Approved: 4-26-07
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 14, 2007 in Room 313-S of the Capitol.

All members were present except:
Ben Hodge- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Duston Slinkard, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:
Representative Oletha Faust-Goudeau
Cristi Cane, Shawnee County Drug Paraphernalia Task Force
Kevin Myles, Wichita NAACP
Daniella Dempsey-Swoops, Director of Kansas African American Affairs Commission
Kyle Smith, KBI
Ed Klumpp, Kansas Association of Chiefs of Police
Thomas Nuemaker, KBI
Jim Clark, Kansas Bar Association
Captain Glenn Kurtz, Sedgwick County Sheriff's Department
Joyce Grover, Kansas Sexual Assault & Domestic Violence Centers of Kansas
Captain Lance Royer, Shawnee County Sheriff's Department

The hearing on **HB 2359 - controlled substance, drug paraphernalia**, was opened.

Representative Oletha Faust-Goudeau, in conjunction with the KBI, are sponsors of the proposed bill. She grew concerned with the large number of convenience stores selling drug paraphernalia. The bill would prohibit the sale of drug paraphernalia. (Attachment 1)

Kevin Myles, Wichita NAACP, identified 13 stores in Wichita where drug paraphernalia was being sold. He explained that the bill would criminalize the purchase and fine the owner for selling such items. (Attachment 2)

Daniella Dempsey-Swoops, Director of Kansas African American Affairs Commission, informed the committee that the sale of drug paraphernalia is explicitly prohibited by federal law, 21-USCA, Section 863. (Attachment 3)

Cristi Cane, Shawnee County Drug Paraphernalia Task Force, commented that selling these types of items to kids are becoming "acceptable". (Attachment 4)

Kyle Smith, KBI, stated that the problem the bill is trying to address is that these items are often legitimate items but are used to take drugs. (Attachment 5)

Ed Klumpp, Kansas Association of Chiefs of Police, appeared as a proponent to the bill. The law enforcement community has found it difficult to show intent for the product to be used for illegal drug consumption when it has a legitimate use. (Attachment 6)

The hearing on **HB 2359** was closed.

The hearing on **HB 2384 - criminal procedure; palm prints; expungement of DNA samples and profile records**, was opened.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 14, 2007 in Room 313-S of the Capitol.

Kyle Smith, KBI, appeared before the committee in support of the proposed bill which would enhance the identification database used by the Kansas criminal justice system. The bill adds palm prints to the fingerprint files and uses swabs instead of drawing blood for DNA database. (Attachment 7)

Ed Klumpp, Kansas Association of Chiefs of Police, appeared as a proponent to the bill. He explained that palm prints are left at scenes more often than fingerprints. He did caution the committee that not all law enforcement offices have the ability to scan palm prints & fingerprints. (Attachment 8)

The hearing on **HB 2384** was closed.

The hearing on **HB 2381 - probable cause determination required before submission of DNA specimen to KBI**, was opened.

Jim Clark, Kansas Bar Association, appeared before the committee as the sponsor of the proposed bill. He explained that it would require probable cause that the person committed a crime before DNA is taken. (Attachment 9)

Kyle Smith, KBI, appeared in opposition to the bill because it is easier and cheaper to collect all identifiers at one time rather than wait to see if there is probable cause. (Attachment 10)

Ed Klumpp, Kansas Association of Chiefs of Police, stated that there could be a problem with the person charged for a crime not coming back in to provide the DNA, and if identifiers are not all taken at one time how would that person be positively identified. (Attachment 11)

Captain Glenn Kurtz, Sedgwick County Sheriff's Department, suggested that it might be easier to take all identifiers at the time of conviction and not at the time of arrest. (Attachment 12)

The hearing on **HB 2381** was closed.

The hearing on **HB 2382 - protection orders not submitted to the national criminal information center without opportunity for a hearing,** was opened.

Jim Clark, Kansas Bar Association, appeared as a proponent to the bill. He stated that problems exist when a protection from abuse order (PFA) are entered into NCIC and the respondent hasn't been notified of the PFA. The proposed bill would require a hearing on the PFA before it is entered into the database. (Attachment 13)

Written testimony in support of the bill was provided by the Kansas Coalition Against Sexual & Domestic Violence. (Attachment 14)

Kyle Smith, KBI, informed the committee that probable cause hearings are held within 20 days after a PFA is filed. He believes that it is better to protect women with the entry of the PFA into the NCIC rather than let something happen to her. (Attachment 15)

Captain Lance Royer, Shawnee County Sheriff's Department, explained that a final PFA order is given an expiration date at which it's withdrawn from the NCIC. (Attachment 16)

The hearing on **HB 2382** was closed.

The hearing on **HB 2360 - arrest powers of federal law enforcement officers**, was opened.

Thomas Nuemaker, KBI, appeared before the committee in support of the proposed bill. The bill would simply remove the sunset clause in KSA 22-2411 to make it permanent. This statute recognizes agents of the FBI as law enforcement officers in Kansas. (Attachment 17)

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 14, 2007 in Room 313-S of the Capitol.

Ed Klumpp, Kansas Association of Chiefs of Police, appeared as a proponent to the bill. He commented that arrest powers are critical to the efficiency of operations especially in joint task forces such as the terrorism task forces. (Attachment 18)

The hearing on **HB 2360** was closed.

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for February 15, 2007.

STATE OF KANSAS

OLETHA FAUST-GOUDEAU
REPRESENTATIVE, 84TH DISTRICT
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WICHITA, KANSAS 67214
FAUST-GOUDEAU@HOUSE.STATE.KS.US
LEGISLATIVE ADDRESS
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(785) 296-7668
TOPEKA, KS 66612

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: FINANCIAL INSTITUTIONS
GOVERNMENTAL ORGANIZATION AND ELECTIONS
UTILITIES

Testimony for HB 2359
House Judiciary Committee
Wednesday, February 14, 2007

Mr. Chairman Mike O'Neal and Honorable Committee Members:

I appreciate the opportunity to speak before you today in support of House Bill 2359.

The issue before you today, House Bill 2359 was brought to my attention by Mr. Kevin Myles, President of the Wichita NAACP. At the request of concerned citizens in my district regarding the sales of drug paraphernalia in our neighborhood convenience shops which imposes a negative impact on our community and state. As a matter of fact I've seen these items on the front counter top of a local gas station just three blocks from our state capitol and it certainly concerned me and for this reason I stand in strong support of the language on page 4, section 4, line 28 which makes it illegal to sell drug paraphernalia.

In 2005, the legislature passed the Meth Bill, putting the key ingredient used to make Meth behind the counters in stores. I feel drug paraphernalia items used as a crack-cocaine pipe should not be so easily accessible to the public for purchase.

We are sending a mixed message: when we say its illegal to use, to buy, or to sell drugs, but we allow the sales of drug paraphernalia. It must be prohibited.

I would appreciate your consideration for the passage of HB 2359.

Thank you,

Rep. Oletha Faust-Goudeau
84th District

House Judiciary
Date 2-14-07
Attachment # 1

The Wichita Branch NAACP

"98 years, Speaking Truth to Power"

February 9th, 2007

Kevin Myles
President

Lavonta Williams
Vice-President

Carolyn Wallace
VP Special Programs

Kenya Cox
VP Public Affairs

Elaine Guillory
Secretary

Sandra Rankin
Asst Secretary

Mark Ritchey
Treasurer

EW Dogan
Asst Treasurer

Carolyn Wallace
Veterans Affairs

Otey Moss
Communications

Elaine Guillory
Freedom Fund

Mary Breckenridge
Sandra Rankin
Barbara Mackey
Education Co-Chairs

Brenda Davis
Community Health

Anthony Suber
Labor & Industry

Mary Dean
Legal Redress

Rev. Mark Smith
Membership

VJ Sessions
Political Action

James Arbertha
Eco. Development

Rev. Reuben Eckels
Rev. Mark Smith
Religious Affairs

To the Honorable Representative Michael O'Neal and members of the Judiciary Committee,

My name is Kevin Myles and I am the President of the Wichita Branch of the NAACP and the Political Affairs Chairman of the Kansas State Conference of NAACP Branches, representing nearly 2,000 members throughout the State of Kansas. I am here today to speak in favor of HB2359 which would strengthen our current statutes against the proliferation and possession of Drug Paraphernalia.

The NAACP became involved with this issue through a grass-roots campaign sponsored by the Wichita Branch NAACP. This project, entitled "the Broken-Windows" campaign, seeks to improve conditions in the community by addressing store and business owners who offer inferior products, poor or dirty conditions, and harmful or toxic products. The community is able to call upon our organization and request that we visit specific shops or businesses. Based on those complaints and our subsequent observations, we determine which businesses we will address.

In the course of this campaign we received a number of complaints regarding a particular convenience store in North Wichita. I personally visited the store to observe the conditions and once inside I noticed right away that they were selling what are sometimes referred to as "Crack Stems" and pipes right on the front counter just a couple feet away from the candy and gum. This is a store that is frequented by a number of children as it is located just a few blocks away from an Elementary school and three local churches. Shortly thereafter, we made contact with the store owner and then announced to the community that we would be addressing the conditions at this store, particularly noting their counter-sale of drug paraphernalia. As the word began to spread throughout the community, we started to receive calls from others in all parts of the city who complained about the same items being sold. Within a couple weeks, we'd received complaints from small neighboring cities such as Haysville and Newton.

I had a conversation around that time with Representative Oletha Faust-Goudeau about possibly developing some legislation that might arrest the sale of paraphernalia. In one of our conversations, she noted that there's a gas station/convenience store just a short distance away from this very building that also sells paraphernalia. So we began to research other State's statutes dealing with paraphernalia in comparison to our own. Once we'd come up with some proposed language for a new bill and submitted that to the revisors office, we were made aware of the fact that the KBI was also working on a new proposal. I was able to get in contact with Mr. Kyle Smith of the KBI and with only a minor change, we were able to assemble a draft representing the concerns and language of both the KBI's Task Force and of the NAACP.

For the record, we know that this bill will not halt illegal drug use. Persons who want to use drugs will continue to find means and methods to do so. But we know that as a community, we can not afford to act as enablers by selling ready made drug kits at bargain basement prices. The presence of these items in neighborhood shops and convenience stores attracts a criminal element; both drug dealers and addicts, into the hearts of our communities.

