

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on January 20, 2005, in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:

Sandra Barnett, Executive Director, Kansas Coalition Against Sexual and Domestic Violence
Senator Jay Emler
Kyle Smith, Special Agent, Kansas Bureau of Investigation

Others attending:

See attached list.

Chairman Vratil opened the meeting and asked for bill introductions. Sandra Barnett requested the introduction of three bills. The first bill expands Kansas' Rape Shield Law to cover any proceeding before the court. The second bill amends K.S.A. 21-3517 to remove the marital exemption from the sexual battery statute. The third bill increases the marriage license fee by \$50. Senator Haley moved, seconded by Senator Bruce, and the motion carried.

Senator Journey introduced a bill to modify child custody statutes language in K.S.A. 60-1610. The language of "shared residency" currently is utilized in court custody cases, and the bill amends the statute to reflect this. (Attachment 1) Senator Haley moved, seconded by Senator Bruce, and the motion carried.

Chairman Vratil opened the hearing on **SB 25**.

SB 25—Terrorism and illegal use of weapons of mass destruction, penalties, procedures

Proponents:

Senator Emler summarized that the Joint Committee on Kansas Security recommendation is that Kansas define terrorism as a crime in Kansas statutes. (Attachment 2)

Kyle Smith testified that the bill was drafted based on what is in federal law. The first three sections define terrorism and the weapons of mass destruction (biological, radioactive, and chemical agents) and the crime of money laundering. The balance of the bill amends the investigative statutes that are already in place in Kansas to include these new crimes. (Attachment 3)

There was discussion regarding the sections of the proposed bill. It was determined that language in section five of K.S.A. 21-3301(d), regarding the provisions for attempting to commit the crime of terrorism, should be in (c). Mr. Smith will work with the revisors to amend this.

A fiscal note was provided. (Attachment 4) There were no neutral or opposing testimonies on this bill.

Chairman Vratil closed the hearing on **SB 25**.

Chairman Vratil had staff prepare case briefs on the *Kleypas* case, handed down by the court in 2001, and *Marsh*, handed down December 17, 2004. (Attachments 5-6) Chairman Vratil requested that the Committee review the briefs to better understand the development of the law in this area and how it pertains to the death penalty.

Chairman Vratil asked the Committee to turn its attention to **SB 5**.

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on January 20, 2005, in Room 123-S of the Capitol.

SB 5 Trade secret defined as in uniform trade secrets act

Chairman Vratil pointed out there was a fiscal note describing the intent of the bill as taking the uniform definition of Trade Secrets and applying it consistently throughout the statute. (Attachment 7) The bill gives certain departments and officials the authority to examine and determine whether information is considered a trade secret. Senator O'Connor stated she had visited with Representative Kinser about this practice. It was not his intent to give authority to agencies or officials to determine what were trade secrets and that it was a drafting error. He had no objections to standardizing the language defining trade secrets. Senator Allen stated she chaired the interim committee and affirmed that Senator O'Connor was correct. The goal was to get one definition of trade secrets throughout the statutes.

Chairman Vratil announced he would not ask the Committee to take final action on the bill at this time. The Chairman requested that the minutes reflect that the Chair will work with the Revisor's Office to come up with amendatory language that would clearly indicate that any decision by an agency head concerning the confidentiality of a trade secret would be subject to the normal appeal process. Furthermore, when the Committee deals with the bill again and this proposed amendment, it will be the intent that the right to appeal be preserved.

Chairman Vratil asked the Committee to turn its attention to **SB 7**.

SB 7 In child custody/residency, relevant factors include whether parent is residing with registered offender or person convicted of child abuse; notification to other parent if parent is residing with such offender

The Chairman stated there was a fiscal note stating the affects of this bill could not be estimated. (Attachment 8) Senator Journey asked for clarification on the intent of this bill. Chairman Vratil indicated there were two factors which were whether or not an individual was a registered sex offender, and whether or not an individual had been convicted of child abuse. Senator Haley wanted to verify that this bill did not address indecent liberties with a child or whether or not grandparents were considered for keeping a child. Jill Wolters clarified that the bill deals with a divorce proceeding or, if a parent is not married, a custody proceeding. It could be that a grandparent would act as a parent. This is defined in the child in need of care statutes. Ms. Wolters stated that indecent liberties with a child and indecent solicitation and prostitution, are covered under offender registration, so if any one had committed that crime, they would be required to be registered and to notify the other parent.

Senator Goodwin suggested that the main thrust of this bill is the material change of circumstances, which in a domestic case, provides a means to file a motion with the court seeking modification of child custody orders. Chairman Vratil concurred that this was very important.

Chairman Vratil had some technical changes that he was going to take up with the Revisor, so no final action was taken. The Chairman stated that since there were no substantive amendments to the bill and the Committee was generally in favor of it, it would be brought back for final action very soon.

Chairman Vratil asked the Committee to consider **SB 24**.

SB 24 Confidential security records or information, not subject to subpoena or discovery

The Committee reviewed a fiscal note which indicated there was no fiscal impact. (Attachment 9) Senator O'Connor clarified that on page 8, line 2, (a) 45 needs to be changed to (a). Chairman Vratil concurred with this technical change. Chairman Vratil indicated the bill reconciles in a technical manner amendments that the legislature made in 2004 affecting the Open Records Act. On page 5, lines 33-41, which are deleted, an amendment was suggested to reinserted the language. Chairman Vratil wanted to discuss the bill, understand what amendments the Committee wanted to consider, then he'd bring the bill back in a balloon amendment for the Committee to deal with.

