

Approved: 11-23-05

Date

MINUTES OF THE HOUSE CORRECTIONS & JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Lloyd at 1:30 P.M. on February 2, 2005 in Room 241-N of the Capitol.

All members were present except:

Mike Peterson- excused

Committee staff present:

Jill Wolters, Revisor of Statutes Office
Diana Lee, Revisor of Statutes Office
Jerry Ann Donaldson, Kansas Legislative Research
Connie Burns, Committee Secretary

Conferees appearing before the committee:

Dr. Gary Daniels, Acting Secretary SRS
Jean Holthaus, Topeka Coalition on Adult Abuse
Julie Reid, Shawnee County Family Resource Center
Larry Hinton, Gatekeepers
Becca Waughn, Topeka Independent Living Resource Center
Martin Kennedy, Dept. Of Aging
Kevin Graham, Attorney General's Office
Michael Donnelly, Disability Rights Center of Kansas
Julia Bulter, KS Sentencing Commission
Donna Schneeweis, State Death Penalty Abolition Coordinator
Kyle Smith, KBI

Others attending:

See attached list.

Representative O'Malley, appeared before the committee to request a bill introduction that would makes consensual sex in a public restroom considered lewd and lascivious behavior.

Representative Yoder made a motion that this request should be introduced as a committee bill. Representative Davis seconded the motion. The motion carried.

HB 2038 – Create multi-disciplinary groups for adult abuse parallel to those for children.

Chairman Loyd opened the hearing on HB 2038.

Representative Gordon provided the committee an introduction of the bill.

Gary Daniels, Acting Secretary, Social and Rehabilitation Services (SRS), appeared before the committee in support of the bill. (Attachment 1) The bill authorizes a multi-disciplinary team for adults in need of protective services and establishes a multi-disciplinary team which would bring together professionals with expertise in working with adults who are in need of protective services, to provide advice and consultation to SRS and other entities regarding cases referred to the team. The team would also serve as advocates for resources and help increase public awareness of adult abuse, neglect, and exploitation and work to eliminate its occurrence where possible. Statutory authority would also provide free exchange of information within the team and a process for obtaining additional information necessary to help resolve case situations.

Jean Holthaus, Topeka Coalition on Adult Abuse, offered support of the bill. (Attachment 2) Passage of this bill is a move toward reducing adult abuse, neglect, exploitation and fiduciary abuse and respectfully

encouraged the committee to pass the bill.

Julie Reid, Executive Director, Shawnee County Family Resource Center, offered an amendment on the bill and SRS is agreement with the amendment. ([Attachment 3](#))

Larry Hinton, Gatekeepers, appeared before the committee in support of the bill and the amendment. ([Attachment 4](#)) Gatekeepers is a strategy of the United Way of Greater Topeka, Success 4 Life initiative. The bill will provide another tool to improve the lives of Kansans in need and strengthen the effectiveness and efficiency of state and community resources. Additional members of the Success 4 Life coalition who wish to express their support of the bill:

- HealthAccess program of the Shawnee County Medical Society
- Julie Reid, Executive Director, Shawnee County Family Resource Center
- Angi Heller, Director of Friendly Visitors, Catholic Community Services
- Jane Metzger, Executive Director, Meals on Wheels of Shawnee & Jefferson Counties
- Monica Brede, Domestic Violence/Sexual Assault and Disability Advocate
- Elizabeth Nichole McClelland, Community Care Coordinator, SCFRC

Becca Vaughn, Topeka Independent Living Resource Center, explained to the committee that this bill is a good beginning to addressing needed changes to the current Adult Protective System (APS). ([Attachment 5](#)) The bill would expand protections and develop person-based solutions to issues of abuse, neglect and exploitation through a multi disciplinary team approach. The amendment to the bill, would provide unbiased and cost-effective resources and advocacy for adults in the APS, and that moving the authority for the investigatory and prosecutorial functions out of SRS and to the Disability Rights Center of Kansas would provide the measure of protections that Kansans deserve.

Sue Lockett, The Prairie Advocacy Center, Inc. provided written testimony in support of the team effort of **HB 2038**. ([Attachment 6](#))

Martin Kennedy, Department of Aging, provided written testimony in support of the multi disciplinary teams proposed in the bill. ([Attachment 7](#))

Kevin Graham, Office of the Attorney General, provided written testimony in opposition of the wording in the bill. ([Attachment 8](#)) Multi disciplinary advisory groups provide a great service and resource to the community, but caution that investigations of specific allegations of abuse, neglect, and exploitation should not be handled by committee and should remain the responsibility of SRS, KDOA & KDHE, and law enforcement.

Michael Donnelly, Disability Rights Center of Kansas, testified in opposition to the bill. ([Attachment 9](#)) The bill proposed does not require informed consent of the individual before the multi-disciplinary team discusses them, or their situation, the team is also given the power to request access to personal and private records and information without the persons consent. To supersede a person's right to consent to the state's involvement in their life, violates the promise of privacy as it relates to a person with disabilities and others who someone has alleged to be unable to manage or care for themselves. The proposed amendments would give the Team carte blanche to discuss whomever they choose to discuss with, or without that persons knowledge or consent. Amendment offered is for a practical implementation of the Team approach, with risks that must be managed.

Chairman Loyd closed the hearing on **HB 2038** and a subcommittee will be appointed to look at this issue.

Julia Butler, Kansas Sentencing Commission on Kansas Sentencing procedure, briefed the committee on the U.S. Supreme Court decision in United States v. Booker and United States v. Fanfan (January 12, 2005). ([Attachment 10](#)) The following was covered:

- Determining the Sentence
- Types of Departure
- State v. Gould
- Blakely v. Washington
- U.S. v. Booker

- U.S. v. Fanfan

The US Supreme Court concluded that the Sixth Amendment as construed in *Blakely* applied to the Federal Sentencing Guidelines. The Federal Sentencing Guidelines are no longer mandatory, but now are advisory.

FY 2004 Departure Statistics in Kansas

- Downward Dispositional Departures 564
- Downward Durational Departures 502
- Upward Dispositional Departures 111
- Upward Durational Departures 21

The Chairman presented the committee a news release and a memorandum from the US Sentencing Commission for information. (Attachment 11)

HB 2162 – Upward Departures from sentencing guidelines.

Chairman Loyd opened the hearing on HB 2162.

Representative Jim Ward appeared before the committee in favor of the bill. (Attachment 12) The bill allows for an upward departure (increase in the punishment) from the sentencing guidelines under certain circumstances.

Donna Schneweis, State Death Penalty Abolition Coordinator appeared before the committee in opposition of the bill. (Attachment 13) The portion of the bill that is being opposed is Section 1, (6) page 3, lines 26 – 29. This portion was not supposed to have been written into the bill.

Kyle Smith, KBI, provided the committee with neutral testimony, and offered technical language clean up on the bill. (Attachment 14) A technical note on page 1, line 42, the phrase “upon conviction of the defendant” is at least unnecessary and somewhat confusing and suggest the phrase be removed.

Chairman Loyd closed the hearing on HB 2162.

The meeting was adjourned at 3:15 pm. The next meeting is February 3, 2005.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 2-2-05

NAME	REPRESENTING
G. Daniel	SRS
Dennis Priest	SRS
Vyle Kersh	SRS
Richard Sams	Kennedy & Assoc.
Kevin Durham	Ks. Atty General
Ruth Kothala	Attorney General's Office
Kelly Stephens	Prison Advocacy Center
Marit Landry	KS Coalition Against Sex DV
Marty Kennedy	KS Dept. on Aging
Barbara Belden	SRS
Becca Vaughn	Topstad Independent Living Resour. Center
B. Mariani	SRS
Mark Gleeson	Judicial Branch
Mary White	ESD-117 BISE
Sean Kralw	KGP
Karen Peterson	SRS
Rev. John Tamilio III	Chaplain for the Day
Julie Reid	Shawnee Co. Family Resource Center
Kyle Smith	KBI

(1)
Kansas Department of

Social and Rehabilitation Services

Gary Daniels, Acting Secretary

House Corrections & Juvenile Justice Committee
February 2, 2005

Adult Multi-Disciplinary Team
HB 2038

Office of the Secretary
Gary Daniels, Acting Secretary
785.296.3271

For additional information contact:
Public and Governmental Services Division
Kyle Kessler, Director of Legislative and Media Affairs

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**Kansas Department of Social and Rehabilitation Services
Gary Daniels, Acting Secretary**

House Corrections & Juvenile Justice Committee
February 2, 2005

HB 2038 - Adult Multi-Disciplinary Team

Mr. Chairman and members of the Committee, my name is Gary Daniels, Acting Secretary of the Department of Social and Rehabilitation Services. Thank you for the opportunity to testify regarding HB 2038 which authorizes a multi-disciplinary team for adults in need of protective services.

The Department provides adult protective services to safeguard the well being and general welfare of adults (age 18 and older) in need of protection from abuse, neglect, exploitation or fiduciary abuse. SRS social workers investigate reports and provide protective services to adults who reside in the community and in facilities licensed or certified by SRS. Emergency support services as well as guardianship/conservatorship services are also available.

HB 2038 establishes the statutory authority for multi-disciplinary teams which would bring together professionals with expertise in working with adults who are in need of protective services, to provide advice and consultation to SRS and other entities regarding cases referred to the team. The teams would also serve as advocates for resources and help increase public awareness of adult abuse, neglect, and exploitation as well as work to eliminate its occurrence where possible. The statutory authority would also provide free exchange of information within the team and a process for obtaining additional information necessary to help resolve case situations.

A similar structure has been in place for children and has worked effectively to provide more comprehensive resolutions for children in need of protective services. The Department believes the same results can be achieved for adults and has worked in collaboration with the authors of this legislation to develop the amended version you have been provided.

SRS is supportive of establishing a multi-disciplinary team process for vulnerable adults and believes the structure provided for in this legislation will provide additional resources to assist in resolving instances of abuse, neglect, and exploitation in Kansas.

I will be glad to respond to questions.

(2)

House Corrections and Juvenile Justice Committee

February 2, 2005

by Jean Holthaus

HB 2038 – Establishment of an adult multidisciplinary team

Chairman Loyd, members of the Committee and Representative Gordon, thank you for this opportunity to provide comments on behalf of the Topeka Coalition on Adult Abuse in support of HB 2038. I am Jean Holthaus and I serve on the Topeka Coalition on Adult Abuse. Our coalition is an action team in the *Success 4 Life* United Way Community Initiative. Our coalition's mission is to form a community partnership of individuals and agencies dedicated to the reduction of abuse of vulnerable adults through advocacy, education, service development and political and legal involvement. Attached is a list of agencies who compose our coalition. One of our goals is the establishment of an adult multidisciplinary team (MDT). MDTs have become a hallmark of adult abuse prevention programs, reflecting growing consensus that no single agency or discipline has all the resources or expertise needed to effectively resolve all forms of abuse and neglect.

Supporters of HB 2038 include 100% of the representatives in the Shawnee County Delegation. The MDT will include professionals from multiple disciplines and agencies, who serve as a resource to community agencies that refer cases of adults in need of protective services. The team's purpose is:

- to offer advice and consultation
- to identify system gaps and barriers in service delivery
- to advocate for adult safety and well-being
- to educate and increase public awareness about adult abuse, neglect, exploitation and fiduciary abuse

The need for and benefits of multidisciplinary teams have increasingly been acknowledged by federal, state and local governments. The Department of Health and Human Services, Administration on Aging, the National Center on Elder Abuse, the Clearinghouse on Elder Abuse and Neglect, the National Committee for the Prevention of Elder Abuse and the Office for Victims of Crime of the U.S. Department of Justice have all supported, encouraged or, in some cases, required the development of local community multidisciplinary teams. Research, resources and promising practices are well documented by these federal agencies.

All agencies will donate their time and expertise. There is no cost to the State of Kansas.

Passage of this bill is a move toward reducing adult abuse, neglect, exploitation and fiduciary abuse. I respectfully encourage this committee to pass HB 2038. Thank you.

Jean Holthaus, M.Ed., LSCSW, Chair of the Adult MDT Committee of the Topeka Coalition on Adult Abuse; Director of SPICE (Senior Prevention Intervention Counseling Education) at Prevention and Recovery Services; Trainer and member of the Kansas Mental Health and Aging Coalition; and member of the Kansas Connecting Services and Research Team of SRS Addiction and Prevention Services.