Our existing statute outlaws the possession of Drug Paraphernalia. However, its wording still allows for store owners and merchants to purchase paraphernalia in bulk for the purpose of sales and distribution. This piece of proposed legislation would close that loophole; maintaining the prohibition against the possession of paraphernalia, while also specifically outlawing its sale and distribution. We believe that removing these types of items from our neighborhood shops and convenience stores is a small but important step towards building safer and healthier communities.

Thank you for you time and I will strand for any questions…

House Judiciary
Date 2-14-07
Attachment # 2

State of Kansas
House Judiciary Committee
Testimony in support of House Bill 2359
Danielle Dempsey-Swopes, Executive Director
Kansas African American Affairs Commission
February 14, 2007

Chairperson O'Neal and Members of the Committee, I appreciate this opportunity to provide testimony on behalf of the Kansas African American Affairs Commission regarding support for House Bill 2359.

Our Commissioners have been concerned about many health disparities in the African American community, including the sale of drug paraphernalia in local stores. There is inherently a disproportionate number of small stores and shops that openly sell drug paraphernalia in our urban communities.

The sale of such paraphernalia is an explicit prohibition of federal law. In addition to the federal prohibition, House Bill 2359 will change the state definition of drug paraphernalia in a way that will give state and local law enforcement greater authority to prosecute and to prevent the sale of such items.

Our Commissioners support any measure that will continue the strides made to prevent the sale and distribution of controlled substances in our communities. Our Commissioners support the idea of giving law enforcement another tool for combating the sale and use of the drug paraphernalia as well.

House Judiciary
Date 2-14-07
Attachment # 3

Based at Shawnee Regional Prevention and Recovery Services, Inc.
2209 SW 29th Street
Topeka, Kansas 66611
(785) 266-8666
Fax (785) 266-3833
E-mail: ccain@parstopeka.com
Website: www.ksmethpreventionproject.org

Testimony in Support of HB 2359 before the House Judiciary Committee

Cristi Cain, State Coordinator of the Kansas Methamphetamine Prevention Project and Co-Chair of the Kansas Alliance for Drug Endangered Children
February 14, 2007

Chairman O'Neal and Members of the Committee,

I appear today on behalf of the Drug Paraphernalia Task Force, as the state coordinator of the Kansas Methamphetamine Prevention Project, and as co-chair of the Kansas Alliance for Drug Endangered Children. I am a Certified Prevention Professional and have worked in substance abuse prevention for 11 years. I have been working to address access to drug paraphernalia in Shawnee County and throughout Kansas for one year. I am here today to share information we have obtained about the level of the drug paraphernalia problem in Shawnee County as well as throughout the state of Kansas.

We began efforts in March of 2006 by conducting visual surveys of a total of 88 convenience stores, gas stations and tobacco stores in Shawnee County to document whether paraphernalia was sold. The amount and varieties of paraphernalia available for sale in our community led to the formation of the Drug Paraphernalia Task Force. (Please see the written testimony of Sally Zellers, Director of Safe Streets Topeka-Shawnee County for specific information about activities and accomplishments of the Drug Paraphernalia Task Force.) As a member of the Task Force, I found it surprising how many different interpretations there were of the existing paraphernalia statutes (KSA 65-4150 through 65-4153) by law enforcement officers and attorneys with whom we discussed the issue. It became immediately apparent that there is a lack of clarity among prosecutors and law enforcement officers across the state about what constitutes paraphernalia. One commonly debated point was whether an item must contain drug residue to be considered paraphernalia. HB2359 clarifies the existing statutes in a way that will significantly reduce the amount of paraphernalia that is being sold in communities across Kansas. The information below provides information about the current level of the problem of availability of drug paraphernalia in Kansas communities.

House Judiciary
Date 2-14-07
Attachment # 4

Drug Paraphernalia in Kansas-Why Should It Be Addressed Through Legislation?

March 2006- Display case at a convenience store in Downtown Topeka which contains many different types of bongs and pipes used for smoking marijuana (photo #1)

#1

2

3

March 2006- Display case at a convenience store in North Topeka (from various angles) which contains bongs and pipes for smoking marijuana, devices to conceal drugs and paraphernalia (photos #2 and#3), and scales for weighing drugs (photo #4).

4

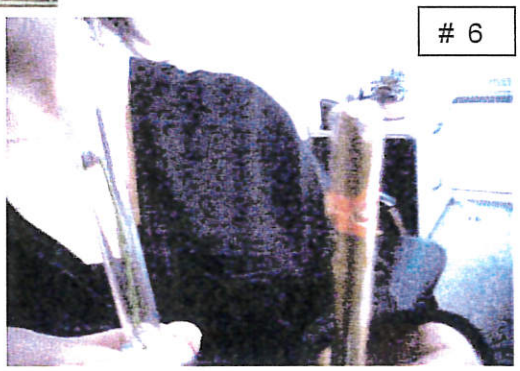
4-2

Is Paraphernalia Available to Minors?

5

14 year old purchases items across the street from Lyman Elementary School- May 2006 (photos #5 and #6). Items include glass pipe and cigar.

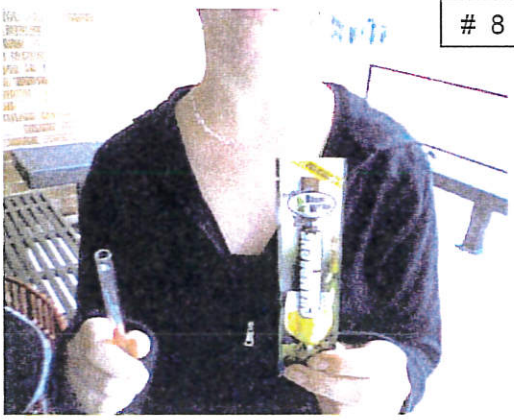
6



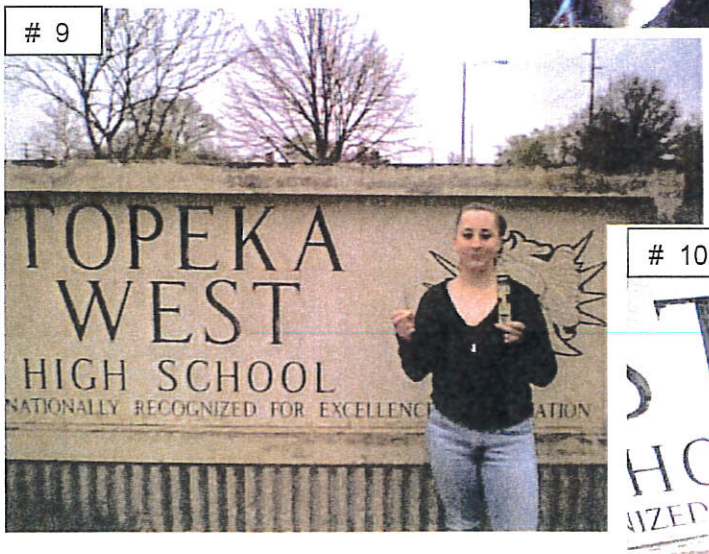
7

14 year old purchases items near Highland Park High School- May 2006 (photos #7 and #8). Items include glass pipe and a flavored blunt wrap.

8



9



14 year old purchases items across the street from Topeka West High School- May 2006 (photos #9 and #10). Items include glass pipe and a flavored blunt wrap.

10

Is This a Problem Across the State of Kansas?

The following counties had paraphernalia available at convenience stores as verified by local law enforcement and/or the Kansas Department of Agriculture:

Allen	Bourbon	Brown	Cowley	Douglas
Ellis	Finney	Franklin	Johnson	Kearny
Labette	Linn	Lyon	McPherson	Miami
Osage	Reno	Rice	Saline	Sedgwick
Shawnee	Trego	Woodson		

Out of 41 counties responding to the law enforcement survey, over 50% reported the availability of glass pipes and 43% reported the availability of blunt wraps. Additionally, 9 counties (Bourbon, Douglas, Franklin, Lyon, McPherson, Reno, Saline, Sedgwick, and Shawnee) reported that their community had "head shops". A "head shop" is a shop specializing in drug paraphernalia and other items appealing to the drug subculture. Ninety-seven percent (97%) of law enforcement officials responding to the survey were very supportive of legislation to clarify the existing Kansas statutes to limit the sales of paraphernalia at stores.

In Shawnee County, 50% of stores sold at least one type of paraphernalia. Twenty-one percent (21%) of convenience stores and 63% of tobacco stores sold large quantities and/or many varieties of paraphernalia. Thirty-one percent (31%) of the stores selling 3 or more types of paraphernalia failed previous tobacco compliance checks. (Data from March 2006)

Why Is Drug Paraphernalia a Problem That Needs To Be Addressed?

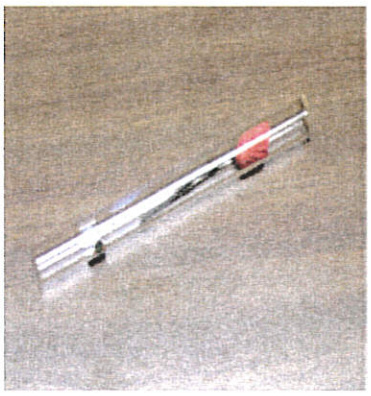
- Establishes community norm that drug use is acceptable/tolerated
- Increases danger for legitimate customers and employees
- Drug relapse trigger for people in recovery who are customers
- Glamorizes drug use to youth
- Increases availability (or perceived availability) of drugs
- Stores that sell it may sell illegal drugs as well
- Increase in illegal activity in areas around the store

I appreciate the opportunity to share information about the drug paraphernalia problem with you today. I wanted to mention that in addition to caring about this issue professionally, I am also a concerned parent of a six year old son. We have an obligation to protect our children by not allowing stores to sell them drug paraphernalia. The passage of HB2359 will greatly support our parents and communities in helping our youth live healthy and drug free lives. Thank you for your consideration of this legislation.

DRUG PARAPHERNALIA SOLD IN KANSAS

Paraphernalia is most often located near the cash register. Some stores may also have special glass cases in which paraphernalia is located.