Senator Umbarger indicated that he had a constituent question page 1, line 26, the list of what would not be

CONTINUATION SHEET

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disclosed. Chairman Vratil said that current law, and the effect of that was to allow a public agency to withhold disclosure of information. For example, in the Cancer Registry, a patient does not have the right to sign off on whether information regarding the patient becomes public. The public agency that is in possession of the records determines whether they will or will not be disclosed.

Senator O'Connor clarified that the strike on page five was part of the exemptions to the Open Records Act, so she questioned if it that information was protected somewhere in the statutes. Ms. Wolters indicated that it was still in the Insurance statutes, and the strikes in the bill passed last year in **SB 552**.

Larrie Ann Lower, with the Kansas Association of Health Plans (KHAP), a guest in the audience, stated KHAP's concern was that legislative intent was not established to show that the changes made in the bill were done with the understanding that Chapter 40 would remain unchanged. If there was a court case, someone might say that the last act of the legislature was to pull the exemptions out of Open Records Act, and therefore it should not be in Chapter 40.

Chairman Vratil stated that the bill is just part of a much bigger issue that the legislature will have to face which is reauthorization of the acceptance to the Open Records Act. Chairman Vratil asked the Committee to go through the bill and see if there were any other amendments that anyone wanted to make before it is brought up again.

Senator Goodwin moved that the Committee adjourn, seconded by Senator Donovan, and the motion carried. The meeting was adjourned at 10:30 A.M. The next meeting is scheduled for January 24, 2005.



Please Route to All Guests

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-20-05

NAME	REPRESENTING
Sandra Barnett	KCSOV
JOYCE GROVER	KCSOV
Emily K. Watson	Sen Allen
DANIEL MAHILL	KATIA
DAN RILEY	KS Dept of Ag
Duane Simpson	KARA
Carolyn M. [unclear]	KS & NS Assn
Jim [unclear]	Foulston Siefkin LLP
Katalie Haag	Security Benefit
Kevin [unclear]	KTLA
Colleen Harrell	KCC
Suzanne Bunnick	KS State Nurses Assoc
Laura Walsh	OJA
Scott Heidner	KADC
Jim Clark	KBA

By Committee on Judiciary

Submitted by
Senator Journey

AN ACT concerning civil procedure; relating to the residency of a child; amending K.S.A. 2004 Supp. 60-1610 and repealing the existing section.

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

Section 1. K.S.A. 2004 Supp. 60-1610 is hereby amended to read as follows: 60-1610. A decree in an action under this article may include orders on the following matters:

(a) Minor children. (1) Child support and education. The court shall make provisions for the support and education of the minor children. The court may modify or change any prior order, including any order issued in a title IV-D case, within three years of the date of the original order or a modification order, when a material change in circumstances is shown, irrespective of the present domicile of the child or the parents. If more than three years has passed since the date of the original order or modification order, a material change in circumstance need not be shown. The court may make a modification of child support retroactive to a date at least one month after the date that the motion to modify was filed with the court. Any increase in support ordered effective prior to the date the court's judgment is filed shall not become a lien on real property pursuant to K.S.A. 60-2202 and amendments thereto. Regardless of the type of custodial arrangement ordered by the court, the court may order the child support and education expenses to be paid by either or both parents for any child less than 18 years of age, at which age the support shall terminate unless: (A) The parent or parents agree, by written agreement approved by the court, to pay support beyond the time the child reaches 18 years of age; (B) the child reaches 18 years of age before completing the child's high school education in which case the support shall not terminate automatically, unless otherwise ordered by the court, until June 30 of the school year during which the child became 18 years of age if the child is still attending high school; or (C) the child is still a bona fide high school student after June 30 of the

school year during which the child became 18 years of age, in which case the court, on motion, may order support to continue through the school year during which the child becomes 19 years of age so long as the child is a bona fide high school student and the parents jointly participated or knowingly acquiesced in the decision which delayed the child's completion of high school. The court, in extending support pursuant to subsection (a)(1)(C), may impose such conditions as are appropriate and shall set the child support utilizing the guideline table category for 16-year through 18-year old children. Provision for payment of support and educational expenses of a child after reaching 18 years of age if still attending high school shall apply to any child subject to the jurisdiction of the court, including those whose support was ordered prior to July 1, 1992. If an agreement approved by the court prior to July 1, 1988, provides for termination of support before the date provided by subsection (a)(1)(B), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(B). If an agreement approved by the court prior to July 1, 1992, provides for termination of support before the date provided by subsection (a)(1)(C), the court may review and modify such agreement, and any order based on such agreement, to extend the date for termination of support to the date provided by subsection (a)(1)(C). For purposes of this section, "bona fide high school student" means a student who is enrolled in full accordance with the policy of the accredited high school in which the student is pursuing a high school diploma or a graduate equivalency diploma (GED). In determining the amount to be paid for child support, the court shall consider all relevant factors, without regard to marital misconduct, including the financial resources and needs of both parents, the financial resources and needs of the child and the physical and emotional condition of the child. Until a child reaches 18 years of age, the court may set apart any portion of property of either the husband or wife,

