ascertained from the statute. When a statute is plain and unambiguous, we must give it the effect intended by the legislature, rather than determine what the law should or should not be. *State v. Taylor*, 262 Kan. 471, 478, 939 P.2d 904 (1997).

Patry first argues that if a sentence is voided, the resentencing court is limited to the same facts, conditions, and circumstances existing at the time the original sentence was imposed, utilizing authority of cases decided prior to the enactment of the KSGA. See *Bridges v. State*, 197 Kan. 704, 706, 421 P.2d 45 (1966); *State v. Cox*, 194 Kan. 120, 122, 397 P.2d 406 (1964); *Richardson v. Hand*, 182 Kan. 326, 329, 320 P.2d 837 (1958). Patry acknowledges the application of the KSGA, but asserts the cases he cites have not been overruled, do not conflict with the KSGA, and must be applied to these facts. Patry would have us hold that a distinction exists between a sentencing and a resentencing, with the former controlled by the KSGA and the latter governed by prior case law. Such a contention is untenable.

The State argues that provisions of the KSGA set forth in K.S.A. 21-4701 through K.S.A. 21-4728 govern because Patry's acts occurred after enactment of the KSGA. The State points to K.S.A. 21-4703(c), which defines criminal history as including, "adult felony, class A misdemeanor, class B person misdemeanor, or select misdemeanor convictions and comparable juvenile adjudications

possessed by an offender at the time such offender is sentenced." (Emphasis added.)

The State further points to K.S.A. 21-4710(a), which provides the criminal history must be based on prior convictions, defined as "any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203 and amendments thereto, *which occurred prior to sentencing in the current case regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case.*" (Emphasis added.)

The State asserts the trial court correctly considered Patry's June 5, 1997, conviction in the separate case in determining his criminal history on October 24, 1997, when he was resentenced in this case. The State argues there is no material distinction between a sentencing and a resentencing which results in the sentence being properly imposed.

The KSGA became effective July 1, 1993. It governs the offenses for which Patry was convicted that occurred during 1995. It is well established that criminal statutes in effect at the time of the offense control the charge as well as the sentence resulting therefrom. *State v. Mayberry*, 248 Kan. 369, 387, 807 P.2d 86 (1991). Because the KSGA controls, Patry's reliance on cases decided prior to its enactment is misplaced.

In *Taylor*, 262 Kan. at 479, we interpreted the intent of the legislature in enacting K.S.A. 21-4710(a) to include all prior convictions in a defendant's criminal history score, unless prohibited by statute "regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case." In applying this clear holding to the facts of this case, when Patry was resentenced in this case on October 24, 1997, the June 5, 1997, conviction was in existence and, following *Taylor* and K.S.A. 21-4710(a), these convictions must be utilized in determining his criminal history. The trial court correctly utilized Patry's conviction to calculate his criminal history score and properly sentenced him in this case.

Patry also argues that his due process rights were violated because the increased sentence amounts to a "presumption of vindictiveness."

Patry relies on *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), limited by *Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989), and *State v. Macomber*, 244 Kan. 396, 769 P.2d 621, *cert. denied* 493 U.S. 842 (1989). In *Pearce*, the United States Supreme Court addressed the constitutional limitations upon a judge when imposing a more severe penalty after conviction of the same crime upon retrial. The Court held that a "presumption of vindictiveness" exists when, upon retrial, a trial judge imposes a heavier sentence on a defendant after the successful appeal of the original conviction. The presumption may be overcome upon a showing of "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. The Court further refined its *Pearce* holding in *Wasman v. United States*, 468 U.S. 559, 572, 82 L. Ed. 2d 424, 104 S. Ct. 3217 (1984), where it held:

"[A]fter retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings."

"Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources." 468 U.S. at 571.