GLASS PIPES

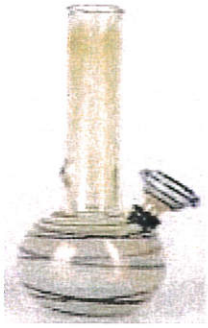



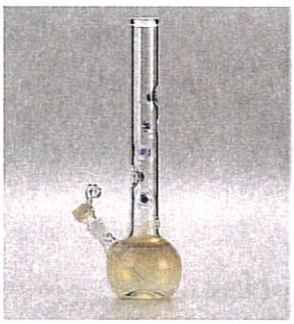

Glass pipes may be a straight tube, or have a bulb on one end. The pipes are often sold as "novelty items" with a small artificial flower inside. They may be packaged in a gift box. Other varieties of glass pipes may be blown glass of various colors or patterns. The pipes pictured above are used to smoke methamphetamine or crack cocaine.

BLUNT WRAPS

Blunt wraps are used to make marijuana cigars known as "blunts". The wraps come in a wide variety of flavors and are typically found near the register or behind the cashier counter with tobacco products. Many of the flavors (e.g. chocolate chip cookie dough) specifically target minors.

BONGS AND WATER PIPES





Bongs and water pipes are both devices used to smoke marijuana.

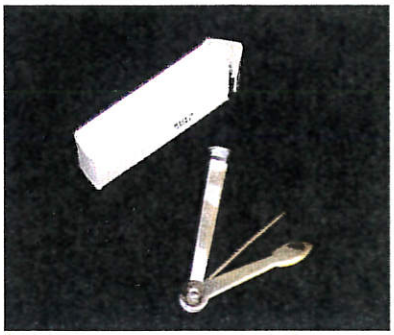
POSTAL SCALES

The photo on the left is of a digital scale, sold as a "jewelry scale". Digital scales may also be sold as "postal scales". These scales are for weighing small amounts and are commonly used to weigh drugs prior to packaging. The photo on the right is of a finger scale, which can also be used to weigh small quantities of drugs.

ITEMS TO CONCEAL DRUGS

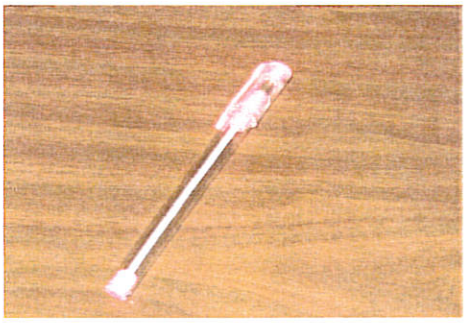
Products such as the soft drink cans above are often marketed as a way to conceal jewelry or other items. Soft drink cans may have a false top or bottom. Wood or metal boxes may also be sold in convenience stores for drug concealment.

ACCESSORIES: PIPE SCREENS, TOOL KITS, SPOONS, ETC.

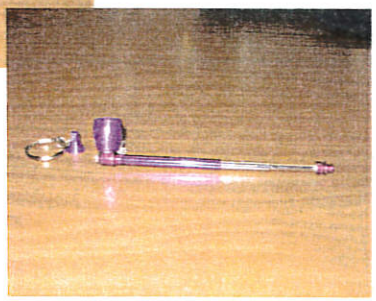


The photo on the left is of a pipe tool-kit. Items included in the tool-kit are used to clean pipes, as well as transfer drugs to the pipe. The photo on the right is of a bag of pipe screens. These screens would be used in conjunction with a glass pipe or bong. "Chore Boys" or other brands of steel wool may also be sold near the counter. Those items can be cut into small pieces and used in place of a pipe screen.

PIPES DISGUISED AS OTHER ITEMS



Glass pipe disguised as a pen.



A metal pipe disguised as a keychain. The photo on the right is of the keychain after it has been converted into a pipe.

Glass pipe disguised as travel incense

Kansas Bureau of Investigation

Larry Welch
Director

Paul Morrison
Attorney General

Testimony in Support of HB 2359
Before the House Judiciary Committee
Kyle Smith, Deputy Director
Kansas Bureau of Investigation
February 14, 2007

Chairman O'Neal and Members of the Committee,

I appear today on behalf of the Kansas Bureau of Investigation and as legislative chair of the Kansas Peace Officers' Association in support of HB 2359, a revision and strengthening of our laws dealing with drug paraphernalia. The Shawnee County Task Force on Drug Paraphernalia has been working for almost a year now in identifying problems and finding solutions. It is clear that our current laws are not working – what is clearly paraphernalia is available across the state of Kansas. HB 2350 is our best effort in addressing what appear to be weaknesses in our criminal statutes dealing with paraphernalia.

The crux of the problem with paraphernalia law is that often legitimate items with legitimate uses are used to produce, store and consume illegal drugs. Needle nose pliers can be used as a roach clip and a turkey baster can not only keep the turkey moist but also help make methamphetamine. But we have merchants setting up shelves of items that are designed for use as paraphernalia, and any legitimate use is clearly an imaginary and twisted stretch.

When you see someone using an item as paraphernalia, or he or she admit they are going to do so, or there is residual evidence of past use, the criminal case is easy. But when items are for sale on the shelves of a gas station, none of that evidence is available and the case is more difficult. HB 2359 tries to address this problem by clarifying, to the advantage of both law enforcement and retailers, exactly what is paraphernalia, adding those items that have no legitimate use (e.g. disguised pipes) and enhancing the penalties for selling these items near schools. Attached is a copy of the bill with section-by-section explanations on each of the amendments.

Thank you for your time and consideration. I would be happy to answer your questions.

House Judiciary
Date 2-14-07
Attachment # 5

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX

Session of 2007

HOUSE BILL No. 2359
Explanation of Proposed Amendments

AN ACT concerning crimes and punishment; relating to controlled substances; drug paraphernalia; amending K.S.A. 65-4153 and K.S.A. 2006 Supp. 65-4150, 65-4151 and 65-4152 and repealing the existing sections.

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

Section 1. K.S.A. 2006 Supp. 65-4150 is hereby amended to read as follows: 65-4150. As used in this act:

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

(b) "Deliver" or "delivery" means actual, constructive or attempted transfer from one person to another, whether or not there is an agency relationship.

(c) "Drug paraphernalia" means all equipment and materials of any kind which are used or, intended for use *or* ***specifically designed for use*** in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of the uniform controlled substances act. "Drug paraphernalia" shall include, but is not limited to:

(1) Kits used or intended for use in planting, propagating, cultivating, growing or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used or intended for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances.

(3) Isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used or intended for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances.

(5) Scales and balances used or intended for use in weighing or measuring controlled substances.

This language was added to assist in the prosecution for paraphernalia that is designed for such use but where it might be difficult to prove that anyone had the intent to use it at that time. E.G., a shop owner has paraphernalia for sale but says he never intended it to be used for drugs.

(6) Diluents and adulterants, such as ***including, but not limited to,***quinine hydrochloride, mannitol, mannite, dextrose and lactose, which are used or intended for use in cutting controlled substances.
(7) Separation gins and sifters used or intended for use in removing twigs and seeds from or otherwise cleaning or refining marihuana.
(8) Blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled substances.
(9) Capsules, balloons, envelopes***, bags*** and other containers used or intended for use in packaging small quantities of controlled substances.
(10) Containers and other objects used or intended for use in storing or concealing controlled substances.
(11) Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting controlled substances into the human body.
(12) Objects used or, intended for use ***or specifically designed for use*** in ingesting, inhaling or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:
(A) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;
(B) water pipes, ***bongs or smoking pipes designed to draw smoke through water or another cooling device;***
(C) carburetion tubes and devices ***pipes, glass or other heat resistant tubes or any other device used or intended to be used, designed to be used to cause vaporization of a controlled substance for inhalation;***
(D) smoking and carburetion masks;
(E) roach clips (objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand);
(F) miniature cocaine spoons and cocaine vials;
(G) chamber ***smoking*** pipes;
(H) carburetor ***smoking*** pipes;
(I) electric ***smoking*** pipes;
(J) air-driven ***smoking*** pipes;
(K) chillums;
(L) bongs; and
(M) ice pipes or chillers; ***and***
(N) any smoking pipe manufactured to disguise its intended purpose.
(d) "Person" means any individual, corporation, government or governmental subdivision or agency,

Changes here are intended to clarify and assist courts, cops, defendants and prosecutors in knowing what is paraphernalia.

Language is targeted at items that are made to hide their true purpose.

business trust, estate, trust, partnership, association or other legal entity.
(e) "Simulated controlled substance" means any product which identifies itself by a common name or slang term associated with a controlled substance and which indicates on its label or accompanying promotional
material that the product simulates the effect of a controlled substance.

Sec. 2. K.S.A. 2006 Supp. **65-4151** is hereby amended to read as
follows: 65-4151. In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors, the following:
(a) Statements by an owner or person in control of the object concerning its use.
(b) Prior convictions, if any, of an owner or person in control of the object, under any state or federal law relating to any controlled substance.
(c) The proximity of the object, in time and space, to a direct violation of the uniform controlled substances act.
(d) The proximity of the object to controlled substances.
(e) The existence of any residue of controlled substances on the object.
(f) Direct or circumstantial evidence of the intent of an owner or person in control of the object, to deliver it to a person the owner or person in control of the object knows, or should reasonably know, intends to use the object to facilitate a violation of the uniform controlled substances act. The innocence of an owner or person in control of the object as to a direct violation of the uniform controlled substances act shall not prevent a finding that the object is intended for use as drug paraphernalia.
(g) Oral or written instructions provided with the object concerning its use.
(h) Descriptive materials accompanying the object which explain or depict its use.
(i) National and local advertising concerning the object's use.
(j) The manner in which the object is displayed for sale.
(k) Whether the owner or person in control of the object is a legitimate supplier of similar or related items to the community, such as a distributor or dealer of tobacco products.
(l) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.
(m) The existence and scope of legitimate uses for the object in the community.

(n) Expert testimony concerning the object's use.
(o) Any evidence that alleged paraphernalia can or has been used to store a controlled substance or to introduce a controlled substance into the human body as opposed to any legitimate use for the alleged paraphernalia.
(p) Advertising of the item in magazines or other means which specifically glorify, encourage or espouse the illegal use, manufacture, sale or cultivation of controlled substances.