or both, that seems necessary and proper for the support of the child. Except for good cause shown, every order requiring payment of child support under this section shall require that the support be paid through the central unit for collection and disbursement of support payments designated pursuant to K.S.A. 23-4,118, and amendments thereto. A written agreement between the parties to make direct child support payments to the obligee and not pay through the central unit shall constitute good cause, unless the court finds the agreement is not in the best interest of the child or children. The obligor shall file such written agreement with the court. The obligor shall maintain written evidence of the payment of the support obligation and, at least annually, shall provide such evidence to the court and the obligee. If the divorce decree of the parties provides for an abatement of child support during any period provided in such decree, the child support such nonresidential parent owes for such period shall abate during such period of time, except that if the residential parent shows that the criteria for the abatement has not been satisfied there shall not be an abatement of such child support.

(2) Child custody and residency. (A) Changes in custody. Subject to the provisions of the uniform child custody jurisdiction and enforcement act (K.S.A. 38-1336 through 38-1377, and amendments thereto), the court may change or modify any prior order of custody, residency, visitation and parenting time, when a material change of circumstances is shown, but no ex parte order shall have the effect of changing residency of a minor child from the parent who has had the sole de facto residency of the child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances. If an interlocutory order is issued ex parte, the court shall hear a motion to vacate or modify the order within 15 days of the date that a party requests a hearing whether to vacate or modify the order.

(B) Examination of parties. The court may order physical or

mental examinations of the parties if requested pursuant to K.S.A. 60-235 and amendments thereto.

(3) Child custody or residency criteria. The court shall determine custody or residency of a child in accordance with the best interests of the child.

(A) If the parties have entered into a parenting plan, it shall be presumed that the agreement is in the best interests of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreed parenting plan is not in the best interests of the child.

(B) In determining the issue of child custody, residency and parenting time, the court shall consider all relevant factors, including but not limited to:

(i) The length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;

(ii) the desires of the child's parents as to custody or residency;

(iii) the desires of the child as to the child's custody or residency;

(iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;

(v) the child's adjustment to the child's home, school and community;

(vi) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent; and

(vii) evidence of spousal abuse.

Neither parent shall be considered to have a vested interest in the custody or residency of any child as against the other parent, regardless of the age of the child, and there shall be no presumption that it is in the best interests of any infant or

young child to give custody or residency to the mother.

(4) Types of legal custodial arrangements. Subject to the provisions of this article, the court may make any order relating to custodial arrangements which is in the best interests of the child. The order shall provide one of the following legal custody arrangements, in the order of preference:

(A) Joint legal custody. The court may order the joint legal custody of a child with both parties. In that event, the parties shall have equal rights to make decisions in the best interests of the child.

(B) Sole legal custody. The court may order the sole legal custody of a child with one of the parties when the court finds that it is not in the best interests of the child that both of the parties have equal rights to make decisions pertaining to the child. If the court does not order joint legal custody, the court shall include on the record specific findings of fact upon which the order for sole legal custody is based. The award of sole legal custody to one parent shall not deprive the other parent of access to information regarding the child unless the court shall so order, stating the reasons for that determination.

(5) Types of residential arrangements. After making a determination of the legal custodial arrangements, the court shall determine the residency of the child from the following options, which arrangement the court must find to be in the best interest of the child. The parties shall submit to the court either an agreed parenting plan or, in the case of dispute, proposed parenting plans for the court's consideration. Such options are:

(A) Primary Residency. The court may order a residential arrangement in which the child resides with one or both parents on a basis consistent with the best interests of the child.

(B) Shared residency. The court may order a residential arrangement in which the child resides with both parents on an equal or near equal basis. For the purposes of this paragraph, "equal or near equal" means at least 45% of the child's time, not

including eight hours of overnight sleep every night, or time the child is in school or in extracurricular school activities.

~~(B)~~ (C) Divided residency. In an exceptional case, the court may order a residential arrangement in which one or more children reside with each parent and have parenting time with the other.

~~(E)~~ (D) Nonparental residency. If during the proceedings the court determines that there is probable cause to believe that the child is a child in need of care as defined by subsections (a)(1), (2) or (3) of K.S.A. 38-1502 and amendments thereto or that neither parent is fit to have residency, the court may award temporary residency of the child to a grandparent, aunt, uncle or adult sibling, or, another person or agency if the court finds the award of custody to such person or agency is in the best interests of the child. In making such a residency order, the court shall give preference, to the extent that the court finds it is in the best interests of the child, first to awarding such residency to a relative of the child by blood, marriage or adoption and second to awarding such residency to another person with whom the child has close emotional ties. The court may make temporary orders for care, support, education and visitation that it considers appropriate. Temporary residency orders are to be entered in lieu of temporary orders provided for in K.S.A. 38-1542 and 38-1543, and amendments thereto, and shall remain in effect until there is a final determination under the Kansas code for care of children. An award of temporary residency under this paragraph shall not terminate parental rights nor give the court the authority to consent to the adoption of the child. When the court enters orders awarding temporary residency of the child to an agency or a person other than the parent, the court shall refer a transcript of the proceedings to the county or district attorney. The county or district attorney shall file a petition as provided in K.S.A. 38-1531 and amendments thereto and may request termination of parental rights pursuant to K.S.A. 38-1581 and amendments thereto. The costs of the proceedings shall be paid from the general fund of the county. When a final

determination is made that the child is not a child in need of care, the county or district attorney shall notify the court in writing and the court, after a hearing, shall enter appropriate custody orders pursuant to this section. If the same judge presides over both proceedings, the notice is not required. Any disposition pursuant to the Kansas code for care of children shall be binding and shall supersede any order under this section.