In *Macomber*, we followed *Pearce* and *Wasman* in holding there is a "presumption of vindictiveness" if a sentencing judge imposes a greater sentence after a new trial unless the court articulates proper information concerning the defendant's conduct that occurred subsequent to the original sentencing.

However, Patry's reliance on *Pearce*, *Wasman*, and *Macomber* is misplaced as they are readily distinguishable from the facts in this case. First, each involves a successful appeal to a conviction resulting in a retrial, while our case concerns a successful appeal of a sentence resulting in a resentencing. Secondly, and most importantly, the State in *Pearce and Macomber* introduced no new evidence to justify an increase in the defendant's sentence. This resulted in a violation of the defendant's due process rights. In our case, in distinct contrast, the trial court used information obtained

from the presentence investigation (PSI) report which included Patry's June 5, 1997, convictions in calculating his criminal history score. This is appropriate information concerning Patry's conduct that occurred after the time of the original sentencing. The report and Patry's own actions may be used in determining his sentence without violating his due process rights.

We considered the same issue in *State v. Rinck*, 260 Kan. 634, 923 P.2d 67 (1996), where the defendant's convictions were affirmed, but the sentences were vacated and a more severe sentence was then imposed. Rinck's due process rights were held to have been violated "[b]ecause the court did not articulate a reason on the record for the new enhanced sentence and relied primarily upon information that was obviously considered in the imposition of the original sentence." 260 Kan. at 645. However, our *Rinck* opinion furthered stated: "[T]he record contains no objective information concerning identifiable conduct of the defendant for the enhanced sentence. Under these circumstances, the defendant's right to due process is violated, *not because the sentence is enhanced, but because no evidence was introduced to rebut the presumption that actual vindictiveness was behind the increased sentence.*" (Emphasis added.) 260 Kan. at 645.

In our case, the trial court properly used additional information showing further violations which existed at the time of the resentencing hearing. Patry's due process rights were not violated because his conduct was the generating cause for the additional information which required an increase in his criminal history. This does not result in due process violation.

Finally, the sentencing does not violate the double jeopardy provisions of the Kansas and United States Constitution. In *State v. Freeman*, 236 Kan. 274, 280-81, 689 P.2d 885 (1984), we said:

"The double jeopardy clause of the Constitution of the United States protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977)."

With the language of section 10 of the Bill of Rights of the Kansas Constitution being similar to that of the Fifth Amendment of

the United States Constitution, the underlying protections set forth above must be considered.

Patry's argument that *State v. Mertz*, 258 Kan. 745, 907 P.2d 847 (1995), is authority for his contention that prior convictions used to enhance his sentences are a form of double punishment is without merit. The issue in *Mertz* was whether prosecution for a DUI charge after defendant's driver's license was revoked for the same crime constituted multiple punishments. We specifically held it did not. In the instant case, Patry's convictions were used to determine his criminal history score. The criminal history score, in turn, was used to cause the required sentence to be entered. *Pearce* holds that the Double Jeopardy Clause does not impose an absolute bar to a greater sentence upon reconviction. *Wasman* states the sentences may be enhanced unless motivated by actual vindictiveness toward the defendant. No such action is shown here. This is a simple matter of the trial court using the facts existing at time of the sentencing to determine the criminal history score. This cannot result in a violation of the Double Jeopardy Clause.

The sentence in this case was properly imposed. The trial court is affirmed.

No. 80,584

In the Matter of W. FREDRICK ZIMMERMAN, *Respondent.*

(965 P.2d 823)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Published Censure.*

Original proceeding in discipline. Opinion filed October 30, 1998. Published censure.

Marty M. Snyder, deputy disciplinary administrator, argued the cause and was on the formal complaint for petitioner.

David W. Boal, of Kansas City, argued the cause and was on the brief for respondent, and *W. Fredrick Zimmerman*, respondent, argued the cause pro se.