The "High Times" rule is an attempt to recognize the logical nexus between the advertising of an item in a magazine about illegal drug use and the item's intended use.

Sec. 3. K.S.A. 2006 Supp. **65-4152** is hereby amended to read as follows: 65-4152. (a) No person shall use or possess with intent to use:
(1) Any simulated controlled substance;
(2) any drug paraphernalia to use, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the uniform controlled substances act;
(3) any drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute a controlled substance in violation of the uniform controlled substances act; or
(4) anhydrous ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas department of agriculture.
(b) Violation of subsection (a)(1) or (a)(2) is a class A nonperson misdemeanor.
(c) Violation of subsection (a)(3), other than as described in paragraph (d), or subsection (a)(4) is a drug severity level 4 felony.
(d) Violation of subsection (a)(3) which involves the possession of drug paraphernalia for the planting, propagation, growing or harvesting of less than five marijuana plants is a class A nonperson misdemeanor.
(e) For persons arrested and charged under paragraph (a)(4), bail shall be at least $50,000 cash or surety, unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.
(f) The fact that an item has not yet been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was designed for use or possessed with the intention for use as drug paraphernalia.

Some courts and prosecutors were unclear whether unused items could or should be considered paraphernalia.

Sec. 4. K.S.A. 65-4153 is hereby amended to read as follows: 65-4153. (a) No person shall ***sell, offer for sale, have in such person's possession with intent to sell,*** deliver, possess with intent to deliver, manufacture with intent to deliver or cause to be delivered within this state:
(1) Any simulated controlled substance;
(2) any drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to use, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of K.S.A. 65-4162, and amendments thereto;
(3) any drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to use, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the uniform controlled substances act, except K.S.A. 65-4162, and amendments thereto; or
(4) any drug paraphernalia, knowing or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute a controlled substance in violation of the uniform controlled substances act.
(b) ***Except as provided further,*** violation of subsection (a)(1) is a nondrug severity level 9, nonperson felony.
(c) ***Except as provided further,*** violation of subsection (a)(2) is a class A nonperson misdemeanor. Any person who violates subsection (a)(2) by delivering or causing to be delivered within this state drug paraphernalia to a person under 18 years of age is guilty of a nondrug severity level 9, nonperson felony.
(d) ***Except as provided further,*** violation of subsection (a)(3) is a nondrug severity level 9, nonperson felony. Any person who violates subsection (a)(3) by delivering or causing to be delivered within this state drug paraphernalia to a person under 18 years of age is guilty of a drug severity level 4 felony.
(e) ***Except as provided further,*** violation of subsection (a)(4) is a drug severity level 4 felony.
(f) Violation of subsection (a)(1) is a nondrug severity level 7, nonperson felony if such person is 18 or more years of age and the items involved were possessed with intent to sell, deliver or distribute; sold or offered for sale in or on, or within 1,000 feet of any school

The N.A.A.C.P. requested this language to clarify that selling of paraphernalia, not just the delivery, is a violation of the act.

This language in (f) - (k) mimics the controlled substances act's penalties and language for selling drugs near schools.

property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.

(g) Violation of subsection (a)(2) is a nondrug severity level 9, nonperson felony if such person is 18 or more years of age and the items involved were possessed with intent to sell, deliver or distribute; sold or offered for sale in or on, or within 1,000 feet of any school property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.

(h) Violation of subsection (a)(3) is a drug severity level 4 felony if such person is 18 or more years of age and the items involved were possessed with intent to sell, deliver or distribute; sold or offered for sale in or on, or within 1,000 feet of any school property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.

(i) Violation of subsection (a)(4) is a drug severity level 3 felony if such person is 18 or more years of age and the items involved were possessed with intent to sell, deliver or distribute; sold or offered for sale in or on, or within 1,000 feet of any school property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.

(j) Nothing in this section shall be construed as requiring that school be in session or that classes are actually being held at the time of the offense or that children must be present within the structure or on the property during the time of any alleged criminal act. If the structure or property meets the description above, the actual use of that structure or property at the time alleged shall not be a defense to the crime charged or the sentence imposed.

(k) As used in this section, the term "or under circumstances where one reasonably should know" that an item will be used in violation of

this section, shall include, but not be limited to, the following:
(1) Actual knowledge from prior experience or statements by customers;
(2) inappropriate or impractical design for alleged legitimate use;
(3) receipt of packaging material, advertising information or other manufacturer supplied information regarding the item's use as drug paraphernalia; or
(4) receipt of a written warning from a law enforcement or prosecutorial agency having jurisdiction that the item has been previously determined to have been designed specifically for use as drug paraphernalia.

New Sec. 5. If any provision of this act or the application thereof is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

"Severability clause" is in case any part of the act is declared unconstitutional, the remainder of the act can be upheld.

Sec. 6. K.S.A. 65-4153 and K.S.A. 2006 Supp. 65-4150, 65-4151 and 65-4152 are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.

TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HB 2359
Presented by Ed Klumpp
On behalf of the
Kansas Association of Chiefs of Police

February 14, 2007

This testimony is in support of HB2359 enhancing the definitions and provisions of state statutes relating to controlled substances and drug paraphernalia. A number of businesses in Kansas continue to openly display for sale products which are only used for the ingestion of illegal drugs. Several communities are exploring various methods of curbing this "in your face" display of products facilitating the use of illegal drugs, especially for our young people. Small smoking pipes, screens for pipes, and other products can be seen in many small convenience stores and head shops. Local efforts have met with limited success in dealing with this problem. Law enforcement agencies are frequently asked by citizens, many of them parents, why we can't do something about the sale of these items. Our experience has been difficulty with existing language in showing the intent for the product to be used for illegal drug consumption when the specific device has yet to be used in that manner. The only cases we are able to pursue with frequent success are those where we can show the item has already been used for illegal purposes. This addresses the drug user but does nothing to address the availability of products any reasonable person knows is only being purchased to facilitate illegal drug use and does nothing to keep these products more difficult for first time drug users to obtain.

The additional language in section 1 of the bill should clarify its applicability to items with the only logical use being to facilitate illegal drug use. The additions presented in section 2 and 3 will also aid in the prosecution of these cases. The provisions of section 4 provide good incentives for persons not to possess or sell these products.

We hope the provisions of this bill will assist us in getting the easy accessibility to these products stopped. If it does, we will be able to meet the demands of many of our community members and decrease the availability of these products.

We urge you to recommend passage of HB 2359.

Ed Klumpp

Ed Klumpp
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House Judiciary
Date 2-14-07
Attachment # 6

Kansas Bureau of Investigation

Larry Welch
Director

Paul Morrison
Attorney General

Testimony in Support of HB 2384
Before the House Judiciary Committee
Kyle Smith, Deputy Director
Kansas Bureau of Investigation
February 14, 2007

Chairman O'Neal and Members of the Committee,

I appear today on behalf of the Kansas Bureau of Investigation in support of HB 2384, a bill enhancing the identification databanks used in the Kansas criminal justice system. HB 2384 updates the statutes and addresses some issues that have arisen in trying to implement last session's HB 2554, DNA sampling upon arrest.

Last October 10, 2006, the Minnesota Court of Appeals in a case named *In re Welfare of C.T.L.*, 722 N.W.2d 484, Minn.App., 2006, held that Minnesota's legislature's decision to require DNA samples be destroyed if no conviction is obtained was used to rule their statute unconstitutional. *"This requirement suggests that the legislature has determined that the state's interest in collecting and storing DNA samples is outweighed by the privacy interests of a person who has not been convicted."* *In re CTL*, page 9. The more the DNA profiles are treated as fingerprints, the more likely HB 2554 will be upheld as constitutional. HB 2384 will help defend HB 2554 from constitutional attack by clarifying that the arrestee DNA program is a reasonable, procedural process. DNA profiles, like fingerprints, are procedural and used to identify arrestees - not a 4th Amendment search designed to just solve crimes.

Changes

Section 1. - Adds palm prints to the fingerprint files, as new technology will allow for the storage and searching of palm prints, greatly enhancing investigations. Palm prints are currently not routinely taken, even though they can be just as useful as fingerprints – thus enhancing criminal investigations.

Section 2. - The changes at the top of page 3 are basically clean-up, deleting a repealed statute and replacing it with the new juvenile offender sentencing statute. (I do think there may be one too many 'or's in the sentence if further clean up is desired).

- The new language at the bottom of page 3 and top of page 4 is actually existing language specifying what misdemeanors are included in the DNA data bank. The amendment will allow the use of cheaper, less intrusive swabs instead of drawing blood for on these offenses.

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- The changes on page 4 from line 20 down, continuing to page 5, line 5, and on page 6, are designed to help protect the arrestee program from court challenge by clarifying that the DNA samples are to be treated as fingerprints – a tool for identification, not a search implicating the 4th Amendment. Further, treating these samples as fingerprints will save money and time in both the DNA and records divisions of the KBI.

    - Striking section (4) treats DNA profiles as fingerprints – a record tying a person to an incident, not an investigative search.
    - Section (5) restores the expungement process to allow destruction of both the DNA sample and the record. HB 2554 set up an automatic system whereby the DNA sample was destroyed but not the record. Without the sample for verification, federally set procedures do not allow entry of the sample into the national database, rendering the record almost useless. This one change could save the KBI over $300,000 dollars as we would no longer have to track every case throughout its history to see if it was ultimately dismissed or reversed.
    - Section (e)(6) strikes the provision that required state prosecutors to notify the KBI whenever the statute of limitations had run on a case involving DNA. This is impractical in the real world given the fact that many prosecutors might not even have a case open, the prosecutors may have changed and the fact that statute of limitations allows filing of sexual assaults one year from whenever there is a DNA hit – so there really isn't a known expiration.
    - Section (f) is struck due to redundancy with section (g), once the changes on page 5, line 12 are made. The new language on page 5, lines 5 to 9, clarifies that registered offenders' DNA will be part of the DNA databank law.

Section 3. - On page 6, line 31, amends K.S.A. 75-724 to clarify the determination in HB 2554 that juvenile offenders who are charged with the specified felonies are subject to DNA testing, therefore they should also be subject to paying the required fee. The statute says 'conviction', but juvenile offender cases are usually referred to as 'adjudications".