(b) Financial matters. (1) Division of property. The decree shall divide the real and personal property of the parties, including any retirement and pension plans, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts, by: (A) a division of the property in kind; (B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (C) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds of the sale. Upon request, the trial court shall set a valuation date to be used for all assets at trial, which may be the date of separation, filing or trial as the facts and circumstances of the case may dictate. The trial court may consider evidence regarding changes in value of various assets before and after the valuation date in making the division of property. In dividing defined-contribution types of retirement and pension plans, the court shall allocate profits and losses on the nonparticipant's portion until date of distribution to that nonparticipant. In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and

reasonable division of property. The decree shall provide for any changes in beneficiary designation on: (A) Any insurance or annuity policy that is owned by the parties, or in the case of group life insurance policies, under which either of the parties is a covered person; (B) any trust instrument under which one party is the grantor or holds a power of appointment over part or all of the trust assets, that may be exercised in favor of either party; or (C) any transfer on death or payable on death account under which one or both of the parties are owners or beneficiaries. Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy.

(2) Maintenance. The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree. The court may make a modification of maintenance retroactive to a date at least one month after the date that the motion to modify was filed with the court. In any event, the court may not award maintenance for a period of time in excess of 121 months. If the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the stated period of time for maintenance payments, the court shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments. Upon motion and hearing, the court may reinstate the payments in whole or in part for a period of time, conditioned upon any modifying or terminating circumstances prescribed by the court, but the reinstatement shall be limited to a period of time not exceeding 121 months. The recipient may file subsequent motions for reinstatement of maintenance prior to the expiration of subsequent periods of time for maintenance payments to be made,

but no single period of reinstatement ordered by the court may exceed 121 months. Maintenance may be in a lump sum, in periodic payments, on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. Except for good cause shown, every order requiring payment of maintenance under this section shall require that the maintenance be paid through the central unit for collection and disbursement of support payments designated pursuant to K.S.A. 23-4,118, and amendments thereto. A written agreement between the parties to make direct maintenance payments to the obligee and not pay through the central unit shall constitute good cause. If child support and maintenance payments are both made to an obligee by the same obligor, and if the court has made a determination concerning the manner of payment of child support, then maintenance payments shall be paid in the same manner.

(3) Separation agreement. If the parties have entered into a separation agreement which the court finds to be valid, just and equitable, the agreement shall be incorporated in the decree. A separation agreement may include provisions relating to a parenting plan. The provisions of the agreement on all matters settled by it shall be confirmed in the decree except that any provisions relating to the legal custody, residency, visitation parenting time, support or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by an agreement incorporated in the decree, other than matters pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children, shall not be subject to

subsequent modification by the court except: (A) As prescribed by the agreement or (B) as subsequently consented to by the parties.

(4) Costs and fees. Costs and attorney fees may be awarded to either party as justice and equity require. The court may order that the amount be paid directly to the attorney, who may enforce the order in the attorney's name in the same case.

(c) Miscellaneous matters. (1) Restoration of name. Upon the request of a spouse, the court shall order the restoration of that spouse's maiden or former name.

(2) Effective date as to remarriage. Any marriage contracted by a party, within or outside this state, with any other person before a judgment of divorce becomes final shall be voidable until the decree of divorce becomes final. An agreement which waives the right of appeal from the granting of the divorce and which is incorporated into the decree or signed by the parties and filed in the case shall be effective to shorten the period of time during which the remarriage is voidable.

Sec. 2. K.S.A. 2004 Supp. 60-1610 is hereby repealed.

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

**Senate Judiciary Committee
January 20, 2005**

**Testimony of Jay Scott Emler
Chairman
Joint Committee on Kansas Security**


Mr. Chairman and members of the Senate Judiciary Committee, I appear in front of you today as the immediate past chairman of the Joint Committee on Kansas Security. It was the recommendation of that Committee that SB 25 be drafted and presented to the 2005 Legislature.

The Committee received testimony that there is currently no state crime that succinctly covers terrorism. There are multiple crimes that cover pieces of a terroristic act, but not one that can be charged for the act. Rather than having to litigate several charges, the Committee was convinced that charging and proving one crime made more sense.

There was discussion in the Committee that the Federal law could be used. This may be true, but the concern of the Committee was that Federal authorities may not have, or want, jurisdiction if all of the elements of the crime are within the state of Kansas. Accordingly, the Committee recommends SB 25 for your consideration and passage.

This has been a brief review of the Security Committee concerns, but I will be happy to stand for questions.