Per Curiam: This is an original proceeding in discipline filed by the office of the Disciplinary Administrator against W. Fredrick Zimmerman of Kansas City, an attorney licensed to practice law in the state of Kansas. The hearing panel found that respondent had violated MRPC 1.1 (1997 Kan. Ct. R. Annot. 268) (competence), MRPC 1.3 (1997 Kan. Ct. R. Annot. 276) (diligence), MRPC 1.8(a) (1997 Kan. Ct. R. Annot. 301) (conflict of interest: prohibited transactions), and MRPC 8.4(a), (c), and (d) (1997 Kan. Ct. R. Annot. 366) (misconduct). The panel recommended respondent be suspended from the practice of law for a period of 1 year. Respondent filed exceptions to all of the panel's findings and conclusions and its recommended discipline.

BACKGROUND

Respondent represented Gordon Chaffin in a loose arrangement over a period of several years, including formation of a number of corporations. The complaint filed herein arises from respondent's acts and omissions concerning one of these corporations, La Cajun. At Chaffin's request, respondent incorporated La Cajun. The corporation was engaged in the Cajun frozen food business. The corporation experienced financial problems. In early 1993 Chaffin interested Dean Fleming in investing in La Cajun. Ultimately, Fleming loaned the corporation approximately $40,000 in exchange for 51% of its stock and a priority creditor position. Fleming assumed control of the corporation's business. Fleming sub-

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2638
to
The House Committee on Corrections and Juvenile Justice

By Roger Werholtz
Secretary
Kansas Department of Corrections

February 16, 2004

HB 2638 amends provisions of the Community Corrections Act found at K.S.A. 75-5291, K.S.A. 75-5292, and K.S.A. 75-52,105. HB 2638 reinstates an eligibility criterion for community corrections placement that was repealed pursuant to passage of SB 123 last session (L. 2003 ch. 135); codifies a limitation of the use of community corrections grant funds to programs that relate to the criminogenic aspects of the offender; requires the community corrections advisory committee to recommend performance indicators and measurable objectives for community corrections programs; extends the Johnson County Community Corrections pilot program for community placement criteria; and emphasizes the role of counties in the supervision of their community corrections programs. HB 2638 also amends references to various divisions within the Department and community corrections regions; staggered terms of appointment to the advisory committee; and the deadline for the submission of fiscal reports to the Department.

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HB 2638 has the support of the Community Corrections Advisory Committee. That committee is comprised of representative from the southeast, northeast, central, and western community corrections regions as well as two members from the state at large.

The Department of Corrections and the Community Corrections Advisory Committee believe that public safety is best achieved by identification of the risk posed by an offender and specifically addressing those risks in a proactive manner. HB 2638 embodies that objective.

Risk/Needs as Criteria for Community Corrections Utilization

- HB 2638 amends K.S.A. 75-5291 to reinstate an eligibility criterion for community corrections placement that existed prior to adoption of L. 2003 ch. 135 (SB 123 drug treatment for possession offenders). Upon adoption of SB 123, the provision of K.S.A. 75-5291 classifying offenders with a high risk or high needs assessment as eligible for community corrections placement was amended to reflect the requirement that drug possession offenders be placed into community corrections programs. However, rather than provide independent disjunctive criteria allowing for community corrections placement of both high risk/high needs offenders and offenders required to participate in substance abuse treatment, K.S.A. 75-5291 was amended to only address drug abuse assessments. HB 2638 amends K.S.A. 75-5291 to permit offenders who have either a high risk for reoffending or an assessment of substance abuse to be eligible for community corrections placement.

- HB 2638 amends K.S.A. 75-5291 to extend to July 1, 2006 the Johnson County Community Corrections pilot program that provides for the placement of offenders into that Community Corrections program pursuant to the District Court Rules of the 10th Judicial District This pilot program will provide data to compare the effectiveness of community corrections placement criteria established by the statewide risk assessment and those established by the District Court in reducing recidivism.