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jholthaus@parstopeka.com

The Topeka Coalition on Adult Abuse Member Agencies

SRS Adult Protective Services
Kansas Department on Aging
District Attorney's Office
Attorney General's Office
Kansas Department of Health and Environment
Topeka Rescue Mission
Shawnee County Health Agency
Sheltered Living, Inc.
Bank of America
TARC
Topeka Police Department
Breakthrough House
United Way
Shawnee County Sheriff Department
Catholic Charities
Gatekeeper Program
Prevention and Recovery Services, S.P.I.C.E.
Capital Federal Savings
Jayhawk Area Agency on Aging
Community Resources Council
Battered Women Task Force
VA Hospital
Valeo
Sheriff's Office

HOUSE BILL No. 2038

By Representatives Gordon, Burgess, Flora, Hutchins, Kirk, Knether,
Lane, Mah and Mays

1-11

10 AN ACT concerning multidisciplinary teams for adults in need of pro-
11 tective services; amending K.S.A. 2004 Supp. ~~39-1411~~ and 39-1430
12 and repealing the existing sections.
13

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

15 New Section 1. ~~(a) The purpose of a multidisciplinary team for adults~~
16 ~~in need of protective services is to offer advice and consultation to the~~
17 ~~department of social and rehabilitation services, the courts, law enforce-~~
18 ~~ment and the health community. A team's role is solely advisory in nature,~~
19 ~~and a team has no authority to impose services or recommendations.~~

20 (b) Upon recommendation of the state department of social and re-
21 habilitation services or the county or district attorney, the court may ap-
22 point a multidisciplinary team to assist in gathering information regarding
23 an adult alleged to be in need of protective services, ~~for an adult: (1) who~~
24 ~~has personally consented to receiving protective services, (2) whose legal~~
25 ~~representative has provided consent for the adult in need of protective~~
26 ~~services to receive protective services, or (3) for whom the secretary of~~
27 ~~social and rehabilitation services or the secretary's designee determines~~
28 ~~that a petition for conservatorship, guardianship or both should be filed,~~
29 ~~according to K.S.A. 39-1405, and amendments thereto, or K.S.A. 39-1407,~~
30 ~~and amendments thereto. The team may be a standing team or may be~~
31 appointed for a specific adult.

32 (c) A multidisciplinary team may request disclosure of information in
33 regard to an adult alleged to be in need of protective services by making
34 a written verified application to the district court. Upon a finding by the
35 district court that there is probable cause to believe that the information
36 sought may assist in determining if the adult is experiencing or has ex-
37 perience abuse, neglect, exploitation or fiduciary abuse as defined in
38 K.S.A. ~~39-1430~~, and amendments thereto, or in assisting an adult who
39 has been adjudged to be in need of protective services, the court shall
40 enter an order for the production of requested documents, reports or
41 information to be delivered to the applicant at a specified time, date and
42 place. The time and date specified shall not be sooner than five days after
43 the service of the ~~subpoena~~ or order, excluding Saturdays, Sundays or

department
of health and
environment,
department
on aging,

Insert

9

New Section 1. (a) A multidisciplinary team for adults in need of protective services shall include professionals who possess knowledge and skills related to the diagnosis, assessment and disposition of those adults. The purpose of the adult multidisciplinary team is to offer advice and consultation to the department of social and rehabilitation services, department of health and environment, department on aging, the courts, law enforcement and the health care community by drawing from the resources and expertise of multiple disciplines and agencies. The team's role is advisory in nature, and the team has no authority to impose services or recommendations. The members of the team shall have free exchange of information.

1 legal holidays. The court issuing the order shall keep all applications filed
2 pursuant to this subsection and a copy of the order in a special file main-
3 tained for that purpose or in the official court file for the adult. Upon
4 receiving service of an order for production pursuant to this subsection,
5 the party served shall give oral or written notice of service to any person
6 known to have a right to assert a privilege or assert a right of confiden-
7 tiality in regard to the documents, reports or information sought at least
8 three days before the specified date of delivery.

9 (d) The written, authenticated application shall contain the following
10 elements:

- 11 (1) The name of the interested adult;
- 12 ~~(2) the case number;~~
- 13 (3) the date of birth of the interested adult;
- 14 (4) the name of the county where the court is located;
- 15 (5) the name of the applicant;
- 16 (6) a statement that there is an investigation being made into the
17 report of alleged neglect, abuse, exploitation or fiduciary abuse in regard
18 to the named person;
- 19 (7) the documents, reports and/or information ~~specifically~~ requested;
- 20 (8) the reasons for the request;
- 21 (9) the signature of the applicant; and
- 22 (10) the authentication of a notary public.

23 (e) Nothing in this act should negate the exclusion of adult protective
24 services records from the Kansas open records act under K.S.A. 45-221,
25 and amendments thereto.

26 ~~Sec. 2. K.S.A. 2004 Supp. 39-1411 is hereby amended to read as
27 follows: 39-1411. (a) The secretary of aging shall maintain a register of
28 the reports received and investigated by the department on aging under
29 K.S.A. 39-1402 and 39-1403, and amendments to such sections, and the
30 findings, evaluations and actions recommended by the department on
31 aging with respect to such reports. The secretary of health and environ-
32 ment shall maintain a register of the reports received and investigated by
33 the department of health and environment under K.S.A. 39-1402 and 39-
34 1403, and amendments thereto, and the findings, evaluations and actions
35 recommended by the department of health and environment with respect
36 to such reports. The findings, evaluations and actions shall be subject to
37 the Kansas administrative procedure act and any requirements of state
38 or federal law relating thereto except that the secretary shall not be re-
39 quired to conduct a hearing in cases forwarded to the appropriate state
40 authority under subsection (b). The register shall be available for inspec-
41 tion by personnel of the department of health and environment or the
42 department on aging as specified by the secretary of health and environ-
43 ment or the secretary of aging and to such other persons as may be re-~~

1 quired by federal law and designated by the secretary of health and en-
2 vironment or the secretary of aging by rules and regulations. Information
3 from the register shall be provided as specified in K.S.A. 65-6205 and
4 amendments thereto.

5 (b) The secretary of aging shall forward any finding of abuse, neglect
6 or exploitation alleged to be committed by a provider of services licensed,
7 registered or otherwise authorized to provide services in this state to the
8 appropriate state authority which regulates such provider. The secretary
9 of health and environment shall forward any finding of abuse, neglect or
10 exploitation alleged to be committed by a provider of services licensed,
11 registered or otherwise authorized to provide services in this state to the
12 appropriate state authority which regulates such provider. The appropri-
13 ate state regulatory authority, after notice to the alleged perpetrator and
14 a hearing on such matter if requested by the alleged perpetrator, may
15 consider the finding in any disciplinary action taken with respect to the
16 provider of services under the jurisdiction of such authority. The secretary
17 of aging may consider the finding of abuse, neglect or exploitation in any
18 licensing action taken with respect to any adult care home or medical care
19 facility under the jurisdiction of the secretary of aging. The secretary of
20 health and environment may consider the finding of abuse, neglect or
21 exploitation in any licensing action taken with respect to any medical care
22 facility under the jurisdiction of the secretary of health and environment.

23 (c) If the investigation of the department of health and environment
24 or the department on aging indicates reason to believe that the resident
25 is in need of protective services, that finding and all information relating
26 to that finding shall be forwarded by the secretary of health and environ-
27 ment or the secretary of aging to the secretary of social and rehabilitation
28 services.

29 (d) Except as otherwise provided in this section, the report received
30 by the department of health and environment or the department on aging
31 and the written findings, evaluations and actions recommended shall be
32 confidential and shall not be subject to the open records act. Except as
33 otherwise provided in this section, the name of the person making the
34 original report to the department of health and environment or the de-
35 partment on aging or any person mentioned in such report shall not be
36 disclosed unless such person specifically requests or agrees in writing to
37 such disclosure or unless a judicial or administrative proceeding results
38 therefrom. In the event that an administrative or judicial action arises, no
39 use of the information shall be made until the judge or presiding officer
40 makes a specific finding, in writing, after a hearing, that under all the
41 circumstances the need for the information outweighs the need for con-
42 fidentiality. Except as otherwise provided in this section, no information
43 contained in the register shall be made available to the public in such a

1 ~~manner as to identify individuals.~~

2 ~~(c) The members of a court-appointed adult multidisciplinary team,~~
3 ~~as defined in K.S.A. 39-1430, and amendments thereto, shall have free~~
4 ~~exchange of information between and among them.~~

Move to page 1 (a)

5 Sec. ~~2~~ 2 K.S.A. 2004 Supp. 39-1430 is hereby amended to read as
6 follows: 39-1430. (a) No person shall be considered to be abused, ne-
7 glected or exploited or in need of protective services for the sole reason
8 that such person relies upon spiritual means through prayer alone for
9 treatment in accordance with the tenets and practices of a recognized
10 church or religious denomination in lieu of medical treatment.

11 (b) As used in this act:

12 ~~(1)~~ (1) "Adult" means an individual 18 years of age or older alleged
13 to be unable to protect their own interest and who is harmed or threat-
14 ened with harm, whether financial, mental or physical in nature, through
15 action or inaction by either another individual or through their own action
16 or inaction when ~~(A)~~ (A) such person is residing in such person's own
17 home, the home of a family member or the home of a friend, ~~(B)~~ (B) such
18 person resides in an adult family home as defined in K.S.A. 39-1501 and
19 amendments thereto, or ~~(C)~~ (C) such person is receiving services through
20 a provider of community services and affiliates thereof operated or funded
21 by the department of social and rehabilitation services or the department
22 on aging or a residential facility licensed pursuant to K.S.A. 75-3307b and
23 amendments thereto. Such term shall not include persons to whom K.S.A.
24 39-1401 *et seq.* and amendments thereto apply.

25 ~~(2)~~ (2) "Abuse" means any act or failure to act performed intention-
26 ally or recklessly that causes or is likely to cause harm to an adult,
27 including:

28 ~~(A)~~ (A) Infliction of physical or mental injury;

29 ~~(B)~~ (B) any sexual act with an adult when the adult does not consent
30 or when the other person knows or should know that the adult is incapable
31 of resisting or declining consent to the sexual act due to mental deficiency
32 or disease or due to fear of retribution or hardship;

33 ~~(C)~~ (C) unreasonable use of a physical restraint, isolation or medica-
34 tion that harms or is likely to harm an adult;

35 ~~(D)~~ (D) unreasonable use of a physical or chemical restraint, medi-
36 cation or isolation as punishment, for convenience, in conflict with a phy-
37 sician's orders or as a substitute for treatment, except where such conduct
38 or physical restraint is in furtherance of the health and safety of the adult;

39 ~~(E)~~ (E) a threat or menacing conduct directed toward an adult that
40 results or might reasonably be expected to result in fear or emotional or
41 mental distress to an adult;

physical or mental

42 ~~(F)~~ (F) fiduciary abuse; or

43 ~~(G)~~ (G) omission or deprivation by a caretaker or another person of

including unreasonable withholding or depriving of medications

HB 2038

5

- 1 goods or services which are necessary to avoid physical or mental harm
2 or illness.
- 3 (c) (3) "Neglect" means the failure or omission by one's self, care-
4 taker or another person with a duty to supply or provide goods or services
5 which are reasonably necessary to ensure safety and well-being and to
6 avoid physical or mental harm or illness.
- 7 (d) (4) "Exploitation" means misappropriation of an adult's property
8 or intentionally taking unfair advantage of an adult's physical or financial
9 resources for another individual's personal or financial advantage by the
10 use of undue influence, coercion, harassment, duress, deception, false
11 representation or false pretense by a caretaker or another person.
- 12 (e) (5) "Fiduciary abuse" means a situation in which any person who
13 is the caretaker of, or who stands in a position of trust to, an adult, takes,
14 secretes, or appropriates their money or property, to any use or purpose
15 not in the due and lawful execution of such person's trust or benefit.
- 16 (f) (6) "In need of protective services" means that an adult is unable
17 to provide for or obtain services which are necessary to maintain physical
18 or mental health or both.
- 19 (g) (7) "Services which are necessary to maintain physical or mental
20 health or both" include, but are not limited to, the provision of medical
21 care for physical and mental health needs, the relocation of an adult to a
22 facility or institution able to offer such care, assistance in personal hy-
23 giene, food, clothing, adequately heated and ventilated shelter, protection
24 from health and safety hazards, protection from maltreatment the result
25 of which includes, but is not limited to, malnutrition, deprivation of ne-
26 cessities or physical punishment and transportation necessary to secure
27 any of the above stated needs, except that this term shall not include
28 taking such person into custody without consent except as provided in
29 this act.
- 30 (h) (8) "Protective services" means services provided by the state or
31 other governmental agency or by private organizations or individuals
32 which are necessary to prevent abuse, neglect or exploitation. Such pro-
33 tective services shall include, but shall not be limited to, evaluation of the
34 need for services, assistance in obtaining appropriate social services, and
35 assistance in securing ~~medical and legal services.~~
- 36 (i) (9) "Caretaker" means a person who has assumed the responsi-
37 bility, whether legally or not, for an adult's care or financial management
38 or both.
- 39 (j) (10) "Secretary" means the secretary of social and rehabilitation
40 services.
- 41 (k) (11) "Report" means a description or accounting of an incident
42 or incidents of abuse, neglect or exploitation under this act and for the
43 purposes of this act shall not include any written assessment or findings.

physical and
mental health

1 (4) (12) "Law enforcement" means the public office which is vested
2 by law with the duty to maintain public order, make arrests for crimes,
3 investigate criminal acts and file criminal charges, whether that duty ex-
4 tends to all crimes or is limited to specific crimes.