Respectfully submitted,


Jay Scott Emler



Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

Senate Judiciary Committee

Testimony in Support of SB 25

Kyle G. Smith
Special Assistant Attorney General and Special Agent
Kansas Bureau of Investigation
January 20, 2005

Chairman Vratil and Members of the Committee:

I appear today on behalf of the KBI in support of SB 25, a bill that I hope is a complete waste of time. However, given the very real and dramatic threat that terrorism poses, it is incumbent upon us to prepare for horrific, if remote, dangers. This is not a bill on how we respond to unthinkable events. Rather, SB 25 sets in place the legal structure to assist Kansas law enforcement in investigating and thereby preventing, terrorism in Kansas.

This legislation offers concrete and specific changes that bring our criminal code up-to-date to deal with the real threat of terrorism. We realize that the FBI and other federal agencies will likely take the lead in anti-terrorism investigations and that any prosecution of a terrorist would likely be under federal law. However, what we do need is the lawful authority to investigate possible terrorist activity. Right now, Kansas has no crime of 'terrorism'. I like to illustrate the need for this legislation by asking prosecutors and cops, what would you do if you came upon someone with a vial of smallpox? Arrest them for what? Would you be interested in their phone tolls to see who their associates were? Would you want to wait until you could get a hold of federal officer and then wait while they got approval and a grand jury subpoena?

SB 25 is a Boy Scout response to the threat of terrorism. Be prepared. And by being prepared, maybe we will be able to prevent an act of terrorism instead of having to respond.

Explanation of the bill

Sec. 1. New Crime of Terrorism For the first time this section would create a crime of "terrorism" under the Kansas code. Again, while prosecution is extremely unlikely, by having a crime on the books, law enforcement will be able to utilize tools such as wiretaps and inquisitions. And, there may be cases (Oklahoma bombing for example) where state prosecution is desirable.

Sec. 2. Creates new Crime illegal use of Weapons of Mass Destruction (WMD)

EXPLANATION: The language used here is a combination, for simplicity sake, of existing federal laws dealing with weapons of mass destruction: 18 USC sections 175 – 178, {biological weapons}; 229 – 229f, {chemical weapons} and 831 {nuclear weapons}. The language is nearly identical to the existing federal law, with only some modifications to combine provisions from separate federal laws and removal of inapplicable definitions as well as language dealing with federal jurisdiction and forfeiture provisions.

Sec. 3 Creates new crime of money laundering for furthering violations of Terrorism or WMD.

EXPLANATION: Money laundering currently only applies to controlled substances investigations. However, terrorist groups are also involved in the transfers of funds to carry out their crimes and money-laundering investigations have proven themselves useful in not just locating the perpetrators but their financial support networks as well. As such, a money laundering statute, nearly identical to the current Kansas law for furthering narcotics transactions, is included to assist agencies to “follow the money” and identify co conspirators.

Sec. 4. Statute of Limitations.

EXPLANATION: Like murder, this section would establish that there is no statute of limitation for prosecuting the new crimes of terrorism or illegal use of weapons of mass destruction.

Sec. 5 Attempt statute.

EXPLANATION: Normally under Kansas law, an attempt to commit a felony is classified as the next or two step lower felony. As this legislation is aimed at preventing these acts and the acts involved are so serious, it was thought appropriate that the normal reduction in penalty not be applicable to persons convicted of terrorism or WMD. (Question: should this language be in sec. (c) instead of (d)?)

Sec. 6. Sentencing classification.

EXPLANATION: This proposal would amend K.S.A. 21-4706 to add Terrorism and WMD to the list of off-grid felonies.

Sec. 7. Electronic surveillance – adding the new crimes as predicate offenses.

EXPLANATION: Electronic surveillance is tightly restricted by federal and state law. Only offenses set out in the controlling statute can be the subject of wiretaps and other electronic surveillance methods.

Sec. 8 Inquisition statute.

EXPLANATION: Current law K.S.A. 22-3101 et seq., allows the prosecuting attorney to subpoena witnesses and records for some crimes (e.g. drug trafficking) while for other

crimes (e.g. burglary) the prosecutor has to go through a judge to issue the subpoena. The delay caused by involving the judicial process in what is essentially the investigative stage (the Kansas Supreme Court has referred to inquisitions as the equivalent of an officer just asking questions) is a problem, especially in cases such as terrorism where the risks of delay can be so devastating. This amendment would put terrorism and WMD in the expedited classification of felonies. Any evidence obtained would still be subject to review before admission in any court proceeding.

Sec. 9. Asset Forfeiture:

EXPLANATION: The language here would amend the list of crimes to which the Kansas Asset Seizure and Forfeiture Act applies to include Terrorism and WMD. Forfeiture serves several salutary purposes including removing assets that allow Criminals to perpetrate their crimes and returning such moneys to productive use.

I realize that this is a fairly long bill but the changes are straightforward: the first three sections fill gaps in the Kansas criminal code and the remaining sections merely amend existing investigative statutes to incorporate these new crimes. Thank you for your attention and I would be happy to answer any of your questions.



KANSAS

KANSAS SENTENCING COMMISSION

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

KATHLEEN SEBELIUS, GOVERNOR

MEMORANDUM

To: Duane A. Goossen, Director of the Budget

ATTN: Ethan Erickson

From: Patricia Biggs, Executive Director

Date: January 12, 2005

RE: Fiscal Note on SB 25

SUMMARY OF BILL:

AN ACT concerning crimes, criminal procedure and punishment; relating to terrorism and illegal use of weapons of mass destruction; amending K.S.A. 21-3301 and 22-2515 and K.S.A. 2004 Supp. 21-3106, 21-4706, 22-3101 and 60-4104 and repealing the existing sections.