- HB 2638 amends K.S.A. 75-5291 to restrict the expenditure of community corrections grant funds to programs and services that address the criminogenic needs of felony offenders. The Department and the Community Corrections Advisory Committee believe that curtailment of crime committed by offenders in community corrections programs must be the focus of the public safety mission of community corrections. Addressing the criminogenic attributes of offenders in community corrections programs directly effects continued criminal behavior. While, school outreach programs and services for crime victims serve a public purpose, those goals can be addressed through other avenues thus reserving the limited resources of community correction grant funds to the unique role of community corrections in the prevention of continued criminal behavior by offenders under the supervision of community corrections. Historically, community corrections grant funds have not been available for use

for programs that do not address the criminogenic aspects of community corrections offenders.

- HB 2638 amends K.S.A. 75-5291 to direct the community corrections advisory committee to identify performance indicators with measurable objectives expected to be accomplished by community corrections programs. The establishment of measurable performance objectives provides for the effective use of grant funds and addresses the concerns raised by the Legislative Post Audit of Juvenile Justice Prevention Programs.

Administration of Community Corrections Programs

- HB 2638 amends K.S.A. 75-5292 to clearly establish that boards of county commissioners retain oversight authority over their respective community corrections programs. This clarification is contained in HB 2638 to avoid issues identified by the Legislative Post Audit of Juvenile Justice grant programs regarding oversight of local programs funded by state grants. Additionally, the continued oversight role of each county commission, particularly if several counties have joined in a cooperative community corrections program, reinforces the authority and responsibility of each participating county in regard to the operation of an effective community corrections program.

- HB 2638 amends K.S.A. 75-5292 to repeal the statutory requirement that fiscal quarterly reports be submitted within 10 days of the end of each calendar quarter. Extensions for the submission of those reports are usually necessary. The submission of reports required for the administration of Community Corrections programs by the Department may be established by regulations of the Secretary.

- HB 2638 also amends the Community Corrections Act to reflect that a variation in the initial length of the terms of the original members of the community corrections advisory committee in order to achieve staggered terms when the Act was first enacted is no longer necessary. Finally, HB 2638 updates the designations of various divisions within the Department and the local community corrections regions.

The Department urges favorable consideration of HB 2638.

STUART J. LITTLE, Ph.D.
Little Government Relations

February 16, 2004

House Corrections and Juvenile Justice Committee

House Bill 2683 ~~2683~~

Chairman Loyd and Members of the Committee,

I am here today on behalf of the Kansas Community Corrections Association. Community corrections programs provide cost-effective community-based supervision for adult and juvenile offenders with lower severity level offenses (although the offenders are increasingly more severe and high-risk). The courts determine whether an offender is assigned to regular probation (through the courts) or intensive supervise probation in a community corrections program. Key community corrections' programs include adult and juvenile intensive supervised probation and programs and adult residential programs in Sedgwick and Johnson counties. Juvenile programs also include graduated sanctions programs for juvenile offenders as well as operating some of the prevention programs and some intake and assessment services

HB 2683 will clarify the duties of community corrections agencies to include substance abuse and mental health services, as well as employment and residential services. The changes will also bring in line the definition of the community corrections population to include SB 123 offenders.

The provisions of HB 2683 have been reviewed by the Department of Corrections' Community Corrections Advisory Committee, who raised no objections to the provisions.

I would be happy to stand for questions.

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(7)

KANSAS

KANSAS SENTENCING COMMISSION
Honorable Ernest L. Johnson, Chairman
District Attorney Paul Morrison, Vice Chairman
Patricia Ann Biggs, Executive Director

KATHLEEN SEBELIUS, GOVERNOR

MEMORANDUM

To: House Corrections and Juvenile Justice Committee

From: Patricia Biggs, Executive Director PB

Date: February 14, 2004

RE: HB 2638

At the most recent meeting of the Kansas Sentencing Commission, held February 13, 2004, HB 2638 was discussed. The Commission unanimously voted in support of the proposed extension to the Johnson County Risk/Needs pilot project from July 1, 2004 to July 1, 2006. This extension is listed in the bill in Section 1 (a) (3).