5 (m) (13) "Involved adult" means the adult who is the subject of a
6 report of abuse, neglect or exploitation under this act.

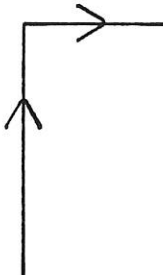
7 (n) (14) "Legal representative," "financial institution" and "govern-
8 mental assistance provider" shall have the meanings ascribed thereto in
9 K.S.A. 39-1401, and amendments thereto.

10 No person shall be considered to be abused, neglected or exploited or
11 in need of protective services for the sole reason that such person relies
12 upon spiritual means through prayer alone for treatment in accordance
13 with the tenets and practices of a recognized church or religious denom-
14 ination in lieu of medical treatment.

15 ~~(15) "Multidisciplinary team" means a group of persons appointed by~~
16 ~~the court under section 1, and amendments thereto, that has knowledge~~
17 ~~of the circumstances of an adult in need of protective services.~~

18 Sec. 4. K.S.A. 2004 Supp. 39-1411 and 39-1430 are hereby repealed.

19 Sec. 5. This act shall take effect and be in force from and after its
20 publication in the statute book.



(15) "Multidisciplinary team" means a group of professionals appointed by the court under section 1, and amendments thereto, who are practicing in the disciplines, including but not limited to, of medicine, public health, protective services, mental health, social work, law and law enforcement. The team serves as a resource to community agencies that refer cases; advocates for resources and funding to fill identified system gaps and barriers in services; provides education and increases public awareness to generate legislative advocacy to promote adult safety and well-being; works to eliminate, where possible, the occurrence of abuse, neglect, exploitation or fiduciary abuse of adults.

House Corrections and Juvenile Justice Committee
January 27, 2005
By Larry Hinton

HB 2038 – Establishment of an adult multidisciplinary team

Chairman Loyd and members of the Committee, I thank you for the opportunity to provide comments on behalf of Success 4 Life Gatekeepers. Gatekeepers is a strategy of the United Way of Greater Topeka, Success 4 Life initiative. Gatekeepers is a community collaboration to improve access to health, mental health, substance abuse, emergency aid and senior services for the rising number of individuals who are uninsured and underinsured in Shawnee County. Success 4 Life has 7 active action teams with 300+ members.

In September, 2003 the Success 4 Life initiative received a \$1.2M grant from Department of Health and Human Services, Health Resources Services Administration to establish the Gatekeepers strategy. A part of the collaborative project design was the formation of an adult multidisciplinary team to identify and address systemic problems in service delivery. The Topeka Coalition on Adult Abuse, which serves as the Success 4 Life Safety Action Team, joined with the Prairie Advocacy Center to pursue development of the Adult Multidisciplinary Team. We look forward to expanding the success of the Shawnee County Multidisciplinary Child Protection Team concept to the adult population in Shawnee County.

We support HB 2038 and the amendments suggested by Prairie Advocacy Center and the Kansas Department of Social and Rehabilitation Services. Additional members of the Success 4 Life coalition who wish to express their support of HB 2038 include: HealthAccess program of the Shawnee County Medical Society; Julie Reid, Executive Director, Shawnee County Family Resource Center; Angi Heller, Director of Friendly Visitors, Catholic Community Services; Jane Metzger, Executive Director, Meals on Wheels of Shawnee & Jefferson Counties; Monica Brede, Domestic Violence/Sexual Assault and Disability Advocate; Elizabeth Nichole McClelland, Community Care Coordinator, SCFRC.

Passage of this bill will provide another tool to improve the lives of Kansan's in need and strengthen the effectiveness and efficiency of state and community resources. We respectfully encourage this committee to act favorably on HB 2038. Thank you.

Larry Hinton, Project Director
Success 4 Life Gatekeepers
785 228 5113
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Topeka Independent Living Resource Center

785-233-4572 V/TTY • FAX 785-233-1561 • TOLL FREE 1-800-443-2207
501 SW Jackson Street • Suite 100 • Topeka, KS 66603-3300

Summary of Proposed Amendments and Additions to HB 2038

General Comments;

HB 2038 is an important issue of civil liberty and the protection of adults with disabilities.

HB 2038 would expand protections and develop person-based solutions to issues of abuse, neglect and exploitation through a multidisciplinary team approach.

This is a good beginning to addressing needed changes to the current APS system, and believe our proposals compliment this goal.

We believe Kansas must go further and provide unbiased and cost-effective resources and advocacy for adults in the Adult Protective Services (APS) system.

We believe moving the authority for the investigatory and prosecutorial functions out of social and rehabilitation services would provide the measure of protection that Kansans deserve.

The Disability Rights Center of Kansas (formerly, Kansas Advocacy and Protection Services) has included this issue in their 2005 Policy Initiatives.

“Access to Justice for Persons with Disabilities- To better protect the rights of persons with disabilities, Kansas should follow the lead of roughly half of the states that provide state support of an independent protection and advocacy system, including independent abuse and neglect investigations. This should include a specific abuse and neglect unit to respond to both the civil/legal rights needs and criminal prosecution.”

Transferring authority of APS to DRC would eliminate the possibility of conflict of interest concerns that exist in its current structure.

We would support joining nearly half of the other states in moving this important matter of civil liberty to our states protection and advocacy agency.

Thank you for having the courage to move these issues of justice and equality forward toward a progressive system which truly prioritizes adults who need protection from abuse, and exploitation while assuring that the necessary advocacy is available to protect their right to choice, independence and equality in all aspects of society.

Advocacy and services provided by and for people with disabilities.



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Testimony

Presented to the Corrections and Juvenile Justice Committee

January 31st, 2005

by Becca Vaughn

Topeka Independent Living Resource Center

RE: HB 2038

Dear Chairperson Loyd and Committee Members;

My name is Becca Vaughn. I am the Director of Advocacy Services at the Topeka Independent Living Resource Center (TILRC). The Topeka Independent Living Resource Center (TILRC) is a 501(c)(3) not-for-profit civil and human rights organization. Our mission is to advocate for equality, justice and essential services for a fully integrated and accessible society for all people with disabilities. Our center is owned, operated and governed by a majority of people with disabilities, representing people of all ages and cultural diversity.

Thank you for the opportunity to address the committee on this important issue of civil liberty and the protection of adults with disabilities. We support the intent, as we perceive it to be, of HB 2038 insofar as it would expand protections and develop person-based solutions to issues of abuse, neglect and exploitation through a multidisciplinary team approach. We would go further, in that we believe Kansas must provide unbiased and cost-effective resources and advocacy for adults in the Adult Protective Services (APS) system. We would offer the attached legislative draft for inclusion into HB 2038.

This proposal is consistent with discussions we have had with the Governor's office and Social and Rehabilitation Services (SRS) past-Secretary Schalansky, proposing to move the investigatory and prosecutorial functions of Adult Protective Services (APS) from SRS to the Disability Rights Center of Kansas (DRC) (formerly Kansas Advocacy and Protective Services). SRS recently shifted the Client Assistance Program (CAP) to the Disability Rights Center of Kansas. The same rationale for shifting the CAP function to KAPS applies to shifting APS to KAPS. Kansans utilizing SRS services deserve to have a disinterested organization available to redress issues of protection and advocacy, regardless of who the respondent is. SRS workers (which include APS staff) are involved in the lives of Kansans with disabilities in a variety of contexts. SRS staff determines eligibility for services/supports and approve Home and Community Based plans of care which often present a very clear conflict when an APS charge is made. Kansans with disabilities deserve to have a responsive, unbiased investigatory agency to provide protection and to advocate for consumers. This mission is consistent with DRC's federal mandate, and represents a "ready made" alternative to the current system.

Thank you for your attention to our proposal and to the civil and human rights of all Kansans.

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Specific Amendments/Additions;

Page 1

Line: 11-Add a reference to transferring authority (of APS) to title

Line: 17-Add “protective and advocacy services”; **delete** “department of social and rehabilitation services”

Line: 20-Add “protection and advocacy services”; **delete** “state department of social and rehabilitation services”

Page 4

Lines: 37-38-**delete**, “except where such conduct or physical restraint is in furtherance of health and safety of the adult”

Page 5

Line: 6-add the following sentence; “Neglect includes the failure to authorize available services which support civil rights to live in a non-institutional setting”.

Line: 11-add the following sentence; “Exploitation shall include the control or taking of property of a person who has been involuntarily placed in an institution while awaiting approval and delivery of supportive services through the department of social and rehabilitation services”.

Line: 17-add the words; “and supports”, after services

Line: 19-add the words; “and supports”, after services

Line: 22-**delete** the words, “facility or institution”, add the word “residence”, **delete** the words “able to”, add the words “which provides”, **delete** the word “offer”, add the words “for obtaining”.

Page 6

Line: 9-add “(15) Protection and Advocacy Services means the organization designated by the Governor to protect the rights of individuals with disabilities, in accordance with 29 U.S.C. 732.”

Line: 9-add “(16) Director means the director of the Protective and Advocacy Services agency as designated under 29 U.S.C. 732, or the director’s designee.”

Additional K.S.A.’s effected-Attached as amendments

KSA 39-1431-adds Protective and Advocacy agency in place of department of social and rehabilitation

KSA 39-1433-adds Protective and Advocacy agency in place of department of social and rehabilitation services; replaces secretary (of SRS) with director

KSA 39-1434-same as above

KSA 39-1435-same as above

KSA 39-1436-same as above

KSA 39-1438-adds the word “support” after services

KSA 39-1440-replaces secretary with director; adds the words or support, after services

KSA 39-1441-replaces secretary with director; adds clarifying language RE: personal liberty

Advocacy and services provided by and for people with disabilities.

HOUSE BILL No. 2038

By Representatives Gordon, Burgess, Flora, Hutchins, Kirk, Kuether,
Lane, Mah and Mays

1-11

*(Topeka Independent Living Resource Center Amendments in 12 point, italic,
Arial font)*

10 AN ACT concerning multidisciplinary teams for adults in need of pro-
11 tective services; *transferring authority for such*; amending K.S.A. 2004 Supp. 39-1411
and 39-1430
12 and repealing the existing sections.

13

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

15 New Section 1. (a) The purpose of a multidisciplinary team for adults
16 in need of protective services is to offer advice and consultation to the
17 *protective and advocacy services* ~~department of social and rehabilitation services~~, the
courts, law enforce-

18 ment and the health community. A team's role is solely advisory in nature,
19 and a team has no authority to impose services or recommendations.

20 (b) Upon recommendation of the *protective and advocacy services* ~~state department of
social and re-~~

21 ~~habilitation services~~ or the county or district attorney, the court may ap-
22 point a multidisciplinary team to assist in gathering information regarding
23 an adult alleged to be in need of protective services for an adult: (1) who
24 has personally consented to receiving protective services; (2) whose legal
25 representative has provided consent for the adult in need of protective
26 services to receive protective services; or (3) for whom the secretary of
27 social and rehabilitation services or the secretary's designee determines
28 that a petition for conservatorship, guardianship or both should be filed,
29 according to K.S.A. 39-1405, and amendments thereto, or K.S.A. 39-1437,
30 and amendments thereto. The team may be a standing team or may be
31 appointed for a specific adult.

32 (c) A multidisciplinary team may request disclosure of information in
33 regard to an adult alleged to be in need of protective services by making
34 a written verified application to the district court. Upon a finding by the
35 district court that there is probable cause to believe that the information
36 sought may assist in determining if the adult is experiencing or has ex-
37 perience abuse, neglect, exploitation or fiduciary abuse as defined in
38 K.S.A. 38-1430, and amendments thereto, or in assisting an adult who
39 has been adjudged to be in need of protective services, the court shall
40 enter an order for the production of requested documents, reports or
41 information to be delivered to the applicant at a specified time, date and
42 place. The time and date specified shall not be sooner than five days after
43 the service of the subpoena or order, excluding Saturdays, Sundays or

1 legal holidays. The court issuing the order shall keep all applications filed
2 pursuant to this subsection and a copy of the order in a special file main-
3 tained or that purpose or in the official court file for the adult. Upon
4 receiving service of an order for production pursuant to this subsection,
5 the party served shall give oral or written notice of service to any person
6 known to have a right to assert a privilege or assert a right of confiden-
7 tiality in regard to the documents, reports or information sought at least
8 three days before the specified date of delivery.

