

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 26, 2008 in Room 313-S of the Capitol.

All members were present except:

Annie Kuether- excused
Kay Wolf - excused

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Jason Thompson, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

HB 2188 - professional screening panel

The balloon provided to the committee represents a compromise between the opponents and proponents of the bill. (Attachment #1)

Representative Watkins made the motion to report HB 2188 favorably for passage. Representative Pauls seconded the motion.

Representative Watkins made the substitute motion to adopt the proposed balloon. Representative Pauls seconded the motion. The motion carried.

Representative Watkins made the motion to report HB 2188 favorably for passage, as amended. Representative Pauls seconded the motion. The motion carried.

HB 2620 - state board of healing arts, non-disciplinary resolutions

Representative Colloton made the motion to report HB 2620 favorably for passage. Representative Whitham seconded the motion.

Representative Pauls made the substitute motion to amend in the provisions of SB 81 - regarding background checks and fingerprinting. Representative Garcia seconded the motion. The motion carried.

Representative Pauls made the motion to report HB 2620 favorably for passage, as amended. Representative Garcia seconded the motion. The motion carried.

HB 2825 - closing court proceedings and sealing court records

Representative Kinzer made the motion to report HB 2825 favorably for passage. Representative Watkins seconded the motion.

Representative Kinzer provided an amendment that would address some of the concerns brought forth during and after the hearing. (Attachment #2) He moved the balloon. Representative Davis seconded the motion. The motion carried.

Representative Davis made the motion to clarify that the bill does not apply to appellant court deliberations. Representative Kinzer seconded the motion. The motion carried.

Representative Kinzer made the motion to report HB 2825 favorably for passage, as amended. Representative Davis seconded the motion. The motion carried 9-7.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 26, 2008 in Room 313-S of the Capitol.

HB 2780 - criminal procedure; new crime committed on probation or community corrections

Representative Colloton made the motion to report HB 2780 favorably for passage. Representative Watkins seconded the motion.

Representative Crow made the substitute motion to adopt the proposed amendment by Judge Ernest Johnson (Attachment #3). Representative Owens seconded the motion. The motion carried.

Representative Pauls made the motion to change the language on page 3, line 9 to read "to obtain personal service" Representative Colloton seconded the motion. The motion carried.

The revisor provided the committee with a balloon which consist of technical cleanup regarding mandatory fines; clarifying that there are no expungments for the conviction of aggravated endangering a child; close a loophole (see 2008 HB 2901) regarding sexually motivated crimes. (Attachment #4)

Representative Ward made the motion to adopt the balloon. Representative Owens seconded the motion. The motion was divided into four parts:

1. The motion on closing the loophole for sexually motivated crimes carried.
2. The motion on post release without departure carried.
3. The motion clarifying language allowing judges to give fines in an non-grid offense was not voted on because Representative Kinzer made the substitute motion to have the cruelty to animal fine be \$500 to \$2,500. - Representative Whitham seconded motion carried. The motion carried
4. The motion to clarify that aggravated endangering a child was non-expugnable carried.

Representative Crow made the motion to increase the fine for domestic battery to not less than \$1,000 nor more than \$7,500. Representative Colloton seconded the motion. The motion carried.

Representative Whitham made the motion to report HB 2780 favorably for passage, as amended. Representative Colloton seconded the motion. The motion carried.

HB 2618 - administrative procedure amendments

Representative Whitham made the motion to report HB 2618 favorably for passage. Representative Davis seconded the motion.

The Kansas Judicial Council provided a balloon amendment at the hearing that amended: the burden of proof; in light of the record as a whole; and conflict of interest language. Representative Colloton made the motion to adopt the Judicial Council's balloon. Representative Watkins seconded the motion. The motion carried.

Adopt the amendment from the Kansas Real Estate Division, page 3 section (h)(3) to read "has participated in an investigatory or prosecutorial capacity in the creation of a summary order as part of another stage of the proceeding." Representative Colloton made the motion to adopt the balloon. Representative Watkins seconded the motion. The motion carried.

Chairman O'Neal provided the committee with a balloon (Attachment #5) which allows for a certification procedure, allows policy decisions to be determined by department heads; the state board of tax appeals and the state corporation commission will be exempt from using the administrative hearing office; defines "adjudicative hearing"; presiding officer assigned by the office of administrative hearing shall be the presiding officer for all adjudicative hearings. The proposed changes in the balloon are to address some of the concern that was noted by agencies at the hearing on the bill during the 2007 session.

Representative Whitham made the motion to adopt the balloon. Representative Kinzer seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 26, 2008 in Room 313-S of the Capitol.

Representative Whitham made the motion to report **Substitute for HB 2618** favorably for passage. Representative Davis seconded the motion. The motion carried.

The committee meeting adjourned at 5:15 p.m. The next meeting was scheduled for March 5, 2008.