This bill is not likely to have an impact upon the Kansas Sentencing Guidelines Act (KSGA). This bill creates two off-grid felonies and one severity level 1 person felony. Specifically, this bill creates an off-grid person felony for terrorism; an off-grid person felony for illegal use of weapons of mass destruction; and a severity level 1 person felony for knowingly and intentionally engaging in transactions involving property in violation of section 1 and 2 of this bill.

Section 1 (a) defines terrorism as the commission of, the attempt to commit or the conspiracy to commit any felony with the intent to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of any unit of government.

(b) Terrorism is an off-grid person felony and the sentence for terrorism is not subject to statutory provisions for suspended sentence, community work service or probation.

(c) The provisions of subsection (d) of K.S.A. 21-3301 and amendments thereto, do not apply to a violation of attempting to commit the crime of terrorism.

Section 2 (a) defines the illegal use of weapons of mass destruction as:

(1) intentionally, knowingly and without lawful authority, developing, producing, stockpiling, transferring, acquiring, retaining or possessing any:

(A) Biological agent, toxin or delivery system for use as a weapon;

(B) chemical weapon; or

(C) nuclear materials or nuclear byproduct materials for use as a weapon;

(2) knowingly assisting a foreign state or any organization to do any such activities as specified in paragraph (1); or

(3) attempting, threatening or conspiring to do any such activities as specified in paragraph (1) or (2).

(b) Illegal use of weapons of mass destruction is an off-grid person felony and the sentence shall not be subject to the statutory provisions of suspended sentence, community work service or probation.

(c) The provisions of subsection (d) of K.S.A. 21-3301, and amendments thereto, do not apply to a violation of attempting to commit the crime of illegal use of weapons of mass destruction.

(d) lists activities that are not prohibited under the provisions of the section.

(e) defines language used in the act.

Section 3 (a) It is unlawful for any person knowingly or intentionally to receive or acquire property, or engage in transactions involving property, for the purpose of committing or furthering the commission of any violation of section

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Senate Judiciary

1-20-05

Attachment 4

Prison Population Impact of 2005 SB 25
January 12, 2005 Page 2 of 3

1 or section 2 and amendments thereto. The provisions of this subsection do not apply to any transaction between an individual and that individual's counsel necessary to preserve that individual's right to representation as guaranteed by section 10 of the bill of rights of the constitution of the state of Kansas and by the sixth amendment to the United States

Constitution. This exception does not create any presumption against or prohibition of the right of the state to seek and obtain forfeiture of any proceeds derived from a violation of section 1 or section 2 and amendments thereto.

(b) It is unlawful for any person knowingly or intentionally to give, sell, transfer, trade, invest, conceal, transport or maintain an interest in or otherwise make available any property which that person knows is intended to be used for the purpose of committing or furthering the commission of any violation of section 1 or section 2 and amendments thereto.

(c) It is unlawful for any person knowingly or intentionally to direct, plan, organize, initiate, finance, manage, supervise or facilitate the transportation or transfer of property known to be for the purpose of committing or furthering the commission of section 1 or section 2 and amendments thereto.

(d) It is unlawful for any person knowingly or intentionally to conduct a financial transaction involving property for the purpose of committing or furthering the commission of any violation of section 1 or section 2 and amendments thereto when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the property known to be for the purpose of committing or furthering the commission of any violation of section 1 or section 2 and amendments thereto, or to avoid a transaction reporting requirement under state or federal law.

(e) A violation of this section is a severity level 1 person felony.

(f) defines language used in this section.

Section 4 amends K.S.A. 2004 Supp. 21-3106 to add "terrorism or illegal use of weapons of mass destruction".

Section 5 amends K.S.A. 21-3301(d) to add the provisions of this subsection do not apply to a violation of attempting to commit the crime of terrorism pursuant to section 1 and amendments thereto or illegal use of weapons of mass destruction pursuant to section 2.

Section 6 amends K.S.A. 2004 Supp. 21-4706(c) to add sections 1 and 2 to off-grid offenses to which the sentence shall be imprisonment for life.

Section 7 amends K.S.A. 22-2515 to add (a)(18) terrorism and (19) illegal use of weapons of mass destruction.

Section 8 amends K.S.A. 2004 Supp. 22-3101 (2) to add terrorism and illegal use of weapons of mass destruction.

Section 9 amends K.S.A. 2004 Supp. 60-4104 to add subsection (k) furtherance of terrorism or illegal use of weapons of mass destruction, section 3 and amendments thereto.

Section 10 repeals K.S.A. 21-3301, K.S.A. 22-2515, K.S.A. 2004 Supp. 21-3106, 21-4706, 22-3101 and 60-4104.

Section 11 sets the effective date as publication in the statute book.

IMPACT ON KANSAS SENTENCING COMMISSION:

Based on the current duties of the Kansas Sentencing Commission, the change(s) proposed in this bill will affect the following:

- The current operation or responsibilities of the Commission
- The current budget of the Commission.
- The current staffing and operating expenditure levels of the Commission.
- The long-range fiscal estimates of the Commission.
- The change(s) proposed in this bill will not likely affect the duties of the Kansas Sentencing Commission.