9 (d) The written, authenticated application shall contain the following
10 elements:

- 11 (1) The name of the interested adult;
- 12 (2) the case number;
- 13 (3) the date of birth of the interested adult;
- 14 (4) the name of the county where the court is located;
- 15 (5) the name of the applicant;
- 16 (6) a statement that there is an investigation being made into the
17 report of alleged neglect, abuse, exploitation or fiduciary abuse in regard
18 to the named person;
- 19 (7) the documents, reports and/or information specifically requested;
- 20 (8) the reasons for the request;
- 21 (9) the signature of the applicant; and
- 22 (10) the authentication of a notary public.

23 (e) Nothing in this act should negate the exclusion of adult protective
24 services records from the Kansas open records act under K.S.A. 45-221,
25 and amendments thereto.

26 Sec. 2. K.S.A. 2004 Supp. 39-1411 is hereby amended to read as
27 follows: 39-1411. (a) The secretary of aging shall maintain a register of
28 the reports received and investigated by the department on aging under
29 K.S.A. 39-1402 and 39-1403, and amendments to such sections, and the
30 findings, evaluations and actions recommended by the department on
31 aging with respect to such reports. The secretary of health and environ-
32 ment shall maintain a register of the reports received and investigated by
33 the department of health and environment under K.S.A. 39-1402 and 39-
34 1403, and amendments thereto, and the findings, evaluations and actions
35 recommended by the department of health and environment with respect
36 to such reports. The findings, evaluations and actions shall be subject to
37 the Kansas administrative procedure act and any requirements of state
38 or federal law relating thereto except that the secretary shall not be re-
39 quired to conduct a hearing in cases forwarded to the appropriate state
40 authority under subsection (b). The register shall be available for inspect-
41 tion by personnel of the department of health and environment or the
42 department on aging as specified by the secretary of health and environment
43 or the secretary of aging and to such other persons as may be re-

1 quired by federal law and designated by the secretary of health and en-
2 vironment or the secretary of aging by rules and regulations. Information
3 from the register shall be provided as specified in K.S.A. 65-6205 and
4 amendments thereto.

5 (b) The secretary of aging shall forward any finding of abuse, neglect
6 or exploitation alleged to be committed by a provider of services licensed,
7 registered or otherwise authorized to provide services in this state to the
8 appropriate state authority which regulates such provider. The secretary
9 of health and environment shall forward any finding of abuse, neglect or
10 exploitation alleged to be committed by a provider of services licensed,
11 registered or otherwise authorized to provide services in this state to the
12 appropriate state authority which regulates such provider. The appropri-
13 ate state regulatory authority, after notice to the alleged perpetrator and
14 a hearing on such matter if requested by the alleged perpetrator, may
15 consider the finding in any disciplinary action taken with respect to the
16 provider of services under the jurisdiction of such authority. The secretary
17 of aging may consider the finding of abuse, neglect or exploitation in any
18 licensing action taken with respect to any adult care home or medical care
19 facility under the jurisdiction of the secretary of aging. The secretary of
20 health and environment may consider the finding of abuse, neglect or
21 exploitation in any licensing action taken with respect to any medical care
22 facility under the jurisdiction of the secretary of health and environment.

23 (c) If the investigation of the department of health and environment
24 or the department on aging indicates reason to believe that the resident
25 is in need of protective services, that finding and all information relating
26 to that finding shall be forwarded by the secretary of health and environ-
27 ment or the secretary of aging to the secretary of social and rehabilitation
28 services.

29 (d) Except as otherwise provided in this section, the report received
30 by the department of health and environment or the department on aging
31 and the written findings, evaluations and actions recommended shall be
32 confidential and shall not be subject to the open records act. Except as
33 otherwise provided in this section, the name of the person making the
34 original report to the department of health and environment or the de-
35 partment on aging or any person mentioned in such report shall not be
36 disclosed unless such person specifically requests or agrees in writing to
37 such disclosure or unless a judicial or administrative proceeding results
38 therefrom. In the event that an administrative or judicial action arises, no
39 use of the information shall be made until the judge or presiding officer
40 makes a specific finding, in writing, after a hearing, that under all the
41 circumstances the need for the information outweighs the need for con-
42 fidentiality. Except as otherwise provided in this section, no information
43 contained in the register shall be made available to the public in such a

1 manner as to identify individuals.

2 *(e) The members of a court-appointed adult multidisciplinary team,*
 3 *as defined in K.S.A. 39-1430, and amendments thereto, shall have free*
 4 *exchange of information between and among them.*

5 Sec. 3. K.S.A. 2004 Supp. 39-1430 is hereby amended to read as
 6 follows: 39-1430. *(a) No person shall be considered to be abused, ne-*
 7 *glected or exploited or in need of protective services for the sole reason*
 8 *that such person relies upon spiritual means through prayer alone for*
 9 *treatment in accordance with the tenets and practices of a recognized*
 10 *church or religious denomination in lieu of medical treatment.*

11 *(b) As used in this act:*

12 *(a)-(1) "Adult" means an individual 18 years of age or older alleged*
 13 *to be unable to protect their own interest and who is harmed or threat-*
 14 *ened with harm, whether financial, mental or physical in nature, through*
 15 *action or inaction by either another individual or through their own action*
 16 *or inaction when (1)-(A) such person is residing in such person's own*
 17 *home, the home of a family member or the home of a friend, (2) (B) such*
 18 *person resides in an adult family home as defined in K.S.A. 39-1501 and*
 19 *amendments thereto, or (3) (C) such person is receiving services through*
 20 *a provider of community services and affiliates thereof operated or funded*
 21 *by the department of social and rehabilitation services or the department*
 22 *on aging or a residential facility licensed pursuant to K.S.A. 75-3307b and*
 23 *amendments thereto. Such term shall not include persons to whom K.S.A.*
 24 *39-1401 et seq. and amendments thereto apply.*

25 *(b) (2) "Abuse" means any act or failure to act performed intention-*
 26 *ally or recklessly that causes or is likely to cause harm to an adult,*
 27 *including:*

28 *(1) (A) Infliction of physical or mental injury;*
 29 *(2) (B) any sexual act with an adult when the adult does not consent*
 30 *or when the other person knows or should know that the adult is incapable*
 31 *of resisting or declining consent to the sexual act due to mental deficiency*
 32 *or disease or due to fear of retribution or hardship;*
 33 *(3) (C) unreasonable use of a physical restraint, isolation or medica-*
 34 *tion that harms or is likely to harm an adult;*
 35 *(4) (D) unreasonable use of a physical or chemical restraint, medi-*
 36 *cation or isolation as punishment, for convenience, in conflict with a phy-*
 37 *sician's orders or as a substitute for treatment, ~~except where such conduct~~*
 38 *~~or physical restraint is in furtherance of the health and safety of the adult;~~*
 39 *(5) (E) a threat or menacing conduct directed toward an adult that*
 40 *results or might reasonably be expected to result in fear or emotional or*
 41 *mental distress to an adult;*
 42 *(6) (F) fiduciary abuse; or*
 43 *(7) (G) omission or deprivation by a caretaker or another person of*

1 goods or services which are necessary to avoid physical or mental harm
2 or illness.

3 (e) (3) "Neglect" means the failure or omission by one's self, care-
4 taker or another person with a duty to supply or provide goods or services
5 which are reasonably necessary to ensure safety and well-being and to
6 avoid physical or mental harm or illness. *Neglect includes the failure*
7 *to authorize available services which support the civil right to*
8 *live in a non-institutional setting.*

78 (f) (4) "Exploitation" means misappropriation of an adult's property
89 or intentionally taking unfair advantage of an adult's physical or financial
9 resources for another individual's personal or financial advantage by the
10 use of undue influence, coercion, harassment, duress, deception, false
11 representation or false pretense by a caretaker or another person.

*Exploitation shall include the control or taking of the property of a person who
has been involuntarily placed in an institution while awaiting approval and
delivery of supportive services through the department of Social and
Rehabilitation Services.*

12 (e) (5) "Fiduciary abuse" means a situation in which any person who
13 is the caretaker of, or who stands in a position of trust to, an adult, takes,
14 secretes, or appropriates their money or property, to any use or purpose
15 not in the due and lawful execution of such person's trust or benefit.

16 (f) (6) "In need of protective services" means that an adult is unable
17 to provide for or obtain services *and supports* which are necessary to maintain physical
18 or mental health or both.

19 (g) (7) "Services *and supports* which are necessary to maintain physical or mental
20 health or both" include, but are not limited to, the provision of medical
21 care for physical and mental health needs, *assistance with* the relocation of an adult to a
22 ~~facility or institution~~ *residence* ~~able to~~ *which provides* ~~offer~~ *for obtaining* such care,
assistance in personal hy-

23 giene, food, clothing, adequately heated and ventilated shelter, protection
24 from health and safety hazards, protection from maltreatment the result
25 of which includes, but is not limited to, malnutrition, deprivation of ne-
26 cessities or physical punishment and transportation necessary to secure
27 any of the above stated needs, except that this term shall not include
28 taking such person into custody without consent except as provided in
29 this act.

30 (h) (8) "Protective services" means services provided by the state or
31 other governmental agency or by private organizations or individuals
32 which are necessary to prevent abuse, neglect or exploitation. Such pro-
33 tective services shall include, but shall not be limited to, evaluation of the
34 need for services, assistance in obtaining appropriate social services, and
35 assistance in securing medical and legal services.

36 (i) (9) "Caretaker" means a person who has assumed the respons-
37 ibility, whether legally or not, for an adult's care or financial management
38 or both.

39 (j) (10) "Secretary" means the secretary of social and rehabilitation
40 services.

41 (k) (11) "Report" means a description or accounting of an incident
42 or incidents of abuse, neglect or exploitation under this act and for the
43 purposes of this act shall not include any written assessment or findings.

1 (†) (12) "Law enforcement" means the public office which is vested
 2 by law with the duty to maintain public order, make arrests for crimes,
 3 investigate criminal acts and file criminal charges, whether that duty ex-
 4 tends to all crimes or is limited to specific crimes.
 5 (‡) (13) "Involved adult" means the adult who is the subject of a
 6 report of abuse, neglect or exploitation under this act.
 7 (§) (14) "Legal representative," "financial institution" and "govern-
 8 mental assistance provider" shall have the meanings ascribed thereto in

9 K.S.A. 39-1401, and amendments thereto.

(15) "Protective and Advocacy Services" means the organization designated by
 the Governor to protect the rights of individuals with disabilities, in accordance
 with 29 U.S.C. 732.

(16) "Director" means the director of the Protective and Advocacy Services
 agency as designated under 29 U.S.C. 732, or the director's designee.

10 ~~No person shall be considered to be abused, neglected or exploited or~~
 11 ~~in need of protective services for the sole reason that such person relies~~
 12 ~~upon spiritual means through prayer alone for treatment in accordance~~
 13 ~~with the tenets and practices of a recognized church or religious denom-~~
 14 ~~ination in lieu of medical treatment.~~

15 (15) "Multidisciplinary team" means a group of persons appointed by
 16 the court under section 1, and amendments thereto, that has knowledge
 17 of the circumstances of an adult in need of protective services.

18 Sec. 4. K.S.A. 2004 Supp. 39-1411 and 39-1430 are hereby repealed.

19 Sec. 5. This act shall take effect and be in force from and after its
 20 publication in the statute book.

(TILRC Amendments, supplemental to HB 2038)

39-1431

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT
PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN
PERSONS

39-1431. Abuse, neglect or exploitation of certain adults; reporting abuse, neglect or exploitation or need of protective services; persons required to report; penalty for failure to report; posting notice of requirements of act. (a) Any person who is licensed to practice any branch of the healing arts, a licensed psychologist, a licensed master level psychologist, a licensed clinical psychotherapist, the chief administrative officer of a medical care facility, a teacher, a licensed social worker, a licensed professional nurse, a licensed practical nurse, a licensed dentist, a licensed marriage and family therapist, a licensed clinical marriage and family therapist, licensed professional counselor, licensed clinical professional counselor, registered alcohol and drug abuse counselor, a law enforcement officer, a case manager, a guardian or conservator, a bank trust officer, a rehabilitation counselor, a holder of a power of attorney, an owner or operator of a residential care facility, an independent living counselor and the chief administrative officer of a licensed home health agency, the chief administrative officer of an adult family home and the chief administrative officer of a provider of community services and affiliates thereof operated or funded by the department of social and rehabilitation services or licensed under K.S.A. 75-3307b and amendments thereto who has reasonable cause to believe that an adult is being or has been abused, neglected or exploited or is in need of protective services shall report, immediately from receipt of the information, such information or cause a report of such information to be made in any reasonable manner. An employee of a domestic violence center shall not be required to report information or cause a report of information to be made under this subsection. Other state agencies receiving reports that are to be referred to the ~~department of social and rehabilitation services~~ Protective and Advocacy agency, shall submit the report to the Protective and Advocacy agency ~~the department~~ within six hours, during normal work days, of receiving the information. Reports shall be made to ~~the department of social and rehabilitation services~~ the Protective and Advocacy agency during the normal working week days and hours of operation. Reports shall be made to law enforcement agencies during the time ~~social and rehabilitation services~~ the Protective and Advocacy agency are not in operation. Law enforcement shall submit the report and appropriate information to the ~~department of social and rehabilitation services~~ Protective and Advocacy agency on the first working day that ~~social and rehabilitation services~~ the Protective and Advocacy agency is in operation.