Thank you for your time and consideration. I would be happy to answer any questions regarding the bill.

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TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HB 2384
Presented by Ed Klumpp
On behalf of the
Kansas Association of Chiefs of Police

February 14, 2007

This testimony is in support of HB2384 which will provide for more universal collection of palm prints and for positive changes in the DNA collection process of arrested persons.

Our extensive law enforcement experience tells us the value of palm prints in criminal investigations. Latent prints left by palm surfaces are at times left at crime scenes by the suspect when useful latent fingerprints are not. These latent palm prints are useless without the palm prints collected from persons arrested. Without both, no comparison and identification can be made. Our only reservation with this provision is our uncertainty of the impact on local agencies regarding the equipment and training for the collection of palm prints. We also know that some local agencies that have gone to the electronic scanned fingerprinting systems are reluctant to do both electronic and ink impressions. And many of the older fingerprint scanning systems are not capable of collecting palm prints, although newer models do have this capability. We are hesitant to make a recommendation regarding this because we have not had adequate time to collect the data from our members regarding any hardship this will cause. We hope to have that data by the time this bill is in a Senate committee if passed by the House. To be clear, we support the concept but if our agencies are not equipped and trained to perform this function, and if getting such equipment and training is problematic, we might later recommend a phase in period during which the collection of palm prints is encouraged before the collection of palm prints is mandated. We feel it is probably premature to do that at this time because our member survey may reveal that it is not a problem at all.

We fully support the DNA provisions of this bill. These provisions strengthen the process for collecting and handling the DNA samples and data. It is a cleaner process administratively and offers a better opportunity for removal of the DNA information if the petition to remove it is approved. Line 41 on page 3 through line 7 on page 4, allow for the DNA collection on additional crimes which will be very helpful in solving these crimes more quickly, thus reducing the opportunity for further victimization by an unknown suspect.

The provision on line 4, page 3, cleans up a statute reference which probably should be made regardless of your decision on the remainder of the bill.

We support a Committee recommendation to pass HB 2384 with the understanding we may take the opportunity at a later stage of the legislative process to address the concerns we expressed regarding the palm prints.

Ed Klumpp

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House Judiciary
Date 2-14-07
Attachment # 8

KANSAS BAR
ASSOCIATION

Testimony in Support of
House Bill No. 2381

Presented to the House Judiciary Committee
February 14, 2007

The Kansas Bar Association is a voluntary, professional association of over 6,900 members dedicated to serving Kansas lawyers, their clients, and the people of Kansas.

The KBA raisses its objection to the collection of DNA samples upon arrest of an adult, or upon a juvenile being taken into custody. Such authority was passed in the 2006 Legislative Session as part of **HB 2554**, even as **SB 261**, the Judicial Council's revision of the Juvenile Offender Code prohibited even fingerprinting and photographing juveniles until after adjudication. Our objections are as follows:

First, removing a DNA sample from a human being is a search of that person, unlike the taking of fingerprints and photographs, In the Matter of the Welfare of C.T.L., Juvenile, A06-874, Minnesota Court of Appeals, October 10, 2006 (portions attached).

Second, a DNA sample is a much more intrusive collection. DNA holds medical and biological clues as well as identification clues, and can be kept forever. The fact that such an invasion of privacy can occur without the intervention of a magistrate is poor public policy. Kansas law on arrests without a warrant clearly allows law enforcement officers to arrest an individual when the officer has probable cause to believe the individual is committing or has committed a felony. See K.S.A.2005 Supp. 22-2401(c)(1); ***Gerstein** v. Pugh,* 420 U.S. 103, 113, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). But after such an arrest, a suspect may be held in custody pending trial only so long as a judicial determination of probable cause is made within 48 hours of the arrest. See K.S.A.2005 Supp. 22-2901(7); ***County of Riverside** v. McLaughlin,* 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). If a person being held for trial, either within 90 days if in custody, or 180 days when released on bond, must have a determination of probable cause within 48 hours of arrest, there should also be a determination of probable cause before a DNA sample is taken upon a warrantless arrest, as a DNA sample lasts forever.

We should point out that in addition to **SB 26**, in **SB 53**, release of dormant judgments, and **SB 54**, signing of arrest warrants, the district court clerks realize that a district judge should be required to perform these acts. The Kansas Bar Association proposes that a magistrate should also be involved with the taking of a DNA sample from a person arrested without a warrant, and we urge the committee to pass **HB 2381** out favorably.

James W. Clark
KBA Legislative Counsel

* * *

House Judiciary
Date 2-14-07
Attachment # 9

722 N.W.2d 484; IN RE WELFARE OF C.T.L.;

722 N.W.2d 484 (MN 2006)
IN RE WELFARE OF C.T.L.

In the Matter of the WELFARE OF C.T.L., Juvenile.

No. A06-874.

Court of Appeals of Minnesota.

October 10, 2006

This Page Contains Headnotes.

Appeal from the District Court, Washington County, Elizabeth Martin, J.

Mike Hatch, Attorney General, St. Paul, MN, and Douglas H. Johnson, Washington County Attorney, Mary M. Pieper, Assistant County Attorney, Stillwater, MN, for appellant.

John M. Stuart, State Public Defender, Lawrence Hammerling, Deputy Assistant Public Defender, Minneapolis, MN, and Megan H. Schlueter, Assistant Washington County Public Defender, Stillwater, MN, for respondent.

Considered and decided by RANDALL, Presiding Judge; KALITOWSKI, Judge; and PETERSON, Judge.

OPINION

PETERSON, Judge.

A delinquency petition was filed alleging that respondent aided and abetted first-degree aggravated robbery and committed fifth-degree assault. Appellant moved for an order requiring respondent to provide a biological specimen for the purpose of DNA analysis pursuant to Minn.Stat. § 299C.105 (Supp.2005). Respondent challenged the constitutionality of Minn.Stat. § 299C.105 and moved for an order certifying the issue of the statute's constitutionality to this court as an important and doubtful question. The district court held that the statute's "compulsory DNA profiling of criminal defendants prior to conviction" is unconstitutional and certified as important and doubtful the question of whether the provisions of Minn.Stat. § 299C.105 that require charged defendants to provide a DNA sample upon a judicial finding of probable cause, but before any conviction on the charged offense, is an unconstitutional search in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. We answer the certified question in the affirmative.

FACTS

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Respondent C.T.L., a juvenile, was charged with one count each of fifth-degree assault, in violation of Minn.Stat. § 609.224, subd. 1(1)(2) (2004), and aiding and abetting first-degree aggravated robbery, in violation of Minn.Stat. § 609.245, subd. 1 (2004). Appellant State of Minnesota moved for an order requiring C.T.L. to report to the sheriff's office immediately after his initial appearance in district court to provide a biological specimen for the purpose of DNA analysis pursuant to Minn.Stat. § 299C.105 (Supp. 2005). Respondent then moved for an order finding that the provisions of Minn.Stat. § 299C.105 that require law-enforcement personnel to obtain biological samples from certain defendants before any finding of guilt violate the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. Respondent also moved for an order certifying the issue of the statute's constitutionality to this court as an important or doubtful question.

Following a hearing, the district court issued an order holding unconstitutional the statute's "compulsory DNA profiling of criminal defendants prior to conviction" and certifying the issue to this court as important and doubtful because of its "broad and far reaching implications for all defendants charged with crimes in the state of Minnesota."

ISSUE

Do the portions of Minn.Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), that direct law-enforcement personnel to take a biological specimen from a person who has been charged with an offense, but not convicted, violate the Fourth Amendment to the United States Constitution

and Article I, Section 10, of the Minnesota Constitution?

ANALYSIS

"This court accepts certification of questions regarding criminal statutes as important and doubtful when the challenged statute has statewide application and the question has not previously been decided." *State v. Mireles,* 619 N.W.2d 558, 561 (Minn.App.2000), *review denied* (Minn. Feb. 15, 2001). Whether Minn. Stat. § 299C.105 (Supp.2005) directs law-enforcement personnel to conduct unconstitutional searches in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution(fn1) has not been addressed by Minnesota appellate courts, and an answer to this question will have statewide application. Therefore, the district court properly certified the question.

The constitutionality of a statute is a question of law, which this court reviews de novo. *State v. Wright,* 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999). Minnesota statutes are presumed to be constitutional, and a court's power to declare a statute unconstitutional "should be exercised with extreme caution and only when absolutely necessary." *State v. Machholz,* 574 N.W.2d 415, 419 (Minn.1998) (quoting *In re Haggerty,* 448 N.W.2d 363, 364 (Minn. 1989)). A party challenging a statute has the burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional. *Id.* (quotation omitted).

The statute that C.T.L. challenges directs law-enforcement personnel to take a biological specimen from C.T.L. for the purpose of DNA analysis. The statute states:

> Sheriffs, peace officers, and community corrections agencies operating secure juvenile detention facilities shall take or cause to be taken biological specimens for the purpose of

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DNA analysis as defined in section 299C.155, of the following:

. . . .

(3) juveniles who have appeared in court and have had a judicial probable cause determination on a charge of committing . . .

(iv) robbery under section 609.24 or aggravated robbery under section 609.245[.]

Minn.Stat. § 299C.105, subd. 1(a)(3)(iv).

Minn.Stat. § 299C.155, subd. 1 (Supp. 2005), defines "DNA analysis" as "the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another human biological specimen for identification purposes." The Bureau of Criminal Apprehension (BCA) is required to "adopt uniform procedures and protocols to maintain, preserve, and analyze human biological specimens for DNA" and "establish a centralized system to cross-reference data obtained from DNA analysis." Minn.Stat. § 299C.155, subd. 3 (Supp. 2005). The BCA is also required to "perform DNA analysis and make data obtained available to law enforcement officials in connection with criminal investigations

in which human biological specimens have been recovered." Minn.Stat. § 299C.155, subd. 4 (Supp. 2005). Biological specimens taken under Minn.Stat. § 299C.105, subd. 1(a), must be forwarded to the BCA within 72 hours. Minn.Stat. § 299C.105, subd. 1(b).