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KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2639
to
The House Committee on Corrections and Juvenile Justice

By Roger Werholtz
Secretary
Kansas Department of Corrections

February 16, 2004

HB 2639 amends K.S.A. 21-3826, which defines the crime of trafficking in contraband in or on the grounds of a correctional facility. HB 2639 expands the criminal prohibition of trafficking in contraband to include specific items provided to a person known to be an inmate in the custody of the department of corrections while the inmate is outside of a correctional facility, even if the items are not intended to be brought into or upon the grounds of a correctional facility.

The Department seeks amendment of K.S.A. 21-3826 to address persons providing contraband to inmates for use or consumption while outside of the correctional facility. Current law prohibiting the traffic in contraband is limited to those situations where the contraband is at a correctional facility or can be shown to have been intended to be brought to the facility. Inmates of the Department are assigned to work details performing a variety of public services throughout the community and participating in work release programs. HB 2639 addresses the Department's interest in prohibiting contraband being provided to inmates on work details or on work release that is intended to be used or consumed by the inmate outside of the facility grounds.

It is not uncommon for inmates to remain assigned to the same work detail for a sufficient period of time and for the work detail to be working at the same site long enough to enable a person to hide contraband at a work site and inform the inmate of its location. An inmate would be able to use or consume the contraband without the intent of bringing the contraband back to the facility, thus falling outside of the prohibition of K.S.A. 21-3826.

HB 2639 provides a specific exhaustive list of the items that constitute contraband relative to outside work assignments. In contrast, contraband on the grounds of a facility is defined by regulation that sets out a non-exhaustive list that is ultimately defined by the absence of the consent of the warden. Due to the procedures for transmitting property to inmates within a correctional facility, K.S.A. 21-3826 is not unconstitutionally vague. State v. Watson, 273 Kan. 426, 44 P.3d 357 (2000). The specific listing

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of contraband relative to outside work assignments provides greater notice regarding items of contraband prohibited from being provided to inmates on work assignments.

The Department proposes two amendments to HB 2639. First, at page 1, line 26 after the word "institution", inserting "; or the possession, attempted possession, use, or attempted use of such contraband by such inmate". Currently, HB 2639 only makes the person providing the contraband criminally liable. This amendment would also make the inmate receiving the contraband criminally liable.

Second, the Department proposes amendment of HB 2639 at page 2, lines 7-8 by striking the phrase ", as defined by the rules and regulations adopted by the secretary," This clause provides for an increased penalty when an employee of the correctional facility is trafficking in contraband. Since the crime of trafficking in contraband is also applicable to correctional institutions other than those of the Department of Corrections, the Department believes that reference to the Secretary's regulations in that provision is improper. A balloon setting out these proposed amendments is attached.

The Department urges amendment of HB 2639 and favorable consideration of this bill.

Session of 2004

HOUSE BILL No. 2639

By Committee on Corrections and Juvenile Justice

1-28

AN ACT concerning crimes and punishment; relating to traffic in contraband; amending K.S.A. 2003 Supp. 21-3826 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2003 Supp. 21-3826 is hereby amended to read as follows: 21-3826. (a) Traffic in contraband ~~in a correctional institution~~ is: *(1)* Introducing or attempting to introduce into or upon the grounds of any correctional institution or taking, sending, attempting to take or attempting to send from any correctional institution or any unauthorized possession while in any correctional institution or distributing within any correctional institution, any item without the consent of the administrator of the correctional institution; *or*

(2) providing to or attempting to provide to a person known to be an inmate in the custody of a department of corrections' correctional institution while such inmate is outside such correction institution for the inmate's use or consumption, irrespective of whether the item is intended to be brought into or upon the grounds of such correctional institution:

(A) Alcohol;

(B) tobacco;

(C) controlled substances;

(D) firearms, ammunition or explosives;

(E) currency, but not including compensation forwarded to the correctional institution for deposit in an inmate's institution account;

(F) tools and equipment except as required in the performance of the inmate's approved work assignment;

(G) cellular telephone;

(H) internet access; or

(I) communication equipment or devices, other than cellular telephones and internet access, except as required in the performance of the inmate's approved work assignment.