(b) The report made pursuant to subsection (a) shall contain the name and address of the person making the report and of the caretaker caring for the involved adult, the name and address of the involved adult, information regarding the nature and extent of the abuse, neglect or exploitation, the name of the next of kin of the involved adult, if known, and any other information which the person making the report believes might be helpful in the investigation of the case and the protection of the involved adult.

(c) Any other person having reasonable cause to suspect or believe that an adult is being or has been abused, neglected or exploited or is in need of protective services may report such information to the ~~department of social and rehabilitation services-~~ the Protective and Advocacy agency. Reports shall be made to law enforcement agencies during the time ~~social and rehabilitation services~~ the Protective and Advocacy agency are not in operation.

(d) A person making a report under subsection (a) shall not be required to make a report under K.S.A. 39-1401 to 39-1410, inclusive, and amendments thereto.

(e) Any person required to report information or cause a report of information to be made under subsection (a) who knowingly fails to make such report or cause such report not to be made shall be guilty of a class B misdemeanor.

(f) Notice of the requirements of this act and the ~~department-~~ agency to which a report is to be made under this act shall be posted in a conspicuous place in every adult family home as defined in K.S.A. 39-1501 and amendments thereto and every provider of community services and affiliates thereof operated or funded by the department of social and rehabilitation services or other facility licensed under K.S.A. 75-3307b and amendments thereto.

39-1433

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN PERSONS

39-1433. Same; duties of ~~department of social and rehabilitation services~~ Protective and Advocacy agency; personal visit; investigation and evaluation; findings referred to appropriate regulating authority, when; information provided to certain persons. (a) ~~The department of social and rehabilitation services-~~ Protective and Advocacy agency upon receiving a report that an adult is being, or has been abused, neglected, or exploited or is in need of protective services, shall:

(1) When a criminal act has occurred or has appeared to have occurred, immediately notify the appropriate law enforcement agency;

(2) make a personal visit with the involved adult:

(A) Within 24 hours when the information from the reporter indicates imminent danger to the health or welfare of the involved adult;

(B) within three working days for all reports of suspected abuse, when the information from the reporter indicates no imminent danger;

(C) within five working days for all reports of neglect or exploitation when the information from the reporter indicates no imminent danger.

(3) Complete, within 30 working days of receiving a report, a thorough investigation and evaluation to determine the situation relative to the condition of the involved adult and what action and services or supports, if any, are required. The evaluation shall include, but not be limited to, consultation with those individuals having knowledge of the facts of the particular case. If the alleged perpetrator is licensed, registered or otherwise regulated by a state agency, such state agency also shall be notified immediately.

(4) Prepare, upon completion of the investigation of each case, a written assessment which shall include an analysis of whether there is or has been abuse, neglect or exploitation, recommended action, a determination of whether protective services are needed, and any follow-up.

(b) ~~The secretary of social and rehabilitation services~~ director shall forward any finding of abuse, neglect or exploitation alleged to have been committed by a provider of services licensed, registered or otherwise authorized to provide services in this state to the appropriate state authority which regulates such provider. The appropriate state regulatory authority may consider the finding in any disciplinary action taken with respect to the provider of services under the jurisdiction of such authority.

(c) ~~The department of social and rehabilitation services~~ Protective and Advocacy agency shall inform the complainant, upon request of the complainant, that an investigation has been made and if the allegations of abuse, neglect or exploitation have been substantiated, that corrective measures will be taken.

(d) ~~The department of social and rehabilitation services~~ Protective and Advocacy agency may inform the chief administrative officer of community facilities licensed pursuant to K.S.A. 75-3307b and amendments thereto of confirmed findings of resident abuse, neglect or exploitation.

History: L. 1989, ch. 129, § 4; L. 1998, ch. 200, § 10; July 1.

39-1434

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN PERSONS

39-1434. Statewide register; report, assessment or written evaluation not public record; disclosure of certain individuals prohibited. (a) ~~The secretary of social and rehabilitation services~~ director shall maintain a statewide register of the reports, assessments received and the analyses, evaluations and the actions recommended. The register shall be available for inspection by personnel of the ~~department of social and rehabilitation services~~ Protective and Advocacy agency and as provided in K.S.A. 2000 Supp. 65-6205 and amendments thereto.

(b) Neither the report, assessment or the written evaluation analysis shall be deemed a public record or be subject to the provisions of the open records act. The name of the person making the original report or any person mentioned in such report shall not be disclosed unless the person making the original report specifically requests

or agrees in writing to such disclosure or unless a judicial proceeding results therefrom. No information contained in the statewide register shall be made available to the public in such a manner as to identify individuals.

39-1435

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN PERSONS

39-1435. Same; assistance of state departments and agencies and other public and private agencies; law enforcement assistance. In performing the duties set forth in this act, the ~~secretary of social and rehabilitation services~~ director may request the assistance of all state departments, agencies and commissions and may utilize any other public or private agencies, groups or individuals who are appropriate and who may be available. Law enforcement shall be contacted to assist the ~~department of social and rehabilitation services~~ Protective and Advocacy agency when the information received on the report indicates that an adult, residing in such adult's own home or the home of another individual, an adult family home, a community development disabilities facility or residential facility is in a life threatening situation.

39-1436

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN PERSONS

39-1436. Same; access to relevant records; confidentiality requirements. (a) Any person or agency which maintains records relating to the involved adult which are relevant to any investigation conducted by the ~~department of social and rehabilitation services~~ Protective and Advocacy agency under this act shall provide, upon the written consent of the involved adult or the involved adult's guardian, the ~~department of social and rehabilitation services~~ Protective and Advocacy agency with the necessary records to assist in investigations. Any such information shall be subject to the confidentiality requirements of K.S.A. 39-1434 and amendments thereto.

(b) The ~~department of social and rehabilitation services~~ Protective and Advocacy agency shall have access to all relevant records in accordance with the provisions of subsection (a).

39-1438

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN PERSONS

39-1438. Same; when protective services or support not provided. If an involved adult does not consent to the receipt of reasonable and necessary protective

services, or if such adult withdraws the consent, such services or supports shall not be provided or continued.

39-1440

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN PERSONS

39-1440. Same; review subsequent to authorization of protective services; continuation of protective services; reevaluations. Subsequent to the authorization for the provision of necessary protective services, the secretary *director* shall initiate a review of each case within 60 days to determine where continuation of, or modification in, the services or support provided is warranted. A decision to continue the provision of such services or support shall comply with the consent provisions of this act. Reevaluations of the need for protective services shall be made not less than every six months thereafter.

39-1441

Chapter 39.--MENTALLY ILL, INCAPACITATED AND DEPENDENT PERSONS;SOCIAL WELFARE

Article 14.--REPORTING ABUSE, NEGLECT OREXPLOITATION OF CERTAIN PERSONS

39-1441. Same; authority of secretary of social and rehabilitation services the director; toll-free telephone number. The authority of the secretary *director* under this act shall include, but is not limited to, the right to initiate or otherwise take those actions necessary to assure the health, safety, civil rights, personal liberty and welfare of an involved adult, subject to any specific requirements for individual consent of the adult. The secretary may establish a toll-free telephone number for the reporting of instances of abuse, neglect or exploitation under this act. When contacting the involved adult, witnesses and persons subject to the complaint, any persons investigating the complaint on behalf of the Protection and Advocacy agency shall be required to provide a statement that information obtained through such contact will be used for purposes of investigating allegations of abuse and/or neglect, and may be used for prosecution therefore.



Disability Rights Center of Kansas

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Life, Liberty and Safety:

2005 Policy Initiatives of the Disability Rights Center of Kansas

Life.

Limiting a Guardians Ability to Withhold & Withdraw Medical Treatment

Kansas guardianship law makes it far too easy for a Guardian to take the life of a person with a disability by withholding or withdrawing medical treatment. The current Kansas Law (K.S.A. 59-3075 (7) (C)) empowers a guardian to remove life preserving medical treatment, including food and water, from their ward (person with a disability) if certified by two physicians that the person relies on a medical treatment referred to as “artificial means,” e.g., feeding tubes, portable respirators, kidney dialysis, and that their disabilities (generally referred to as “medical condition”) will not improve. Under the statute it is not required that the person with disabilities be in a permanent, persistent catatonic state to have life sustaining food, water or medical care withdrawn. The person with a disability, whose life sustaining medical treatment is being withheld, does not have a say in what happens to them. Under current law, they have no due process rights. The Kansas Legislature needs to change that.

DRC proposes legislation that would establish an automatic due process system for individuals with disabilities under guardianship to ensure that their intent regarding withdrawal, or withholding of food, water and medical care is honored. Establishing a required due process system would include appointment of an attorney to represent the person with disabilities, an examination of all of the facts including the individual’s wishes, a hearing and a final decision by the court.

Protecting All Kansans with Mental Retardation from the Death Penalty

The recent Kansas Supreme Court Decision that ruled a portion of the death penalty law is unconstitutional underscores the importance of having a law that will clearly withstand future constitutional challenges. DRC is proposing to clarify the Kansas death penalty law to ensure that all persons with significant intellectual functioning disabilities (generally known to the public as mental retardation) are protected from the death penalty, regardless of the onset of the disability. Nearly 80% of Americans support preventing persons with a significant intellectual functioning disability (like mental retardation) from being executed by the State. DRC supports:

- Eliminating the “age of onset” language in current law regarding mental retardation. If a person has significant intellectual functioning disability (defined as two or more standard deviations below the norm in Kansas law) it should not matter when the intellectual functioning disability (or “retardation”) first occurred (at birth, during the developmental years or later in life because of significant head trauma, etc.).
- Deleting the constitutionally questionable “nexus” language that ties the disability to understanding the criminality of ones actions.

- Ensuring the determination of mental retardation can be made pre-trial (like 2004 SB 355)
- Including a post-trial verdict on the finding of mental retardation (like 2004 SB 355).
- Adopting the Judicial Council's recommendations on the Death Penalty and persons with mental retardation/cognitive disability.

DRC's proposal is nearly identical to the bill endorsed by the 2004 Interim Committee on Judiciary.

LIBERTY & SAFETY.

Lessons from the Kaufman House Case:

Eliminating Conflicts of Interest with Guardianship & Protecting Persons with Disabilities from Abuse, Neglect or Exploitation

The Kaufman House case, in Newton Ks, has brought the wrong kind of national attention to Kansas. Kansas policy makers need to learn from this case and change Kansas law to eliminate conflicts of interests of Guardianship/Conservatorship and better defend persons with disabilities from abuse, neglect and exploitation. Arlan and Linda Kaufman have been arrested and indicted by a federal grand jury with 34 counts of criminal charges, from compelling mentally ill residents of Kaufman House to perform sexually explicit acts to defrauding taxpayers by billing Medicare for therapy sessions never provided. These 34 counts carry a cumulative charge of 325 years in prison and \$8.5 million in damages. Given the severity of these charges, hopefully justice will prevail in this case.

A Kansas State Board of Nursing public report states that videotape evidence, seized from Mr. Kaufman's bedroom, vividly shows Mr. Kaufman sexually touching the genitals of both male and female patients, including a woman with mental illness for whom he was court appointed Guardian & Conservator. In addition to this report of sexual abuse, Mr. Kaufman was also a service provider (therapist) for this woman with mental illness, he was her landlord for housing and had other financial conflicts of interest. Mr. Kaufman was the: 1) Guardian/Conservator, 2) therapist, 3) landlord and 4) alleged sexual abuser of the woman for whom he was appointed to protect. These are clear conflicts of interest.

Three critical lessons learned & Three needed changes to Kansas law:

1. **Prevent Conflict of Interest with Guardians/Conservators** – DRC will be seeking legislation to prevent Guardians/Conservators from having conflicts of interests with persons with disabilities for whom they are Guardian/Conservator, to prevent instances like the Kaufman case from ever happening again. The Conflict of Interest standards of the National Guardianship Association will be used as the starting point. The NGA states that Guardians/Conservators should avoid even the appearance of a conflict of interest and should provide no direct service to the ward, so there is no financial, agency or personal conflict of interest.
2. **Increase Accountability with Small, Unlicensed Group Homes** – Ensure accountability by requiring unlicensed group homes that serve persons with disabilities to meet some minimum standards (licensure/registration/certification) and require access for investigators of abuse & neglect (law enforcement, SRS/ Adult Protective Services, DRC, etc.).
3. **Access to Justice for Persons with Disabilities** – To better protect the rights of persons with disabilities, Kansas should follow the lead of roughly half of the states that provide state support of an independent protection and advocacy system, including independent abuse and neglect investigations. This should include a specific abuse and neglect unit to respond to both the civil/legal rights needs and criminal prosecution.