In addition to the provision that applies to C.T.L., Minn.Stat. § 299C.105, subd. 1(a), directs law-enforcement personnel to take biological specimens from (1) juveniles who have had a probable-cause determination on a charge of any one of several enumerated offenses or who have been adjudicated delinquent for committing, or attempting to commit, any of the offenses; Minn.Stat. § 299C.105, subd. 1 (a)(3); (2) persons who have had a judicial probable-cause determination on a charge of committing, or have been convicted of committing or attempting to commit, any of several enumerated offenses; Minn.Stat. § 299C.105, subd. 1(a)(1); and (3) persons sentenced as patterned sex offenders under Minn.Stat. § 609.108; Minn.Stat. § 299C.105, subd. 1(a)(2).

The certified question before us involves only the portions of Minn.Stat. § 299C.105, subd. 1(a)(1) and (3) that direct law-enforcement personnel to take biological specimens from juveniles and adults who have had a probable-cause determination on a charged offense but who have not been convicted. If one of these people is later found not guilty, the BCA is required to destroy the biological specimen taken from the person who is found not guilty and to return all records to the person. Minn. Stat. § 299C.105, subd. 3(a). If the charge against one of these people is later dismissed, the BCA is required to destroy the biological specimen and return all records to the person upon the request of the person who submitted a biological specimen. *Id.* If the BCA destroys a person's biological specimen under either of these circumstances, the BCA is also required to "remove the person's information from the [BCA's] combined DNA index system and return all related records and all copies or duplicates of them." Minn.Stat. § 299C.105, subd. 3(b).

The state does not dispute that taking and analyzing biological specimens as required under the statute is a search under the Fourth Amendment. *See Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 618, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989) ("the collection and subsequent analysis of the

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requisite biological samples must be deemed Fourth Amendment searches"). The Fourth Amendment and Article I, section 10, of the Minnesota Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "[T]he most basic constitutional rule in this area is that `searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment —subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)).

In *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court explained the role of the Fourth Amendment when the state directs that a biological specimen be taken from a person and analyzed. *Schmerber* involved a defendant who was arrested at a hospital while receiving treatment for injuries that he had suffered when the automobile that he apparently had been driving was involved in an accident. *Id.* at 758, 86 S.Ct. at 1829. A police officer directed that a blood sample be drawn from the defendant by a

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physician at the hospital, and a chemical analysis of the sample indicated intoxication. *Id.* at 758-59, 86 S.Ct. at 1829. At the defendant's trial for driving an automobile while under the influence of intoxicating liquor, the report of the chemical analysis was admitted into evidence over the defendant's objection that the blood had been drawn without his consent. *Id.* at 759, 86 S.Ct. at 1829. The defendant contended that in that circumstance, the withdrawal of the blood and the admission of the report denied him his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. *Id.*

In considering whether administering the blood test violated the Fourth Amendment, the Supreme Court explained that

> the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring [the defendant] to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.(fn2)

Id. at 768, 86 S.Ct. at 1834.

The Supreme Court acknowledged that there was plainly probable cause for the officer to arrest the defendant and charge him with driving an automobile under the influence of alcohol. *Id.* But the court determined that the considerations that ordinarily permit a search of a defendant incident to an arrest

> have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
>
> Although the facts which established probable cause to arrest in this case also suggested the

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> required relevance and likely success of a test of [the defendant's] blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

Id. at 769-70, 86 S.Ct. at 1835 (quoting *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948) (citation omitted)).

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The Supreme Court then recognized that the officer who directed the physician to draw the defendant's blood might reasonably have believed that the delay necessary to obtain a warrant threatened the destruction of the evidence because the amount of alcohol in the blood begins to diminish shortly after drinking stops. *Id.* at 770, 86 S.Ct. at 1835. Given the fact that the evidence could disappear during the time that it would take to seek out a magistrate and obtain a search warrant, the Supreme Court held that the officer's attempt to secure evidence of blood-alcohol content was an appropriate incident to the defendant's arrest. *Id.* at 771, 86 S.Ct. at 1836.

The significant principle to be drawn from *Schmerber* with respect to Minn.Stat. § 299C.105, subd. 1(a), is that establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant. In *Schmerber,* the facts that established probable cause to arrest the defendant were the smell of liquor on his breath, and the blood-shot, watery, and glassy appearance of his eyes. *Id.* at 769, 86 S.Ct. at 1835. These symptoms of drunkenness also suggested that there was alcohol in the defendant's blood. But, by itself, the strong inference that there was alcohol in the defendant's blood was not enough to permit the police officer to direct the physician to draw the defendant's blood. It was only because evidence of alcohol in the defendant's blood could disappear during the time it would take to obtain a search warrant that the Supreme Court permitted the search without a warrant. Otherwise, a search warrant was required, and the inferences to support the warrant needed to be drawn by a neutral and detached magistrate, instead of the police officer.

The state acknowledges that the Fourth Amendment requires a showing of probable cause in order for a search warrant to be issued. But it argues that Minn.Stat. § 299C.105, subd. 1(a), satisfies this requirement because, under the statute, a biological specimen will not be taken until a court makes a probable-cause determination. What this argument fails to recognize, however, is that probable cause to support a criminal charge is not the same thing as probable cause to issue a search warrant.

Probable cause to support a criminal charge exists when "`the evidence worthy of consideration * * * brings the charge against the prisoner within reasonable probability.'" *State v. Koenig,* 666 N.W.2d 366, 372 (Minn.2003) (quoting *State v. Florence,* 306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976)). Probable cause to issue a search warrant exists when, given the totality of the circumstances, there is "a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Zanter,* 535 N.W.2d 624, 633 (Minn.1995) (quotation omitted).

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Minn.Stat. § 299C.105, subd. 1(a)(1) and (3), use a judicial determination of probable cause to support a criminal charge as a substitute for a judicial determination of probable cause to issue a search warrant. But, just as in *Schmerber,* where the existence of probable cause to arrest the defendant was not sufficient to permit an intrusion into his body without a warrant, a determination of probable cause to support a criminal charge, even if it is made by a judge, is not sufficient to permit a biological specimen to be taken from the person charged without a warrant. The fact that a judge has determined that the evidence in a case brings a charge against the defendant within reasonable probability does not mean that the judge has also

determined that there is a fair probability that contraband or evidence of a crime will be found in a biological specimen taken from the defendant.

By directing that biological specimens be taken from individuals who have been charged with certain offenses solely because there has been a judicial determination of probable cause to support a criminal charge, Minn.Stat. § 299C.105, subd. 1(a)(1) and (3), dispense with the requirement under the Fourth Amendment that before conducting a search, law-enforcement personnel must obtain a warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime. Under the statute, it is not necessary for anyone to even consider whether the biological specimen to be taken is related in any way to the charged crime or to any other criminal activity.

Citing federal court opinions that conclude that requiring a defendant to submit to DNA sampling does not violate the defendant's Fourth Amendment right against unreasonable searches and seizures, the state argues that this court should examine the reasonableness of Minn.Stat. § 299C.105 under a general balancing test that weighs a defendant's right to privacy against the state's interest in collecting and storing DNA samples. But all of the opinions that the state cites involve statutes that require specimens for DNA testing to be taken only from individuals who have been convicted of a criminal offense, and when weighing the individual's right to privacy against the state's interest in DNA testing, the opinions recognize that an individual who has been convicted of an offense has a reduced expectation of privacy and conclude that this reduced expectation of privacy does not outweigh the state's interest in DNA testing. *Kruger v. Erickson,* 875 F.Supp. 583 (D.Minn.1995), *aff'd on other grounds,* 77 F.3d 1071 (8th Cir.1996); *Johnson v. Quander,* 370 F.Supp.2d 79 (D.D.C.2005), *aff'd,* 440 F.3d 489 (D.C.Cir.2006); *Padgett v. Ferrero,* 294 F.Supp.2d 1338 (N.D.Ga. 2003), *aff'd sub nom., Padgett v. Donald,* 401 F.3d 1273 (11th Cir.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 352, 163 L.Ed.2d 61 (2005); *United States v. Sczubelek,* 255 F.Supp.2d 315 (D.Del.2003), *aff'd,* 402 F.3d 175 (3rd Cir.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 2930, ___ L.Ed.2d ___ (2006).

The question certified by the district court involves only biological specimens to be taken from individuals who have been charged with a criminal offense but who have not been convicted. Therefore, the reduced expectation of privacy that was present in the cases the state cites is not present here.

Furthermore, Minn.Stat. § 299C.105, subd. 3, requires the BCA to destroy a biological specimen and remove information about the specimen from the combined DNA index system when the person from whom the specimen was taken is found not guilty or the charge against the person is dismissed. This requirement suggests that the legislature has determined that the state's interest in collecting and storing DNA samples is outweighed by the privacy interest of a person who has not been convicted. Consequently, unless the privacy expectation of a person who has been charged and is awaiting the disposition of the charge is different from the privacy expectation of a person who was charged but the

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charge was dismissed or the person was found not guilty, we see no basis for concluding that the state's interest in taking a biological specimen from a person solely because the person has been charged outweighs the person's right to privacy. And because a person who has

been charged is presumed innocent until proved guilty, we see no basis for concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty. Therefore, we conclude that the privacy interest of a person who has been charged but has not been convicted is not outweighed by the state's interest in collecting and analyzing a DNA sample.

DECISION

Because Minn.Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), direct law-enforcement personnel to conduct searches without first obtaining a search warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime, and because the privacy interest of a person who has been charged with a criminal offense, but who has not been convicted, is not outweighed by the state's interest in taking a biological specimen from the person for the purpose of DNA analysis, the portions of Minn.Stat. § 299C.105, subd. 1(a)(1) and (3), that direct law-enforcement personnel to take a biological specimen from a person who has been charged but not convicted violate the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution.

Certified question answered in the affirmative.

Footnotes:

FN1. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Although there are minor differences in language and punctuation, Article I, Section 10 of the Minnesota Constitution is substantively the same as the Fourth Amendment.

FN2. C.T.L. does not claim that the means and procedures for taking a biological specimen from him do not respect relevant Fourth Amendment standards of reasonableness. The only question before us is whether the statute may require that biological specimens be taken from individuals who have been charged with an offense, but not convicted.