(b) For purposes of this section: *(1)* "Correctional institution" means any state correctional institution or facility, conservation camp, state security hospital, juvenile correctional facility, community correction center or facility for detention or confinement, juvenile detention facility or jail.

; or the possession, attempted possession, use, or attempted use of such contraband by such inmate:

(2) "Controlled substance" shall have the meaning ascribed thereto by subsection (e) of K.S.A. 65-4101, and amendments thereto.

(c) (1) Traffic in contraband ~~in a correctional institution~~ of firearms, ammunition, explosives or a controlled substance ~~which is defined in subsection (e) of K.S.A. 65-4101, and amendments thereto,~~ is a severity level 5, nonperson felony.

(2) Traffic in any contraband, ~~as defined by rules and regulations adopted by the secretary,~~ ~~in a correctional institution~~ by an employee of a correctional institution is a severity level 5, nonperson felony.

(d) Except as provided in subsection (c), traffic in contraband ~~in a correctional institution~~ is a severity level 6, nonperson felony.

Sec. 2. K.S.A. 2003 Supp. 21-3826 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

K A N S A S

JUVENILE JUSTICE AUTHORITY

DENISE L. EVERHART
COMMISSIONER

KATHLEEN SEBELIUS
GOVERNOR

Memorandum

DATE: February 16, 2004

TO: State Representative Ward Loyd, Chair
House Corrections & Juvenile Justice Committee

FROM: Denise L. Everhart, Commissioner

SUBJECT: House Bill 2639 – JJA Testimony

Chairman Loyd and Members of the House Corrections and Juvenile Justice Committee, the Juvenile Justice Authority provides this written testimony on HB 2639 in support of the Kansas Department of Correction's amendment to K.S.A. 2003 Supp. 3826 and offers various technical amendments to bring juvenile offenders under it's purview.

The testimony offered by Secretary Werholtz today plainly details the reasons for the necessity of this amendment. The Kansas Juvenile Justice Authority supports the KDOC's amendment to K.S.A. 21-3826. The introduction of contraband into secure correctional institutions poses a very real threat to the safety and security of staff and offenders alike.

The amendment proposed by the KDOC extends the proscription of contraband beyond the walls of a correctional institution. Like the KDOC, the JJA will, at times, have offenders out in the community for various reasons. The danger of contraband does not diminish merely because possession of contraband occurs outside of a correctional institution. For those reasons, the JJA has proposed a balloon amendment to include juvenile offenders.

The JJA is also in support of the KDOC's balloon amendment wherein the phrase "as defined by the rules and regulations adopted by the secretary" is stricken from page 2, lines 7-8 of HB 2639. Contraband in a correctional institution, other than firearms, ammunition, explosives or controlled substances, would then be those items not authorized by the administrator of the correctional institution. This would include wardens, sheriffs and superintendents. For that reason, the JJA would withdraw the proposed technical amendment that would have added "or the commissioner of the Juvenile Justice Authority" in line 8 of page 2 of HB 2639.

Thank you for the opportunity to present this information.