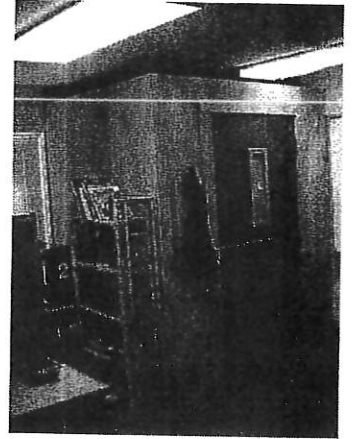
SAFETY.

Special Education Accountability Reform

Funding Kansas Schools is clearly a major issue of the 2005 Legislature. Additionally, Accountability of the expenditure of those dollars should also be a key issue. DRC and a coalition of numerous disability organizations believe that discussion of School Finance must happen concurrently with Accountability reforms. This coalition will be asking for a change in law to enact the following Accountability reforms to benefit the 65,000 Kansas students in Special Education.

Accountability to Limiting Seclusion Rooms & Restraint –

There is currently no state law or policy to place limits on placing children in seclusion rooms or harmful restraints. Accountability in the use of seclusion and restraint must be interjected by the Legislature through state law to establish a statewide policy. Kansas regulates these tactics in state institutions (KNI, Osawatomie, etc.), but not in schools. Persons in state institutions have more protection from seclusion and restraint than our school children. State policy needs to hold schools accountable for the use of seclusion rooms and restraint. A consistent, statewide policy needs to be passed that limits use of seclusion and restraint used on students with disabilities in special education and instead instills the evidenced-based practice of positive behavior supports in Kansas schools.



Increase Advocacy & Training for Parents to Make System Less Adversarial –

Accessing Special Education services is complex, confusing and intimidating to parents of students with disabilities. The law and rights afforded to students with disabilities is complex. Parents of students with disabilities want and deserve greater supports, through more access to advocacy and training, to help navigate this confusing process. Along with providing greater funding support of public schools, the Legislature should also provide additional state funding for independent supports and services to assist parents to more effectively participate, better navigate, and advocate for their child's rights under Special Education. This training & advocacy will make the system more accountable, and less confusing and adversarial for the parents of the 65,000 students with disabilities in Special Education. Educated parents make for a less adversarial system.

According to a KSDE 2002 report and a University of Kansas Beach Center study found that even school personnel admitted that, the "processes required by law overwhelms and intimidates parents." Those same reports describe current interactions between schools and parents as "battles, fights, face-offs and bloodbaths."

Fully Fund Special Education & Tie Accountability to the Needs of the Youth –

If the Legislature increases funding for K-12 public schools, the first new dollars spent should be targeted to Special Education. Special Education should be fully funded and Kansas should develop a new way that bases funding on the true support needs of students with disabilities, not the needs of the administration (numbers of teachers and percentages of excess costs). The promise in federal special education law is that each Individualized Education Program (IEP) is designed on *individual* support needs of the student. However, Kansas' way of funding special education focuses on the system instead of the student with a disability.

6

House Corrections and Juvenile Justice Committee

February 2, 2005

by Sue Lockett

HB 2038 – Establishment of an adult multidisciplinary team

Chairman Loyd and members of the Committee, because of a prior commitment, I was unable to appear before you today in support of HB 2038. These are my written comments. I am Sue Lockett and I serve on the Board of Directors of The Prairie Advocacy Center, Inc. whose mission is to provide a comprehensive and integrated approach to the services of, and advocacy for, child and adult victims of crime and violence. I am also one of the founders of the Shawnee County Multidisciplinary (MDT) Child Protection Team established in 1991.

Last year Prairie Advocacy Center, Inc. received a grant from Topeka Community Foundation to fund the formation, training, and facilitation of an Adult MDT. The MDT would include professionals from multiple disciplines and agencies, to serve as a resource to community agencies that refer cases of adults in need of protective services. The purpose of the adult multidisciplinary team is to offer advice and consultation; advocate for resources and funding to fill identified system gaps and barriers in services; and to advocate for adult safety and well-being.

Confidentiality is very important to the integrity of the team. All members of the team sign agreements stating that they will not share information revealed during meetings to anyone outside the group. The bill allows the team to have a free exchange of information between and among members.

We would draw upon our 13 years experience and expertise with the Shawnee County Multidisciplinary (MDT) Child Protection Team. Attached is a list of members of the Child Protection Team who support this bill.

The following organizations are also in support of HB 2038: SRS, Topeka Coalition on Adult Abuse, United Way *Success 4 Life*, Gatekeepers, and Jayhawk Area Agency on Aging.

All agencies would donate their time and expertise. There is no cost to the State of Kansas.

Passage of this bill is another community tool to help reduce adult abuse, neglect, exploitation and fiduciary abuse. I respectfully encourage this committee to act favorably on HB 2038. Thank you.

Sue Lockett: A founder of the Shawnee County Multidisciplinary Child Protection Team; member of the Board of Directors of The Prairie Advocacy Center, Inc.; past Executive Director of CASA; and current president of the Shawnee County Family Resource Center Board.

Members of the Shawnee County Multidisciplinary
Child Protection Team supporting HB 2038

Joy Thomas, R.N., S.A.N.E.-A
SANE/SARP Supervisor
Stormont Vail HealthCare

Christine Oesterreich, LSCSW
Treatment Coordinator
DCCCA Family Preservation Services

Julie Reid, MS, CPM
Executive Director
Shawnee County Family Resource Center

Terri Jowett, MSW
Program Coordinator
Prairie Advocacy Center, Inc.

Kelly Stephens
Director
Prairie Advocacy Center, Inc.

Susan Voorhees, PsyD
Private Practice

Reggi Greco
TARC

Cathy Leonhart
Director County Court Services
Third Judicial District

Brenda Gomez, BSW
Family Resource Center

Sharolyn Dugger, MSW
Executive Director
CASA



KANSAS

DEPARTMENT ON AGING
PAMELA JOHNSON-BETTS, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Jan. 31, 2005

TO: House Committee on Corrections and Juvenile Justice

FROM: Martin Kennedy
Director of the Budget and Governmental Affairs

RE: HB 2038/Multidisciplinary teams for adults

Chairman Loyd and members of the House Committee on Corrections and Juvenile Justice, thank you for the opportunity to submit written testimony in support of the establishment of multidisciplinary teams for adults as proposed in HB 2038.

The responsibilities of the Kansas Department of Aging are three-pronged – the department is an advocate for seniors, a purchaser of services and a regulator of services provided by adult care homes. Our philosophy encourages collaborations that strengthen the department's capability to be responsive to the social, health care, nutritional, housing and transportation needs of the senior citizens of Kansas.

The establishment of multidisciplinary teams as proposed in HB 2038 provides communities another tool to assure that seniors who may be abused or neglected, or at risk of being abused or neglected, have the support and resources needed to keep their senior citizens safe and secure.

Thank you again for the opportunity to express our support for this bill.

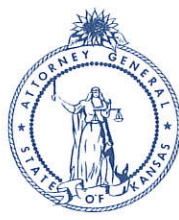
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House C&JJ
2-2-05
Attachment 7



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PHILL KLINE
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WRITTEN TESTIMONY SUBMITTED TO THE
HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
REGARDING
HOUSE BILL No. 2038

Chairman Loyd and Members of the Committee:

Across the United States, multidisciplinary task forces have been forming and cooperating in advocacy on behalf of elders, including protecting elders from abuse and prosecuting those who commit crimes against them. Task forces addressing these important issues already exist here in Kansas. (Wichita TRIAD, Topeka Task Force, I believe Johnson County). The Attorney General certainly supports and actively assists in the creation of task force groups which include those persons and disciplines listed in section (b)(15) of K.S.A. 39-1430 of this proposed bill. (Last page, see list of disciplines). These advisory groups often address the goals stated in that proposed section (last page, see list of purpose).

Multidisciplinary advisory groups provide a great service and resource to the community. They should be recognized and promoted. We applaud their impact on the community at large and particularly on professionals working in the area of elder abuse. However, these collaborative task forces should be advisory and not investigative in nature. We caution that investigations of specific allegations of abuse, neglect, and exploitation should not be handled by committee. Investigations into specific allegations of abuse should remain the responsibility of SRS, KDOA & KDHE, and law enforcement.

Currently, crimes against elders may be reported directly to law enforcement. Suspected adult abuse (including neglect, financial, physical, sexual, emotional, fiduciary, and other abuse) is reported to SRS or to KDOA/KDHE, depending on the venue, for initial review. Obviously, many types of suspected abuse involve criminal activity. If a crime has occurred or has appeared to have occurred, those agencies are to immediately contact law enforcement. Given the broad definition of abuse and the number applicable criminal statutes, this means a large number of cases of reported abuse are or should be reported to law enforcement. Therefore, much of the investigative material referenced in this bill may be obtained through existing criminal investigation procedures.

For example, section 1(c) of the proposed bill requires a special application by the agency to the Court, and finding of probable cause by the Court, to obtain documents,

reports, or information related to the investigation. We question how this does not duplicate or would improve upon current methods of obtaining information such as inquisitions, subpoenas, or search warrants. Additionally, this bill gives written notice of an Order of Production to interested parties prior to delivery of information. Notice gives the alleged perpetrator a "heads up" about the investigation and an opportunity to dispose of evidence.

If SRS/KDHE/KDOA and law enforcement are jointly investigating a situation of alleged abuse, we agree there should be a cooperative interagency sharing of information. However, "free exchange of information" (New section 1(a)) with non-investigatory personnel may compromise an investigation and certainly raises issues of confidentiality.

Elder abuse is a significant problem in Kansas. It is imperative that people from all disciplines work together to recognize it, stop it, and punish it. Multidisciplinary task forces should continue as a forum for discussion and information, law enforcement and designated agency investigators should continue their pursuit of individual offenders.

Respectfully submitted,

OFFICE OF KANSAS ATTORNEY GENERAL
PHILL KLINE


Kevin A. Graham
Assistant Attorney General



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HB 2038

Testimony to the House Corrections and Juvenile Justice Committee

February 2, 2005

Chairman Loyd and members of the committee, my name is Michael Donnelly. I am the Director of Policy and Outreach for the Disability Rights Center of Kansas, formerly Kansas Advocacy and Protective Services (KAPS). The Disability Rights Center of Kansas (DRC) is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As such, DRC is the officially designated protection and advocacy organization for Kansans with disabilities. DRC is a private, 501(c)(3) nonprofit corporation, independent of both state government and disability service providers. As the federally designated protection and advocacy organization for Kansans with disabilities our task is to assist persons with disabilities, regardless of age or disability, to live in the most integrated setting possible, and to ensure that they receive the appropriate medical care, support services and treatment in a safe and effective manner as promised by federal, state and local laws. That responsibility includes protecting the rights of individuals with disabilities who are alleged to be in need of protection, including the responsibility to investigate allegations of abuse, neglect and exploitation.

HB 2038 presents an opportunity to implement a great concept, a coordinated and seamless system of communication, planning and assistance to adults in Kansas communities. The concept that the community wide service system will be asked to coordinate and communicate to assist a person in need so that the individual can remain living independently in the community with the supports and services they need is simple, yet amazing. In communities where service providers have come together to create and maintain such a coordinated system children, adults

and families have experienced fewer CINC cases, improved services to adults and families, and a healthier community.

With that said, the DRC has concerns about how the multi-disciplinary team would actually work as it relates to the rights of Kansans with disabilities. As written, HB 2038 expands the power of the state, e.g., Adult Protective Services, to supersede a person's right to consent to the state's involvement in their life, and in DRC's experience, inappropriately interfere in that persons life. Current law (KSA 39-1430) places limits on the power of the state to interfere without consent and those limits should not be eroded by instituting a multi-disciplinary team as proposed in HB 2038. Current law does not prohibit any community from establishing a multi-disciplinary team like the one conceived in HB 2038, it simply would require that the individual being discussed provide consent, or that the court has received and granted a petition for guardianship with the guardian consenting. Two simple, yet important safeguards for our citizens.

One of the most sacred of rights that all Kansans enjoy is their right to privacy. Our banks, our healthcare providers, our pharmacists, the driver's license agency and other service providers are prohibited from sharing information about us without our consent (Section 2, (e)). Secondly, each of us has an inherent right to choose our own lifestyle without risk of interference, or restriction by the state. Both of these rights must be preserved.

As written, HB 2038 violates that promise of privacy as it relates to a person with disabilities and others who someone has alleged to be unable to manage or care for themselves. The Bill as proposed does not require informed consent of the individual before the multi-disciplinary team discusses them, or their situation. HB 2038, Section 2 (e) provides for a "free exchange of information" among the Team. No releases of information are required. The team is also given the power to request access to personal and private records and information without the persons consent. Further, the amendments being proposed to strike most of Section 1, (b) further eliminates the state's responsibility to obtain consent or petition for guardianship as currently required. Instead, the proposed amendments would give the Team carte blanche to discuss whomever they choose to discuss with, or without that persons knowledge or consent.