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Kansas Bureau of Investigation

Larry Welch
Director

Paul Morrison
Attorney General

Testimony in Opposition to HB 2381
Before the House Judiciary Committee
Kyle Smith, Deputy Director
Kansas Bureau of Investigation
February 14, 2007

Chairman O'Neal and Members of the Committee,

I appear today on behalf of the Kansas Bureau of Investigation in opposition to HB 2381. The bill would appear to be a direct effort to make the Kansas law on collecting DNA upon arrest unconstitutional. Further, it would make actual compliance incredibly difficult for local agencies.

Last October, the Minnesota court of appeals in a case named *In re C.T.L., 722 N.W. 2d 484, 2006,* held that Minnesota's statute, that had almost the exact same language as is proposed in HB 2381 requiring a probable cause determination, was unconstitutional. The inclusion of a probable cause determination only strengthens the argument, successful in Minnesota, that the collection of the DNA sample is a search, not an administrative action.

HB 2381 does nothing but try to make our statute identical to a statute that has been found unconstitutional. While I can understand defense attorneys attacking the legislation directly, this bizarre attempt to insert language to make the law unconstitutional and subject to attack in the courts is unique.

If we approach the collection of DNA samples as an investigative search then the analysis in CTL is probably correct – and a specific search warrant would be required for each sample collected. However, if the DNA samples collected under HB 2554 are simply 'the new fingerprints', and an administrative function of the police powers, it may well pass constitutional muster. Passage of HB 2381 inserting a probable cause requirement would certainly indicate that this is an investigative tool first and foremost, and not an administrative function like fingerprints.

Thank you for your time and consideration. I would be happy to stand for any questions.

House Judiciary
Date 2-14-07
Attachment # 10

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE
IN OPPOSITION OF HB 2381
Presented by Ed Klumpp
On behalf of the
Kansas Association of Chiefs of Police

February 14, 2007

This testimony is in opposition to the provisions of HB2381 requiring a finding of probable cause prior to the collection of DNA samples. The only provision of this bill we can support is the cleanup of the statute reference on page 2, line 1. This cleanup language is also in HB2384 which contains the DNA provisions we support.

The provision of this bill requiring a probable cause finding will create inconsistencies and difficulties in the collection of the DNA samples. We offer the following points as the rationale for our opposition:

1. The collection of DNA is fundamentally no different than the collection of fingerprints or palm prints. They are all identification methods for the person arrested. While one consists of images of the ridges on the skin the other is merely the collection of a saliva sample. They all produce a record that can positively identify the person arrested. There is no real need to separate the administrative processes for the different types of identifying samples.
2. Arrests with a warrant occur after a probable cause finding to issue the warrant and the submission will be required at time of arrest, but an on view arrest or probable cause arrest by an officer would require waiting for the submission of the sample.
3. The wording suggests, while not clearly stating, that the sample can be collected at time of the arrest—just not sent to the KBI. It is difficult in practice to collect the sample immediately following the probable cause hearing when a person is out on bond. The personnel and materials to collect this sample are not normally available at the court house at the time of the hearing. This can be further compounded if the preliminary hearing is waived. So collection at time of arrest is necessary. This will produce a storage issue for agencies collecting the samples. It will also require yet another administrative process to assure the agency is aware of the finding of probable cause or waiver of preliminary so the sample can be sent to the KBI.
4. The current language of the statute allows for a clean consistent flow of collecting the sample and sending it to the KBI at the time of arrest, with the process of removal of the sample if no probable cause is found. To our knowledge there have not been any problems with this system.

We further submit that if the Committee determines to proceed with the proposed probable cause provisions then lines 25-30 on page 2 should be stricken since under those conditions the KBI would not have any DNA samples taken from the arrested person.

In summary, we see no need to change the current language on lines 8-12 of page 2 of this bill. We strongly urge you to <u>not</u> recommend HB 2381 to be passed.

Ed Klumpp
Chief of Police-Retired
Topeka Police Department

Legislative Committee Chair
Kansas Association of Chiefs of Police
E-mail: eklumpp@cox.net
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Cell: (785) 640-1102

House Judiciary
Date 2-14-07
Attachment # 11

SEDGWICK COUNTY, KANSAS

SHERIFF'S OFFICE
GARY STEED
Sheriff

141 WEST ELM * WICHITA, KANSAS 67203 * TELEPHONE: (316) 383-7264 * FAX: (316) 660-3248

TESTIMONY
Before the House Judiciary Committee
February 14, 2007

Honorable Chairman Michael O'Neal and members of the committee, I appreciate the opportunity to testify concerning the collection and submission of samples of DNA. The proposed change in House Bill 2381 fundamentally alters the responsibilities from the original law that went into effect in January.

The jails and detention facilities across the state are tasked with the collection of DNA sample at the time finger prints are taken. We at the Sedgwick County Sheriff's Office understood the importance of the collection of DNA samples so we volunteered to assist the Kansas Bureau of Investigation with the development of the collection procedures, sample packaging and the training for the entire state. The proposed revisions will shift the determination of which samples should be destroyed or forwarded for analysis from the courts and the Kansas Bureau of Investigation to the sheriff's office.

The proposed language lacks a mechanism by which the sheriff is notified by the courts when there has been a finding of probable cause so that samples can be legally submitted to the Kansas Bureau of Investigation. In addition the sheriff will be responsible for the secure storage of all samples until the probable cause determination is made and for the disposal of all samples that are not required. The Kansas Bureau of Investigation is better equipped to store, track and destroy samples that are not required. The Kansas Bureau of Investigation should continue to be the central repository for all DNA samples.

The Fourth Amendment to the Constitution requires that probable cause be established before any search or seizure occurs. The court's ruling on similar statutes has prompted the proposed change of state law. As proposed each sheriff would be potentially exposed to additional liability for violating the individual's right by submitting a DNA sample for a case where probable cause was not found.

In Sedgwick County more than 35,000 persons were booked in 2006 and more than sixty DNA samples have been taken between January 1, 2007 and February 12, 2007. Starting in 2008 the number of charges for which samples are required will increase and it is realistic to expect the number of DNA sample will increase as well.

The Sedgwick County Sheriff's Office would like to suggest the amending K.S.A. 2006 Supp. § 21-2511 so that DNA sample would be collected upon conviction. The Kansas Department of Corrections and the various collection points for DNA samples prior to January 2007 are still in place. By reverting to collection after conviction court challenges should be minimal.

House Judiciary
Date 2-14-07
Attachment # 12

KANSAS BAR
ASSOCIATION

Testimony in Support of
House Bill No. 2382

Presented to the House Judiciary Committee
February 14, 2007

The Kansas Bar Association is a voluntary, professional association of over 6,900 members dedicated to serving Kansas lawyers, their clients, and the people of Kansas.

The KBA has a requested **HB 2382**, not out of opposition to protecting victims of domestic violence, but because of problems that occur when protection orders are entered into NCIC, National Criminal Information Center, when the respondent has not been notified of the order.

Currently, KSA 60-3104 allows for a protection from abuse order by the filing of a petition with any district judge, or with the clerk of the district court. When the court is unavailable, a verified petition with protection order may be submitted to any district judge, who may give emergency relief by granting the order *ex parte*, KSA 60-3105. KSA 60-3106 requires a hearing within 20 days of the filing of the petition, which may be continued, with the temporary orders remaining in effect. Prior to the hearing, on a showing of good cause, the court may issue an *ex parte* order, but if the temporary order modifies an existing order of custody, residency or visitation, sworn testimony is required. KSA 60-3107(a) lists 10 different types of conditions a court may impose in a protective order, but under (b) a court may not issue such an order against a plaintiff unless the defendant files a counter petition, plaintiff has notice and if a court has made specific findings against both parties as to their acting as aggressors. There is no similar protection for defendants before the initial protection order is issued. Protection orders last for up to one year unless otherwise specified in the order, KSA 60-3107.

Consequently, it is possible for a person to have a protective order issued against them without their having knowledge of such an order. Under the Violent Crime Control and Law Enforcement Act of 1994, such persons are prohibited from purchasing a firearm, and under the Kansas Personal and Family Protection Act passed year, such persons are prohibited from being issued a permit to carry a conceal weapon.

The Kansas Bar Association supports all efforts to control domestic violence, and by requesting this bill, it is not seeking to weaken current law. We are only concerned that some individuals may be harmed by the lack of opportunity to have the intervention of a disinterested magistrate before protection from abuse orders are entered into a national record.

James W. Clark
KBA Legislative Counsel

* * *

House Judiciary
Date 2-14-07
Attachment # 13

Kansas Coalition Against Sexual and Domestic Violence

UNITED AGAINST VIOLENCE

634 SW Harrison Topeka, Kansas 66603
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org • www.kcsdv.org

TO: Representative O'Neal and Members of the House Judiciary Committee
FROM: Joyce Grover, General Counsel
RE: House Bill 2382
DATE: February 14, 2007

The Kansas Coalition Against Sexual and Domestic Violence is a coalition of 30 programs across Kansas that provide direct services to victims of sexual and domestic violence. One of the critical services provided by these programs is to assist victims in accessing the courts and legal remedies, including protection orders when appropriate.

Protection orders are often a critical piece of a safety plan for victims of abuse and their children. When a victim of domestic violence decides to leave her abuser, she may be putting her life and the lives of her children in great danger. This is why leaving is such a critically individual decision for every battered woman. Statistics show that during this time of leaving the frequency of the violence may increase, stalking may begin, or the severity of the abuse may become lethal.

"Leaving" can be interpreted in a variety of ways by the abuser. It may be when she calls her mom for the first time after many months because he has forbidden any contact with mom. It may be when she tells her minister or rabbi about the abuse. It may be when she calls the domestic violence hotline for help. It may be when she contacts her attorney. And, it certainly may be the point when she petitions for a protection order.

The Kansas Protection from Abuse Act is designed to maximize protection for victims of abuse who seek relief in the courts during this potentially lethal time. A critical part of this design is the *ex parte* temporary protection order. Safety is what makes this interim *ex parte* order so important. The temporary order provides immediate protective measures for the petitioner until the final order is issued. Once this temporary order is issued, the defendant immediately receives notice of the order, the matter is set for hearing within 20 days, and the defendant is notified of that hearing. Sometimes this temporary order can be in place longer than the 20 days if the defendant is avoiding service or if the parties ask for a continuance or if the final hearing is contested and requires a trial. At all times during this period, however, the risk of increased violence may be high.