HOUSE BILL No. 2188

By Committee on Judiciary

1-24

Proposed amendment
Kansas Association of Defense Counsel
February 22, 2008

9 AN ACT concerning civil procedure; relating to medical and professional
10 malpractice screening panels; amending K.S.A. 60-3502, 60-3503, 60-
11 3505, 60-3508, ~~60-3509~~, 65-4901, 65-4902, 65-4904, 65-4907 and ~~65-~~
12 ~~4908~~ and repealing the existing sections.

and

13
14 *Be it enacted by the Legislature of the State of Kansas:*

15 Section 1. K.S.A. 60-3502 is hereby amended to read as follows: 60-
16 3502. (a) If a professional malpractice liability action is filed in a district
17 court of this state and one of the parties to the action requests, by filing
18 a memorandum with the court, that a professional malpractice screening
19 panel be convened, the judge of the district court or, if the district court
20 has more than one division, the chief judge of such court shall convene
21 a professional malpractice screening panel, hereafter referred to as the
22 screening panel. If a claim for damages arising out of the rendering of or
23 failure to render services by a professional licensee has not been formal-
24 ized by the filing of a petition, any party affected by such claim may
25 request, by filing a memorandum with the court, that a screening panel
26 be convened and, if such request is made, the judge of the district court
27 or the chief judge of such court shall convene a screening panel. *If a*
28 *petition or claim is filed naming more than one defendant or more than*
29 *one person against whom a claim is being made, each defendant or person*
30 *is entitled to request a separate screening panel.*

31 (b) The membership of the screening panel shall be selected as fol-
32 lows: ~~(a)~~ (1) A person licensed in the same profession as the defendant
33 or person against whom the claim is filed, designated by the defendant
34 or by the person against whom the claim is made if no petition has been
35 filed; ~~(b)~~ (2) a person licensed in the same profession as the defendant
36 or person against whom the claim is filed, designated by the plaintiff or
37 by the claimant if no petition has been filed; ~~(c)~~ (3) a person licensed in
38 the same profession as the defendant or person against whom the claim
39 is filed, selected jointly by the plaintiff and the defendant or by the claim-
40 ant and the person against whom the claim is made, if no petition has
41 been filed; and ~~(d)~~ (4) an attorney selected by the judge of the district
42 court or the chief judge of such court from a list of attorneys maintained
43 by the judge of the district court for such purpose. Such attorney shall

House Judiciary
Date 2-24-08
Attachment # 1

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1 be a nonvoting member of the screening panel but shall act as chairperson
2 of the screening panel.

3 (c) The state agency which licenses, registers, certifies or otherwise
4 is responsible for the practice of any group of professional licensees shall
5 maintain and make available to the parties to the proceeding a current
6 list of professional licensees who are willing and available to serve on the
7 screening panel. The persons appointed shall constitute the screening
8 panel for the particular professional malpractice claim to be heard.

9 Sec. 2. K.S.A. 60-3503 is hereby amended to read as follows: 60-
10 3503. The district judge or the chief judge of such court shall notify the
11 parties to the action that a screening panel has been convened ~~and that~~
12 ~~the members of such screening panel are to be appointed within 10 days~~
13 ~~of the receipt of such notice. If the plaintiff and the defendant or, if no~~
14 ~~petition has been filed, the claimant and the party against whom the claim~~
15 ~~is made. The plaintiff or, if no petition has been filed, the claimant shall~~
16 ~~select a person licensed in the same profession as the defendant or person~~
17 ~~against whom the claim is filed, within 10 days after receipt of notice that~~
18 ~~a screening panel has been convened. Within 10 days following the date~~
19 ~~of the selection by the plaintiff or claimant of a professional licensee, the~~
20 ~~defendant or, if no petition has been filed, the party against whom the~~
21 ~~claim is made shall select a professional licensee. Within 10 days following~~
22 ~~the date of the selection by the defendant or the party against whom the~~
23 ~~claim is made of a professional licensee, the parties shall jointly select a~~
24 ~~professional licensee. If the parties are unable to jointly select a profes-~~
25 ~~sional licensee within such 10 days after receipt of notice that a screening~~
26 ~~panel has been convened, the judge of the district court or the chief judge~~
27 ~~of such court shall select such professional licensee.~~

The plaintiff or claimant and the defendant or respondent shall each designate a person licensed in the same profession as the defendant or respondent within 20 days of such party's receipt of notice of the convening of the screening panel. The parties shall jointly designate a person licensed in the same profession as the defendant or respondent within 10 days after the individual designations have been made.

28 Sec. 3. K.S.A. 60-3505 is hereby amended to read as follows: 60-
29 3505. (a) Within ~~90~~ 120 days after the screening panel is commenced,
30 such panel shall make written recommendations on the issue of whether
31 the professional licensee departed from the standard of conduct in a way
32 which caused the plaintiff or claimant damage. A concurring or dissenting
33 member of the screening panel may file a written concurring or dissenting
34 opinion. All written opinions shall be supported by corroborating refer-
35 ences to published literature and other relevant documents.

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36 (b) The screening panel shall notify all parties when its determination
37 is to be handed down, and, within seven days of its decision, shall provide
38 a copy of its opinion and any concurring or dissenting opinion to each
39 party and each attorney of record and to the judge of the district court
40 or the chief judge of such court.

41 (c) The written report of the screening panel shall be admissible in
42 any subsequent legal proceeding, and either party may subpoena any and
43 all members of the panel as witnesses for examination relating to the

1-3

1 issues at trial.