So how do we take a great concept, e.g., the voluntary multi-disciplinary team approach to problem solving, and do it in such a way that every persons' rights are honored? DRC recommends that HB 2038 hold fast to these principles:

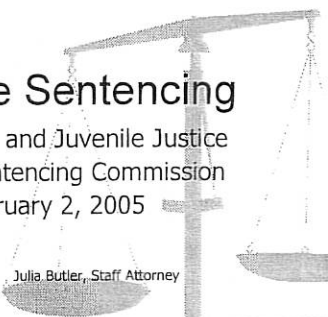
1. No case will be brought to the Team without the informed consent of the individual whose case is being discussed.
2. Every alternative to guardianship as defined in KSA 59-3051 (b) will be explored and utilized prior to the any petition for guardianship is filed.
3. Do not create a new compulsory legal process for Adult Protective Services to carry out their responsibilities. Instead use the process already in place, guardianship.
4. The Team should be statutorily held to the highest standards of privacy and confidentiality, e.g., what's discussed by the team stays with the team.
5. The Legislature should ensure by statute that the Team must enforce the individual's right to receive necessary and appropriate services in the least restrictive setting.

In keeping with these principles DRC requests that HB 2038 be amended as follows:

1. ~~Strike New Section 1 (b) (3), for whom the secretary of social and rehabilitation services or the secretary's designee determines that a petition for conservatorship, guardianship or both should be filed, according to K.S.A. 39-1405, and amendments thereto, or K.S.A. 39-1437, and amendments thereto.~~ The Secretary already has the authority to pursue guardianship in those cases where he / she believes it is necessary.
2. Insert language in New Section 1 (a) that more clearly defines the responsibilities of the Team.
 - a. New Section 1 (a) (i), The Team is responsible to keep all matters confidential and private.
 - b. New Section 1 (a) (ii), No recommendations made by the Team shall be used to violate the individual's right to receive necessary and appropriate services in the least restrictive setting.

As I stated earlier, every Kansas community could benefit from a coordinated and communicative system of supports and services for children, adults and families. The concept is one that deserves pursuit. However, the practical implementation of the Team approach is inherent with risks that must be managed. Please take the time to enact the right

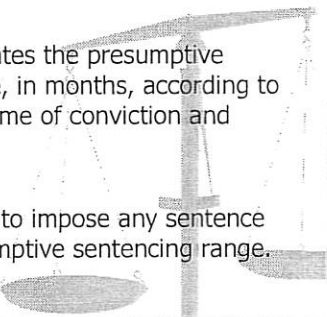
measures that both support adults in need of supports or services, and at the same time preserving their rights to privacy and liberty to chose a lifestyle and manner of living that you or I might not choose.



Departure Sentencing

Corrections and Juvenile Justice
Kansas Sentencing Commission
February 2, 2005

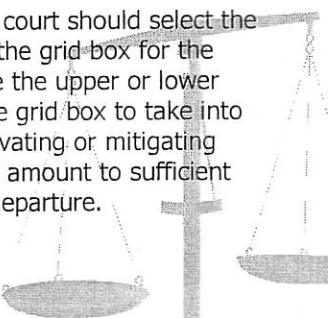
Julia Butler, Staff Attorney



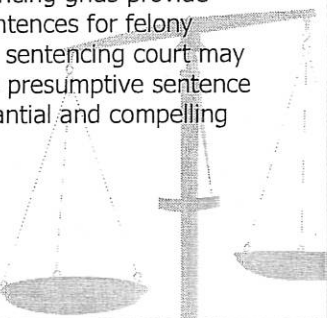
Determining the Sentence

Presumptive Sentencing Range

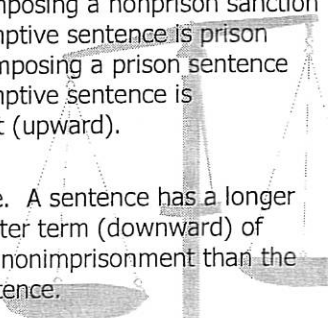
- Each grid box states the presumptive sentencing range, in months, according to the offender's crime of conviction and criminal history.
- The court is free to impose any sentence within the presumptive sentencing range.



- At sentencing, the court should select the middle number in the grid box for the usual case and use the upper or lower numbers within the grid box to take into account any aggravating or mitigating factors that do not amount to sufficient justification for a departure.

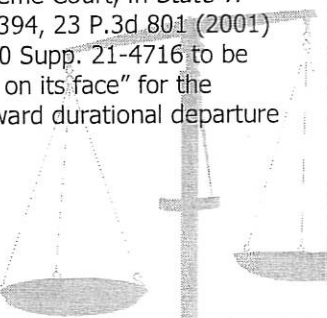


- While the sentencing grids provide presumptive sentences for felony convictions, the sentencing court may depart from the presumptive sentence based on substantial and compelling reason.



Types of Departures

- Dispositional – imposing a nonprison sanction when the presumptive sentence is prison (downward) or imposing a prison sentence when the presumptive sentence is nonimprisonment (upward).
- Durational – time. A sentence has a longer (upward) or shorter term (downward) of imprisonment or nonimprisonment than the presumptive sentence.



- The Kansas Supreme Court, in *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) found K.S.A. 2000 Supp. 21-4716 to be "unconstitutional on its face" for the imposition of upward durational departure sentences.

State v. Gould

- Convicted of three counts of abuse of a child, a severity level 5 person felony.
- Presumptive sentencing range is 31-32-34
- State moved for upward departure under K.S.A. 2000 Supp. 21-4716 citing:
 - the victims were Gould's children;
 - the abuse of one of the victims was so severe that he will never walk, talk, or care for himself; and
 - Gould showed no emotion or remorse until she was found guilty.

- The district court found three aggravating factors under K.S.A. 2000 Supp. 21-4716 and granted the State's motion.
- The court imposed two 68 month sentences and ordered the sentences to run consecutively.
- Gould appealed her sentence claiming that her sentence violated the United States Supreme Court decision in *Apprendi v. New Jersey*.

- Citing the Sixth and Fourteenth Amendments in *Apprendi*, the US Supreme Court concluded:

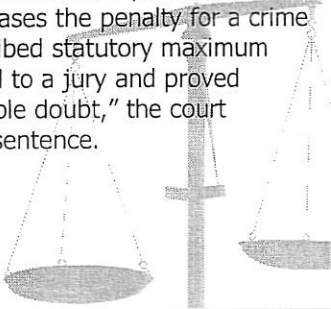
"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

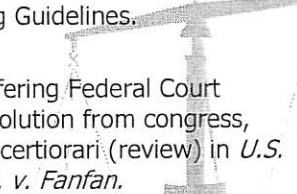
- The statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.
- In *Gould*, the court not the jury, made findings as to the aggravating factors which increased Gould's sentence beyond the statutory maximum.
- Because *Apprendi* requires the jury to make the findings to increase the sentence beyond a the statutory maximum, and K.S.A. 2000 Supp. 21-4716 requires the court to make the findings, the Kansas law authorizing upward departures was unconstitutional.

- In 2002 the Kansas legislature amended K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 to provide a procedure that allows the jury to determine all of the aggravating factors that might enhance the maximum sentence, based on the reasonable doubt standard.

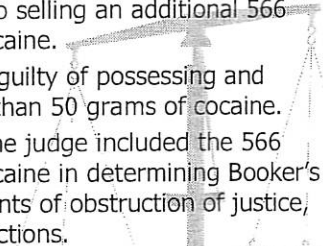
Blakely v. Washington

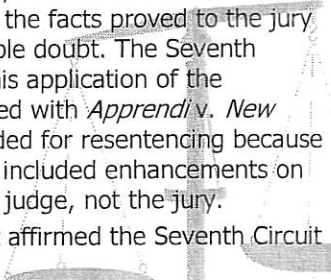
- Blakely pled to se cond-degree kidnapping with a firearm and domestic violence.
- The Washington Guidelines Sentencing range for that offense is 49 to 53 months.
- Judge determined that Blakely acted with "deliberate cruelty" and imposed a 90 month sentence.
- Blakely appealed claiming that his Sixth Amendment rights had been violated.

- 
- Citing their decision in *Apprendi*, which held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt," the court vacated Blakely's sentence.

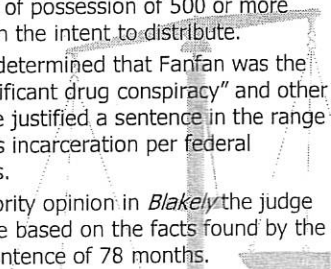
- 
- The Court's decision in *Blakely* did not directly challenge the constitutionality of the Federal Sentencing Guidelines.
 - However, after differing Federal Court opinions and a resolution from congress, the Court granted certiorari (review) in *U.S. v. Booker* and *U.S. v. Fanfan*.

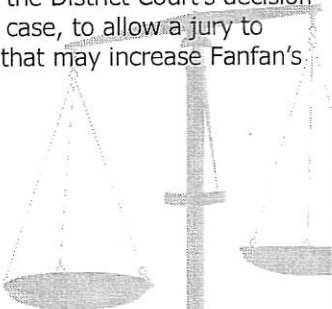
■ U.S. v. Booker

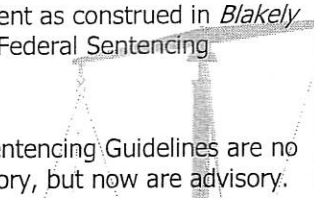
- 
- Had 92.5 grams of crack cocaine at the time of arrest. In a written statement to police, Booker admitted to selling an additional 566 grams of crack cocaine.
 - Jury found him guilty of possessing and distributing more than 50 grams of cocaine.
 - At sentencing the judge included the 566 grams of crack cocaine in determining Booker's sentence, two counts of obstruction of justice, and 23 prior convictions.

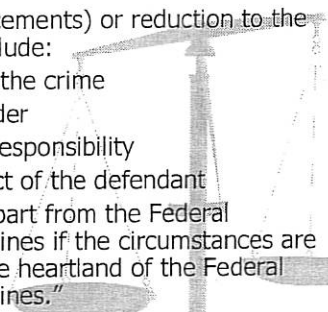
- 
- Because of the additional findings, the judge gave Booker a 30-year sentence instead of the 21-year, 10-month, sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. The Seventh Circuit held that this application of the Guidelines conflicted with *Apprendi v. New Jersey* and remanded for resentencing because Booker's sentence included enhancements on facts found by the judge, not the jury.
 - US Supreme Court affirmed the Seventh Circuit opinion.

■ U.S. v. Fanfan

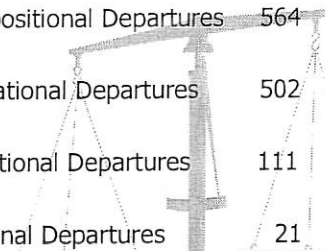
- 
- Was arrested with 1.25 kilograms of cocaine and 281.6 grams of cocaine base.
 - Jury convicted him of possession of 500 or more grams of cocaine with the intent to distribute.
 - The District Court determined that Fanfan was the "ring leader of a significant drug conspiracy" and other facts that would have justified a sentence in the range of 188 to 235 months incarceration per federal sentencing guidelines.
 - Relying on the majority opinion in *Blakely* the judge imposed the sentence based on the facts found by the jury, resulting in a sentence of 78 months.

- 
- The government appealed.
 - The Court vacated the District Court's decision and remanded the case, to allow a jury to decide the factors that may increase Fanfan's sentence.

- 
- The US Supreme Court concluded that the Sixth Amendment as construed in *Blakely* applied to the Federal Sentencing Guidelines.
 - The Federal Sentencing Guidelines are no longer mandatory, but now are advisory.

- 
- Federal Sentencing Guideline Components
- Every offense has a base level
 - Additions (enhancements) or reduction to the base level can include:
 - minimal role in the crime
 - first time offender
 - acceptance of responsibility
 - relevant conduct of the defendant
 - The Court can depart from the Federal Sentencing Guidelines if the circumstances are "totally outside the heartland of the Federal Sentencing Guidelines."

FY 2004 Departure Statistics in Kansas

- 
- Downward Dispositional Departures 564
 - Downward Durational Departures 502
 - Upward Dispositional Departures 111
 - Upward Durational Departures 21

(13,049 felony sentences in FY 2004)

Kansas Legislature

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21-4716

Chapter 21.--CRIMES AND PUNISHMENTS
PART III.--CLASSIFICATION OF CRIMES AND SENTENCING
Part 2.--Prohibited Conduct
Article 47.--SENTENCING GUIDELINES

21-4716. Imposition of presumptive sentence; jury requirements; departure sentencing; substantial and compelling reasons for departure; mitigating and aggravating factors. (a) Except as provided in subsection (b), the sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines for crimes committed on or after July 1, 1993, unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.