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K.S.A. 60-3112, added to the Protection From Abuse Act in 2001, requires that all temporary, amended, final and other protection from abuse orders shall be entered into the national criminal information center protection order file. Emergency orders, which can be obtained after hours and are good until the close of the next business day, may be entered into the database. This statute was amended in 2002 when the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (K.S.A. 60-31b01 *et seq.*) was passed. The statute requires that the sheriff in the county where these orders are issued enter them into the NCIC database and cancel them when the order is no longer valid. The sheriff is also directed to enter any modifications to the orders. The sheriff is charged with ensuring the accuracy of the entries. K.S.A. 60-3112(a).

We are most concerned about the impact of House Bill 2382 on temporary orders. This Bill would, in effect, prohibit the entry of these temporary orders into the NCIC Protection Order File. There will not have been a hearing prior to the issuance of the temporary order, which is the safety mechanism inherent in the temporary order. I will let others speak to how important the NCIC protection order file is to enforcement and quick response but I will say that enforcement and response are critical to survival and safety. This critical period of time should not be where we compromise safety or decrease response time. It should be a period when we strive to tighten up the loopholes that could impact response.

KCSDV opposes HB2382 because we believe it will decrease safety for victims of abuse. The statute as it is currently written provides for the cancellation and removal of expired orders from the database. It also directs who should enter the orders and who should remove them. There may be a problem in the procedures for getting this done but there is not a problem in the statute. We urge you to vote against HB2382.

Kansas Bureau of Investigation

Larry Welch
Director

Paul Morrison
Attorney General

Testimony in Opposition to HB 2382
Before the House Judiciary Committee
Kyle Smith, Deputy Director
Kansas Bureau of Investigation
February 14, 2007

Chairman O'Neal and Members of the Committee,

I appear today on behalf of the Kansas Bureau of Investigation and as legislative chair of the Kansas Peace Officers' Association in opposition to HB 2382, legislation that would endanger battered women across Kansas. HB 2382 would prohibit the entry into the National Crime Information Center (NCIC) database the issuance of a protection from abuse order until the probably cause hearing has been held – exactly the time when the entry is most needed.

Domestic violence cases are some of the most dangerous and difficult situations confronted by law enforcement. Emotions run deep and are sometimes overwhelming in these confrontations. An officer responding to a confrontation needs to have accurate, current information that can be verified by someone other than the parties who are so intensely engaged. By entering a PFA order into the NCIC system, a local agency provides that verifiable check for agencies across jurisdictional lines. Otherwise law enforcement is left with a 'he said, she said' determination on what orders are in effect. A wrong decision could get someone beaten or killed.

PFA's can be most important at the beginning of a separation, when the emotions are running hot. Experience shows that battered women frequently run to relatives or shelters and are in real fear for their lives. Those havens may well be across some jurisdictional line so having the PFA on file in the town that she fled won't be of much help. The pursuit will likely be immediate, not a couple of weeks later, after the probable cause hearing.

Further, by entering the PFA into the NCIC system, any attempt to purchase a firearm by that person will be flagged by the federal system and prevented. Again, the emotional turmoil that might drive someone to consider such action is most likely right after the fight or separation, not days or weeks later, after both sides have attorneys and a probable cause hearing is held.

HB 2382 is bad public policy, and worse, it is a danger to abused spouses in Kansas. We would urge the committee to kill this bill.

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Attachment # 15

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX

Shawnee County
Sheriff's Office
Sheriff Richard W. Barta
Law Enforcement Center

320 S. KANSAS, SUITE 200
TOPEKA, KANSAS 66603-3641
785-368-2200

February 14, 2007

Mr. Chairman and Members of the Committee:

My name is Lance Royer; I am a Captain with the Shawnee County Sheriff's Office. I have been in Law Enforcement for the past 19 years. In 2001 I stood before this body and explained to you my frustrations as a street officer in attempting to help victims who would tell me they had a restraining order and someone would violate the order. I would tell them this is a civil order and you would have to take this matter before the judge. That was all we could do to help the victim and tell them to leave their home and go somewhere safe.

The victims and advocates came to the legislature asked for your help. A law was created, which allowed officers to make an arrest based on a violation of that order.

The next frustration came when the victim said I have this order and the other party should be arrested. OK, we have a law now for which I can arrest but the order is file stamped two months ago from the court. Is this still a good order? I cannot call the court at 2 in the morning to see if the order is still good.

Then I found out about the National Crime Information Computer (or NCIC) Protection Order File. A place to put these orders in a computer used nationally and have them confirmed 24 hours a day. Tonya Hutchings, at the time who worked at the Kansas Bureau of Investigation, and I made entering PFA's into NCIC our project. All law enforcement officers understand and are used to using NCIC.

We went across the state teaching dispatchers and officers about the NCIC Protection Order File. Since that time the officers have become used to the fact they are able to run the parties names through the NCIC and find out if there is a valid order on file. The NCIC Protection Order File makes the order confirmable 24 hours day and ensures agencies keep them up to date.

When an order is entered into NCIC it is entered with an expiration date. The computer automatically purges the order from NCIC on that date without the need of any human intervention. A second safe guard of NCIC is the validation process. NCIC requires $1/12^{th}$ of NCIC entries be validated by the entering agency every month. This requires the agency to make sure the orders are still active by checking with the courts.

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I understand that someone wanting to purchase a handgun or a concealed carry weapon permit may be turned down by the fact his or her name may be in the NCIC Protection Order File. If someone completes the paperwork to purchase a weapon, NICS will run the persons name through NCIC and will contact the agency that entered the subject into the Protection Order File and request a copy of the order and the validity of the order before they deny the application. The Kansas Attorney Generals Office will be faxed a copy of the PFA of anyone who has a concealed carry permit and they will validate the order. If it is a concealed carry applicant, again they will contact the entering agency and request a copy of the order and again validate the validly of the order. Therefore only folks who really should not be carrying weapons will be denied.

To change the law so that NCIC entries are not made on the temporary orders would be a step backwards in time and would put victims back in a position of not obtaining the help they are entitled to by virtue of the Temporary Protection from Abuse Order. It is my observation that the majority of our calls come during the time that the Temporary Order is in effect.

Please do not take Law Enforcement back to the time where we could not have at our fingertips information about if there was a valid order on file or help the victims.

I will be happy to answer any questions you might have. Thank you for your time and consideration.

Respectfully Submitted,

Captain Lance W.T. Royer,
Commander Operations Division.

16-2

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Testimony in Support of HB 2360
Before the House Judiciary Committee
Thomas A. Nunemaker, Assistant Special Agent in Charge
Federal Bureau of Investigation, Kansas City Field Office
February 14, 2007

Chairman O'Neal and Members of the Committee,

On behalf of the Federal Bureau of Investigation and the Special Agents of the Kansas City Field Office, I thank you for this opportunity to provide testimony in support of HB 2360.

As I noted in 2004 when I had the honor to provide testimony in support of the Bill which extended peace officer status to FBI Agents in the State of Kansas, the Kansas City Field Office works closely with its state and local partners in Kansas on a variety of matters, including terrorism investigations, violent crime and drug cases, and computer crimes. The passage of HB 2784 in 2004 granted the same protection and authority that a number of other states had previously extended to FBI Agents. As with other similar statutes, the law enacted by the State of Kansas provides limited peace officer authority and civil liability protection to federal agents who find themselves in a situation where they are required to take immediate action to protect the public or prevent the commission of a crime and no federal violation is readily apparent.

In addition to providing FBI Agents with the requisite legal authority to act in order to protect the public when the specific federal jurisdictional basis may be unclear, the statute served to facilitate the cooperative relationships that exist between the FBI and state and local law enforcement agencies in Kansas. For example, the Heart of America Joint Terrorism Task Force has federal and state officers assigned to FBI offices in Kansas City, Topeka, Wichita, and Garden City. We also have the Heart of America Regional Computer Forensics Laboratory (HARCFL), which provides computer forensics assistance and analysis to law enforcement agencies throughout the State of Kansas. To complement the HARCFL's mission, the Kansas City Field Office established the Cyber Crimes Task Force, which i

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Date 2-14-07
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several Kansas law enforcement agencies. Based upon the cooperative relationships that the FBI has developed with law enforcement agencies throughout the State of Kansas, our Agents are subject to being called upon to assist in a variety of matters where ultimate jurisdictional issues may not be determined for some time.

Since the enactment of the Kansas legislation extending peace officer status to FBI Agents in 2004, I am not aware of any instance where the FBI invoked the protections afforded by the law in order to defend the actions undertaken by an Agent. Moreover, since the passage of a similar statute in the State of Missouri in 1997, the FBI has not had to avail itself of the provisions of that law. FBI Agents assigned to the Kansas City Field Office have been briefed on multiple occasions regarding the scope of these statutes, and have consistently demonstrated an ability to discharge their duties as federal law enforcement officers while remaining mindful of the limitations on their status as state peace officers.

Given the continuing need for our Agents to work on matters of mutual interest and jurisdiction with their law enforcement partners in the State of Kansas, and our interest in ensuring that are permitted to respond appropriately to protect the public, I respectfully request that the sunset provision to this statute be removed.

Again, I sincerely appreciate the opportunity to address this Committee in support of HB 2360 and the benefits it will provide to the State of Kansas and the entire law enforcement community.

17-2

TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HB 2360
Presented by Ed Klumpp
On behalf of the
Kansas Association of Chiefs of Police

February 14, 2007

This testimony is in support of HB2360 removing the sunset clause in KSA 22-2411 regarding arrest powers of federal law enforcement agents working under the direction of the FBI. Since its passage there have been no problems that we know of regarding the federal agents' use of these arrest powers. These arrest powers are critical to the efficiency of operations especially in joint task forces such as the terrorism task forces. Such task forces bring the expertise of many federal and local law enforcement officers together to address violent crime in our communities as well as national security investigations and interventions.

We supported the provisions of KSA 22-2411 when it was passed several years ago. Our experience since then has further strengthened our belief in the benefits of granting these powers to the professional law enforcement officers employed by the federal government.

We urge you to recommend passage of HB 2360.

Ed Klumpp
Chief of Police-Retired
Topeka Police Department

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House Judiciary
Date 2-14-07
Attachment # 18