Although there may be some very small impact on the number of journal entries processed by

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*Prison Population Impact of 2005 SB 25
January 12, 2005 Page 3 of 3*

the Commission staff, this would be limited substantially in effect.

ANALYTIC RESULT SUMMARY:

IMPACT ON PRISON ADMISSIONS:

- Increase by an estimated:
- Potential to increase but cannot quantify
- Decrease by an estimated:
- Potential to decrease but cannot quantify
- Remain the same

IMPACT ON OFFENDER POPULATION LEVELS:

- Impact offender population as noted below
- Potentially impact offender population as noted below.
- Minimal or no impact on offender population.
- May impact offender population but cannot quantify with data available.

No data is available for the crimes defined in sections 1, 2, or 3 of this bill. While there may be some increase in prison admissions and populations, that increase would be unquantifiable and small.

State v. Kleypas
No. 80,920, 40 P.3d 139
Kan.,2001.
Dec 28, 2001

Submitted by
CHAIRMAN URAFIL

Facts and Procedural History:

Defendant was convicted in the District Court, Crawford County, of capital murder, attempted rape, and aggravated burglary, and sentenced to death. Defendant appealed, challenging, *inter alia*, the weighing equation of aggravating and mitigating circumstances in KSA 21-4624. *Kleypas* was the first court challenge of the Kansas's death penalty statute.

- Issues:**
1. Is Kansas's death penalty statute (KSA 21-4624) unconstitutional because of the weighing equation that mandated a sentence of death when aggravating and mitigating circumstances are equal?
 2. Does the weighing equation in KSA 21-4624 invalidate Kansas's death penalty statute?

Supreme Court's Decision:

1. Yes, weighing equation in death penalty statute, which mandated death if aggravating and mitigating circumstances were equal, was unconstitutional as applied, violating the Eighth Amendment prohibition on cruel and unusual punishment.
2. No, court construed statute as requiring aggravating circumstances to outweigh mitigating circumstances, and thus statute was constitutional.

Reasoning:

1. The majority, by a 4-3 vote, held it was improper for the jury to be instructed, as K. S. A. 21-4624(3) requires, that if aggravating circumstances were found but "not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death." This has the effect of requiring the death penalty even when the aggravating and mitigating circumstances are found by the jury to be in equal balance. The majority stated: "Here the weighing equation not only limits the jury's consideration, it mandates death if the aggravating and mitigating circumstance are equal. As such, it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstances that it finds exist." Thus, the majority held, the so-called Kansas "weighing equation"—which in essence allows a "tie" to go to the state—violates the federal constitutional prohibitions against cruel and unusual punishment and the guarantee of due process. The court's majority ruled that "fundamental fairness" requires that a "tie" goes to the defendant when life or death is at issue.
2. However, the court reasoned that the Kansas legislature intended to enact a constitutional death penalty scheme and thus concluded that K.S.A. 21-4624(e) is not void on its face, but only in its application. The majority held that by requiring the "tie" to go to the defendant, the intent of the legislature may be carried out in a constitutional manner: "So construed, we hold that K. S. A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual punishment," the court concluded.

Dissents:

Three dissenters would have upheld the constitutionality of the Kansas weighing equation. Justice Davis, dissenting, concluded that the majority, "in rewriting the language of the weighing equation, ignored the clear intent of the statute and invaded the province of the legislature." Justice Davis also said that the United States Supreme Court has held that as long as the weighing equation does not preclude the jury from considering relevant mitigating evidence, the specific method of balancing the aggravating and mitigating factors may be left up to the states.

Justice Abbott, writing in a separate dissent, concluded that the visceral appeal of the "tie" going to the defendant is not required by the cruel and unusual punishment prohibitions of the Eighth Amendment.

Senate Judiciary

1-20-05

Attachment 5

Sub. Item by
CHAIRMAN Uratil

State v. Marsh
No. 81,135., 102 P.3d 445
Kan., 2004.
Dec 17, 2004

Facts and Procedural History: Defendant was convicted in the Sedgwick District Court of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary. Defendant appealed, challenging, *inter alia*, the weighing equation of aggravating and mitigating circumstances in KSA 21-4624.

- Issues:**
1. Is Kansas's death penalty statute (KSA 21-4624) unconstitutional because of the weighing equation that mandated a sentence of death when aggravating and mitigating circumstances are equal?
 2. Does the weighing equation in KSA 21-4624 invalidate Kansas's death penalty statute?

Supreme Court's Decision:

1. Yes, weighing equation in death penalty statute, which mandated death if aggravating and mitigating circumstances were equal, was unconstitutional as applied, violating the Eighth Amendment prohibition on cruel and unusual punishment.
2. Yes, KSA 21-4624(e) is unconstitutional on its face and that the portion of the *Kleypas* decision that saved the statute through judicial construction is overruled.

Reasoning:

1. The *Marsh* majority (again a 4-3 vote) agreed with the *Kleypas* majority and that the "weighing equation"—which in essence allows a "tie" to go to the state—violates the federal constitutional prohibitions against cruel and unusual punishment and the guarantee of due process. The court's majority ruled that "fundamental fairness" requires that a "tie" goes to the defendant when life or death is at issue.