(b) Subject to the provisions of subsection (b) of K.S.A. 21-4718, and amendments thereto, any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt.

→ (c) (1) Subject to the provisions of subsection (b)(3) [(c)(3)], the following nonexclusive list of mitigating factors may be considered in determining whether substantial and compelling reasons for a departure exist:

(A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.

(B) The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense.

(C) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor.

(D) The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(E) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

→ (2) Subject to the provisions of subsection (b)(3) [(c)(3)], the following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

(A) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity which was known or should have been known to the offender.

(B) The defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense.

(C) The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim or the offense was motivated by the defendant's belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim whether or not the defendant's belief or perception was correct.

(D) The offense involved a fiduciary relationship which existed between the defendant and the victim.

(E) The defendant, 18 or more years of age, employed, hired, used, persuaded, induced, enticed or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto to commit any person felony regardless of whether the defendant knew the age of the individual under 16 years of age.

(F) The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender. As used in this subsection:

(i) "Crime of extreme sexual violence" is a felony limited to the following:

(a) A crime involving a nonconsensual act of sexual intercourse or sodomy with any person;

(b) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is 14 or more years of age but less than 16 years of age and with whom a relationship has been established or promoted for the primary purpose of victimization; or

(c) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is less than 14 years of age.

(ii) "Predatory sex offender" is an offender who has been convicted of a crime of extreme sexual violence as the current crime of conviction and who:

(a) Has one or more prior convictions of any crimes of extreme sexual violence. Any prior conviction used to establish the defendant as a predatory sex offender pursuant to this subsection shall also be counted in determining the criminal history category; or

(b) suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts constituting crimes of extreme sexual violence.

(iii) "Mental condition or personality disorder" means an emotional, mental or physical illness, disease, abnormality, disorder, pathology or condition which motivates the person, affects the predisposition or desires of the person, or interferes with the capacity of the person to control impulses to commit crimes of extreme sexual violence.

(G) The defendant was incarcerated during the commission of the offense.

In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement.

(3) If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the crime severity scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime.

(c)[(d)] In determining aggravating or mitigating circumstances, the court shall consider:

(1) Any evidence received during the proceeding;

(2) the presentence report;

(3) written briefs and oral arguments of either the state or counsel for the defendant;

and

(4) any other evidence relevant to such aggravating or mitigating circumstances that

the court finds trustworthy and reliable.

History: L. 1992, ch. 239, § 16; L. 1993, ch. 291, § 263; L. 1994, ch. 341, § 2; L. 1996, ch. 258, § 12; L. 2000, ch. 181, § 9; L. 2002, ch. 170, § 1; June 6.



January 21, 2005

MEMORANDUM TO ALL: **CHIEF JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT COURT EXECUTIVES
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES COURTS OF APPEALS
CLERKS, UNITED STATES DISTRICT COURTS
CHIEF PROBATION OFFICERS**

SUBJECT: Documentation Required to be Sent to the Sentencing Commission

On January 12, 2005, the Supreme Court issued its opinion in U.S. v. Booker, ___ S.Ct. ___, 2005 WL 50108 (Jan. 12, 2005), in which two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3553(b)(1) and 3742(e), were severed and excised. The opinion makes clear that “with these two sections excised...the remainder of the Act satisfies the Court’s constitutional requirements.” Booker at 16 (opinion of BREYER, J.).

This memorandum reiterates and emphasizes the importance of continuing to submit sentencing documents to the Sentencing Commission in accordance with the requirements of 28 U.S.C. § 994(w). This subsection of the statute requires the Chief Judge in each district to ensure that a report of sentence be submitted to the Commission within 30 days of entry of judgment. It also requires that five specific sentencing documents (judgment and commitment order, statement of reasons [including the reasons for any departures], any plea agreement, indictment or other charging document, and presentence report) be included with the report, along with any other information the Commission deems appropriate.

Booker makes clear that “the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court decisions, undertaking research, and revising guidelines accordingly. See 28 U.S.C.A. § 994.” Booker at 21 (opinion of BREYER, J.). The collection and analysis of sentencing data continue to be extremely important aspects of the Commission’s work. Since Booker makes no change in the document submission requirements of 28 U.S.C. § 994(w), it is imperative that all districts continue to make these submissions to the Commission in a timely manner.

It is particularly important that judges continue to comply with the requirements of 28 U.S.C. § 3553(c) by providing a complete statement of reasons for imposing the sentence. From the standpoint of the Commission and the judiciary as a whole it will be necessary to be able to capture information about any sentence that varies from the guidelines and the reasons for such a variance. Unless sentencing judges comply with § 3553(c) by giving specific reasons for sentences that vary from the guidelines, the Commission will be unable to provide complete information. Providing specific, detailed information in the statement of reasons will also assist the courts of appeals in reviewing sentences for reasonableness.

The documentation will be useful to the Judiciary, the Commission, and the Congress as we strive to continue to carry out the goals cited by the Supreme Court, to “provide certainty and fairness in meeting the purposes of sentencing [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.” Booker at 21 (opinion of BREYER, J.) (quoting 28 U.S.C. § 991(b)(1)(B)).

In the weeks that follow, the Commission will be working with the Criminal Law Committee to determine whether revisions to any of the sentencing forms would be advisable. In the meantime, we would ask courts to refrain from modifying locally the Statement of Reasons adopted by the Judicial Conference at its September 2003 session. JCUS-SEP 03, p. 18. If you have suggestions for revising any of these forms, please communicate them to Kim Whatley at the AO at e-mail address Kim_Whatley@ao.uscourts.gov who will compile them for consideration by the Committee and Commission.

Thank you for your prompt attention to this memorandum.



Ricardo H. Hinojosa
Chair, United States Sentencing Commission



Sim Lake
Chair, Criminal Law Committee of
the Judicial Conference of the
United States

U.S. SENTENCING COMMISSION COMMENTS ON HIGH COURT... Page 1 of 1

News Release

U.S. Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

For Immediate Release
January 13, 2005

Contact: Michael Courlander
Public Affairs Officer
(202) 502-4597

U.S. SENTENCING COMMISSION CHAIR COMMENTS ON HIGH COURT RULING

WASHINGTON, D.C. (January 13, 2005) — In response to yesterday's 5-4 decision by the Supreme Court about the federal sentencing guidelines in *United States v. Booker*, U.S. Sentencing Commission Chair Judge Ricardo H. Hinojosa issued the following statement:

"The United States Sentencing Commission is in the process of thoroughly reviewing the *Booker/Fanfan* decision released by the United States Supreme Court. Prior to the decision, we held hearings to allow judges, prosecutors, the defense bar, victims rights groups, and academics to testify before the Commission on the issues raised by *Blakely* and the federal sentencing cases pending before the Court at the time. Now that a decision has been issued, the Commission will work with Congress, members of the federal judiciary's Committee on Criminal Law, the Department of Justice, the defense bar, members of the criminal justice community, and other interested individuals to ensure that we have a fair and just sentencing system within the bounds of our Constitution. The U.S. Sentencing Commission is in a unique position to continue to assist all three branches of government during this period of transition. As the opinion in *Booker/Fanfan* states, the Commission 'remains in place' and will continue to fulfill its statutorily mandated functions such as collecting sentencing data from all federal district courts, amending the guidelines where appropriate, and conducting sentencing-related research."

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

JIM WARD

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SEDGWICK COUNTY
(316) 683-3609

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TOPEKA

ASSISTANT MINORITY LEADER

COMMITTEE ASSIGNMENTS
CORRECTIONS AND JUVENILE JUSTICE
JUDICIARY
LEGISLATIVE BUDGET
BASE REALIGNMENT CLOSURE
RECODIFICATION, REHAB. AND RESTORATION
PROJECT COMMITTEE
JOINT COMMITTEE ON CORRECTIONS AND
JUVENILE JUSTICE OVERSIGHT

**TESTIMONY OF REPRESENTATIVE JIM WARD
ON BEHALF OF HB 2162 BEFORE
HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE**

HB 2162 provides another sentencing alternative for Courts and Prosecutors. It allows for an upward departure (increase in the punishment) from the sentencing guidelines under certain circumstances. It is a tool that prosecutors may employ in those situations where the personal history of the defendant, or the circumstances of the crime justifies additional punishment beyond that provided for in the sentencing guidelines. Currently, Kansas law allows a downward departure and defendants use this provision to get lesser sentences, especially in drug cases. At this time, there is no method for upward departure in Kansas law.

HB 2162 sets out a procedure whereby the prosecution must give notice of their intent to request an enhanced sentence to a defendant at the beginning of a case. This notice would set out the type of departure requested (amount of additional punishment) and the reasons such departure is appropriate.

The bill then provides for a bifurcated trial. The first trial would determine the guilt of the defendant. Then a second trial, before the same jury, would be held to determine whether or not an upward departure is appropriate. At this second trial the prosecutor would present facts and circumstances supporting an upward departure (aggravating circumstances), the defendant would present facts and circumstances against such an upward departure (mitigating circumstances), and the jury would decide. If the jury is convinced that sufficient aggravating circumstances have been shown, the sentence for that defendant would be enhanced. If the jury determines that insufficient aggravating factors exist or sufficient mitigating circumstances exist, then that defendant's sentence would not be enhanced and they would be sentenced under the appropriate sentencing grid box. Should the jury find the mitigating and aggravating factors are equal, that defendant's sentence would not be enhanced.

I request this committee report House Bill 2162 to the Kansas House of Representatives favorable for passage. I stand for questions.



13

HB 2162
House Corrections and Juvenile Justice

February 2, 2005

Chairman Loyd and members of the Committee, my name is Donna Schneweis. I appear on behalf of Amnesty International, a worldwide human rights organization. Our mandate is based on the Universal Declaration of Human Rights and other international human rights treaties. We oppose the death penalty without reservation as a violation of the right to life and the right to freedom from cruel, inhuman degrading treatment or punishment. We have nearly 1800 Kansas members.

We oppose a small, but not insignificant portion of this bill found in Section 1, (6) on page 3, lines 26-29. *"If such jury finds that the aggravating circumstances and mitigating circumstances are equal, the defendant shall not be sentenced to death and shall be sentenced to life without the possibility of parole."*

This sentence is "the fix" in terms of Kansas' death penalty legislation. Whether one opposes or supports the death penalty, the ramifications of this section are far too large to be lumped in with another bill. In the Senate, when SB 28 with identical language was heard, there was significant concern voiced by prosecutors about the implications of this "fix" on current cases and on the anticipated cert petition to the United States Supreme Court. Present for the hearing, and later speaking to the news media, were Mr. and Mrs. Oblander. Their son and daughter in law were homicide victims of one of the men sentenced to death. They were quoted by the media as also wanting the Legislature to not act upon a "fix" at this time. Neutral testimony was also presented about other dimensions of the death penalty that one needs to consider concurrent with the "fix" question. A murder victim family member submitted written testimony against the fix and the death penalty in general. No one testified in support of this fix language.

We urge that this section of HB 2162 be stricken. The issues and implications of the Kansas death penalty take this language far beyond the scope of the rest of this bill. Such a "fix" needs to stand on its own.

Donna Schneweis, State Death Penalty Abolition Coordinator
827 SW Tyler, Apt. 21, Topeka, KS 66612 785-234-3061 dms2@mindspring.com

Amnesty International is a worldwide grassroots movement that promotes and defends human rights.

House C&JJ
2-2-05
Attachment i 3



Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

Testimony in Support of HB 2162
Before the House Corrections and Juvenile Justice Committee
Kyle G. Smith
Kansas Peace Officers Association
February 2, 2005

Chairman Loyd and Members of the Committee,

I did not intend to testify on this bill due to the ‘death penalty’ issues but since that appears to have been a typo I would like to make certain points that might be helpful to the committee. While the current language has been cited by the United States Supreme Court as a good example on how states can handle the problem of how juries must decide facts to enhance sentences, HB 2162 does make some significant changes.

As a prosecutor, I think the mandatory language that if the prosecutor requests departure then there must be a hearing on the issue, is a major improvement over current law that requires the judge first conduct and additional ‘mini-hearing’ on whether the facts are sufficient. This would save time and judicial resources.

On the other hand, the proposed language also makes the time periods mandatory which would prevent even the most appropriate enhancement if the evidence were discovered after the 5 days from arraignment deadline has passed. There should be some flexibility there to serve the interests of justice.

Finally, on a technical note, I believe at page 1, line 42, the phrase “upon conviction of the defendant” is at least unnecessary and somewhat confusing as the sentence goes on to say the motion must be filed within 5 days or arraignment – which of course happens before trial and conviction. I would suggest that phrase be removed, as even in my most enthusiastic prosecutorial efforts, even I wouldn’t try to enhance the sentence of someone who had not been convicted.

Thank you for your attention. I would be happy to respond to any questions.