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Session of 2004 [or

HOUSE BILL No. 2639

By Committee on Corrections and Juvenile Justice

1-28

Proposed Technical Amendment

AN ACT concerning crimes and punishment; relating to traffic in contraband; amending K.S.A. 2003 Supp. 21-3826 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2003 Supp. 21-3826 is hereby amended to read as follows: 21-3826. (a) Traffic in contraband ~~in a correctional institution~~ is:

(1) Introducing or attempting to introduce into or upon the grounds of any correctional institution or taking, sending, attempting to take or attempting to send from any correctional institution or any unauthorized possession while in any correctional institution or distributing within any correctional institution, any item without the consent of the administrator of the correctional institution; *or*

(2) *providing to or attempting to provide to a person known to be an inmate in the custody of a department of corrections' correctional institution or a juvenile offender in the custody of a juvenile justice authority's correctional institution,* [while such inmate is outside such correction institution for the inmate's use or consumption, irrespective of whether the item is intended to be brought into or upon the grounds of such correctional institution:

(A) Alcohol;

(B) tobacco;

(C) controlled substances;

(D) firearms, ammunition or explosives;

(E) currency, but not including compensation forwarded to the correctional institution for deposit in an inmate's institution account;

(F) tools and equipment except as required in the performance of the inmate's approved work assignment;

(G) cellular telephone;

(H) internet access; or

(I) communication equipment or devices, other than cellular telephones and internet access, except as required in the performance of the inmate's approved work assignment.

(b) For purposes of this section,: (1) ''Correctional institution'' means any state correctional institution or facility, conservation camp, state security hospital, juvenile correctional facility, community correction center

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(2) ''Controlled substance'' shall have the meaning ascribed thereto by subsection (e) of K.S.A. 65-4101, and amendments thereto.

(c) (1) Traffic in contraband ~~in a correctional institution~~ of firearms, ammunition, explosives or a controlled substance ~~which is defined in subsection (e) of K.S.A. 65-4101, and amendments thereto~~, is a severity level 5, nonperson felony.

(2) Traffic in any contraband, as defined by rules and regulations adopted by the secretary, ~~in a correctional institution~~ by an employee of a correctional institution is a severity level 5, nonperson felony.

(d) Except as provided in subsection (c), traffic in contraband ~~in a rrectional institution~~ is a severity level 6, nonperson felony.

Sec. 2. K.S.A. 2003 Supp. 21-3826 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

[or commissioner of the juvenile justice authority

(10)

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2727
to
The House Committee on Corrections and Juvenile Justice

By Roger Werholtz
Secretary
Kansas Department of Corrections

February 16, 2004

HB 2727 exercises Kansas' authority pursuant to 21 U.S.C.§ 862a to allow otherwise eligible persons convicted of a controlled substance related felony to receive Temporary Assistance to Needy Families (TANF) and participate in the food stamp program. This allowance is contingent upon either an assessment by a licensed substance abuse treatment provider that the individual does not require substance abuse treatment, or that the individual is either participating in a licensed substance abuse treatment program or has successfully completed treatment. HB 2727 is a result of interagency meetings between the Department of Corrections and the Department of Social and Rehabilitation Services.

Congress, in enacting the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, granted states the authority to provide assistance funds and food stamps to persons convicted of the felony possession, use, or distribution of controlled substances provided the state has elected to exclude this prohibition from the eligibility criteria applicable to state residents. Therefore, Kansas has authority to determine whether individuals who have been convicted of a felony drug

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offense pursuant to any state or federal law are eligible to receive assistance if the conviction was due to a drug crime committed after August 22, 1996. Thirty-one states have passed legislation to exercise their option to waive or modify this disqualification. HB 2727 waives this disqualification contingent upon either the absence of a need for substance abuse treatment determined by a substance abuse treatment provider or the person's completion or participation in a licensed substance abuse program. Therefore, HB 2727 directly relates waiver of the disqualification due to a drug offense conviction to the individual addressing his or her substance abuse.

Additionally, under current law, former offenders who have been convicted of violent or non-drug crimes are eligible for the benefits that are prohibited to those that have a felony drug history. Under current law, assistance is denied to former drug offenders who have overcome their substance abuse while other offenders are provided assistance.