2. The *Marsh* majority did not construe KSA 21-4624 to pass constitutional muster as the *Kleypas* majority did. The *Marsh* majority declined to use the avoidance doctrine, or rule of constitutional doubt, under which a court will not strike down a statute as unconstitutional if it can be construed in a manner consistent with legislative intent. Instead, the *Marsh* majority found KSA 21-4624 unconstitutional on its face, stating that the statutory interpretation maxims of avoidance and constitutional doubt cannot apply where the statute itself is clear and unambiguous.

Dissents:

Chief Justice McFarland and Justice Nuss join the dissent of Justice Davis, who says the death penalty statute was constitutional when it was passed by the Legislature and remains constitutional today.

The majority states that the United States Supreme Court has never directly addressed the issue in *Marsh*. Justice Nuss, dissenting, and said the U.S. Supreme Court has already implicitly approved of the death penalty sentencing scheme adopted in Kansas. In his opinion, an Arizona weighing equation "functionally identical" to the Kansas equation was approved by the U.S. Supreme Court in its 1990 *Walton v. Arizona* decision, and *Walton* therefore should control the result in *Marsh*.

Chief Justice McFarland said in her separate dissent that legally the Court should follow the *Kleypas* precedent decided just three years earlier: "[I]n *Kleypas*, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law, is, in my opinion, wholly inappropriate and unjustified."

KANSAS

DIVISION OF THE BUDGET
DUANE A. GOOSSEN, DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

January 14, 2005

The Honorable John Vratil, Chairperson
Senate Committee on Judiciary
Statehouse, Room 522-S
Topeka, Kansas 66612

Dear Senator Vratil:

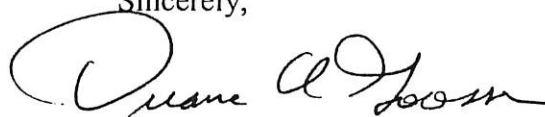
SUBJECT: Fiscal Note for SB 5 by Special Committee on Local Government

In accordance with KSA 75-3715a, the following fiscal note concerning SB 5 is respectfully submitted to your committee.

SB 5 would apply the definition of the term "trade secret" as defined in the Uniform Trade Secrets Act to the term's use in other statutes, creating a consistent definition. It also gives certain departments and officials the authority to examine and determine whether information is considered to be a trade secret under the Uniform Trade Secrets Act.

There is no fiscal effect associated with the passage of SB 5.

Sincerely,



Duane A. Goossen
Director of the Budget

cc: Jarrod Forbes, Insurance Department

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KANSAS

DIVISION OF THE BUDGET
DUANE A. GOOSSEN, DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

January 14, 2005

The Honorable John Vratil, Chairperson
Senate Committee on Judiciary
Statehouse, Room 522-S
Topeka, Kansas 66612

Dear Senator Vratil:

SUBJECT: Fiscal Note for SB 7 by Senator Brownlee

In accordance with KSA 75-3715a, the following fiscal note concerning SB 7 is respectfully submitted to your committee.

SB 7 would amend current law relating to child custody and residency in the situation of divorce. This bill would require that parents must notify each other if they, or a person they live with, becomes subject to the registration requirements of the Kansas Offender Registration Act or a similar act. Notification would also be required if a parent or someone with whom they live has been convicted of child abuse. Notification would be required within ten days of registration as a Kansas offender or within ten days of a conviction of child abuse. If notification does not occur, the parent can be charged with civil contempt.

Passage of this bill would increase the number of hearings held relating to child custody and could increase the workload of the courts. However, the Office of Judicial Administration states that it cannot determine the new number of hearings that may be caused by this bill. Therefore, the fiscal effect of this bill cannot be estimated.

Sincerely,



Duane A. Goossen
Director of the Budget

cc: Jackie Aubert, SRS
Chris Radeke, Guardianship Program
Brandy Wheeler, Judiciary

KANSAS

DIVISION OF THE BUDGET
DUANE A. GOOSSEN, DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

January 14, 2005

The Honorable John Vratil, Chairperson
Senate Committee on Judiciary
Statehouse, Room 522-S
Topeka, Kansas 66612

Dear Senator Vratil:

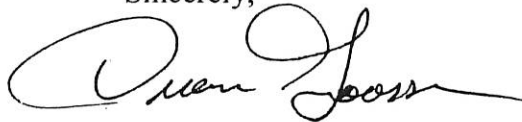
SUBJECT: Fiscal Note for SB 24 by Joint Committee on Kansas Security

In accordance with KSA 75-3715a, the following fiscal note concerning SB 24 is respectfully submitted to your committee.

SB 24 reconciles conflicting provisions of HB 2758 and SB 552, both enacted by the 2004 Legislature. SB 24 would also change the Open Records Act regarding security measures. Confidential records or information relating to security measures would not be subject to subpoena, discovery, or other demand in any administrative, criminal, or civil action.

Enactment of SB 24 would have no fiscal effect.

Sincerely,



Duane A. Goossen
Director of the Budget

cc: Ruth Glover, Human Rights
Jarrod Forbes, Insurance Department
Kevin Graham, Attorney General's Office
Brandy Wheeler, Judiciary
Christy Harvey, Secretary of State's Office

Linda Durand, KBI
Janice Harper, Adjutant General's Dept.
Carol Williams, Governmental Ethics
Kim Gulley, League of KS Municipalities