Both the Department of Corrections and the Department of Social and Rehabilitation Services support HB 2727. The Department's interest is derived from the significant number of female offenders being released from prison after service of sentences for drug offenses. The reintegration of these offenders with their children, with the full assistance offered by the federal Welfare Reform Act, is greatly enhanced and reduces one of the most significant criminogenic factors in recidivism. At the same time, through this assistance these offenders can access job training, which will further enable them to stabilize and reintegrate safely and successfully.

The current disqualification has a significant impact on the dependent families of persons convicted of drug offenses. The impact on a household that is a single parent family with two children is a reduction of one-third of their potential benefits for a month. The Department's experience is that this type of situation places an extreme amount of stress on a family that is already undergoing the difficult task of successful reintegration.

HB 2727 exercises an opportunity afforded by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, to provide needed federal assistance to otherwise eligible former drug offenders, while at the same time preserving the public's interest in limiting that assistance to persons who have addressed their substance abuse through necessary treatment.

The Department urges favorable consideration of HB 2727.

Kansas Department of Social and Rehabilitation Services
Janet Schalansky, Secretary

House Corrections and Juvenile Justice
February 16, 2004

Public Assistance for Persons Convicted of a Controlled Substance Felony
HB 2727

Mr. Chairman and members of the Committee, my name is Candy Shively, Deputy Secretary of the Department of Social and Rehabilitation Services. Thank you for the opportunity to testify in support of HB 2727, a Department of Corrections proposal to stabilize families and reduce prison recidivism by allowing former drug felons to receive public assistance upon release from prison, if they are otherwise eligible.

The federal *Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)*, also known as federal welfare reform, prohibits persons convicted of a drug felony from receiving both Food Assistance and Temporary Assistance to Needy Families (TANF) cash and employment services. Medical Assistance is not prohibited. This lifetime ban applies only to persons convicted of drug offenses but not to felons convicted of other more violent types of offenses.

Federal law also contains a provision which allows states to override the ban against drug felons. Thirty-one states have already passed legislation to override the ban in order to assist in stabilizing families when drug felons are released from prison. Without some type of assistance to reunite and stabilize the family, children may not be reunited with their parent, and recidivism to prison may be increased. States may specify the conditions under which they will provide TANF and food assistance. The Kansas proposal was crafted to limit assistance to drug felons who have completed or are participating in a licensed substance abuse program.

SRS supports this bill because women are the fastest growing prison population and much of this growth is due to nonviolent drug offenses, not involving manufacture or sale of drugs. Ninety-nine percent of single parent households receiving TANF are women. Often parents are released but do not have the resources to reunite with their children and obtain housing, food and utilities. By lifting the ban and providing TANF and food assistance when needed, parents leaving prison will be able to:

- Reestablish a home through receipt of a small cash grant for rent, utilities, and food
- Find a job, though job readiness, training, and job-seeking services
- Receive needed services such as substance abuse treatment, domestic violence services, and mental health counseling

There are currently 150 families in which the children receive TANF assistance, but the parent is disqualified due to a drug felony in their past. Enactment of this bill would increase the benefit and help these mothers stabilize the families during the period following prison release. Qualifying for TANF will also provide employment services which will help move these families toward independence and self-sufficiency.

Unlike TANF which is limited to families with children, Food Assistance is available to households without children. Lifting the federal ban against providing Food Assistance to former drug felons will help this population with nutritional needs during the period after release from prison.

This population typically has trouble gaining employment upon release. Without food and the other basic necessities of life during this transition period, the likelihood of returning to drugs or other criminal activity is increased.

While there will be some increase in state and federal costs, SRS supports this proposal because it is good public policy. There are already so many barriers to successful reintegration, it makes sense to remove the barriers we can control. Children of incarcerated parents are reported to be six times more likely to become incarcerated themselves. Giving these children a better opportunity to succeed and break the cycles of poverty and incarceration are good reasons to make the change.

This concludes my testimony. I will be glad to respond to questions.