2 Sec. 4. K.S.A. 60-3508 is hereby amended to read as follows: 60-
3 3508. (a) Each professional licensee member of the screening panel shall
4 be paid a total of ~~\$250~~ \$500 for all work performed as a member of the
5 panel exclusive of time involved if called as a witness to testify in court
6 and, in addition thereto, reasonable travel expense. The chairperson of
7 the panel shall be paid a total of ~~\$500~~ \$750 for all work performed as a
8 member of the panel exclusive of time involved if called as a witness to
9 testify in court and, in addition thereto, reasonable travel expenses. The
10 chairperson shall keep an accurate record of the time and expenses of all
11 the members of the panel, and the record shall be submitted to the parties
12 for payment with the panel's report.

13 (b) Costs of the panel including travel expenses and other expenses
14 of the review shall be paid by the side in whose favor the majority opinion
15 is written. If the panel is unable to make a recommendation, each side
16 shall pay 1/2 the costs. Items which may be included in the taxation of
17 costs shall be those items enumerated by K.S.A. 60-2003 and amend-
18 ments thereto.

19 ~~Sec. 5. K.S.A. 60-3500 is hereby amended to read as follows: 60-
20 3500. In those cases before a screening panel which have not been for-
21 malized by filing a petition in a court of law, the filing of a memorandum
22 requesting the convening of a screening panel shall toll any applicable
23 statute of limitations and. Such statute of limitations shall remain tolled
24 until 30 days after the screening panel has issued its written recommen-
25 dations or 180 days after the convening of a screening panel, whichever
26 occurs first.~~

27 Sec. 6. K.S.A. 65-4901 is hereby amended to read as follows: 65-
28 4901. (a) If a petition is filed in a district court of this state claiming
29 damages for personal injury or death on account of alleged medical mal-
30 practice of a health care provider and one of the parties to the action
31 requests, by filing a memorandum with the court, that a medical mal-
32 practice screening panel be convened, the judge of the district court or,
33 if the district court has more than one division, the chief judge of such
34 court shall convene a medical malpractice screening panel, hereafter re-
35 ferred to as the "screening panel." If a petition is filed in a district court
36 of this state claiming damages for personal injury or death on account of
37 alleged medical malpractice of a health care provider and none of the
38 parties to the action requests that a screening panel be convened, the
39 judge may convene a screening panel upon the judge's own motion. If a
40 claim for damages for personal injury or death on account of alleged
41 medical malpractice of a health care provider has not been formalized by
42 the filing of a petition, any party affected by such claim may request, by
43 filing a memorandum with the court, that a screening panel be convened,

Renumber remaining sections accordingly.

1 and if such request is made the judge of the district court or, if the district
 2 court has more than one division, the chief judge of such court shall
 3 convene a screening panel. *If a petition or claim is filed naming more*
 4 *than one defendant or more than one person against whom a claim is*
 5 *being made, each defendant or person is entitled to request a screening*
 6 *panel.*

7 (b) The membership of the screening panel shall be selected as fol-
 8 lows: ~~(a)~~ (1) A health care provider designated by the defendant or by the
 9 person against whom the claim is made if no petition has been filed; ~~(b)~~
 10 (2) a health care provider designated by the plaintiff or by the claimant
 11 if no petition has been filed; ~~(c)~~ (3) a health care provider selected jointly
 12 by the plaintiff and the defendant or by the claimant and the person
 13 against whom the claim is made if no petition has been filed; and ~~(d)~~ (4)
 14 an attorney selected by the judge of the district court or, if the district
 15 court has more than one division, the chief judge of such court from a
 16 list of attorneys maintained by the judge of the district court or, if the
 17 district court has more than one division, the chief judge of such court
 18 for such purpose. Such attorney shall be a nonvoting member of the
 19 screening panel but shall act as chairperson of the screening panel. ~~The~~
 20 ~~health care providers selected pursuant to this subsection shall meet the~~
 21 ~~qualifications as an expert witness as established in K.S.A. 60-3412, and~~
 22 ~~amendments thereto.~~

23 (c) The state agency which licenses, registers, certifies or otherwise
 24 is responsible for the practice of any group of health care providers shall
 25 maintain and make available to the parties to the proceeding a current
 26 list of ~~qualified~~ health care providers who are willing and available to serve
 27 on the screening panel. The persons appointed shall constitute the screen-
 28 ing panel for the particular medical malpractice claim to be heard.

29 Sec. 7. K.S.A. 65-4902 is hereby amended to read as follows: 65-
 30 4902. The district judge or, if the district court has more than one division,
 31 the chief judge of such court shall notify the parties to the action that a
 32 screening panel has been convened and that the members of such screen-
 33 ing panel are to be appointed within 10 days of the receipt of such notice.
 34 If the plaintiff and the defendant or, if no petition has been filed, the
 35 claimant and the party against whom the claim is made. ~~The plaintiff or,~~
 36 ~~if no petition has been filed, the claimant shall select a health care provider~~
 37 ~~within 10 days after receipt of notice that a screening panel has been~~
 38 ~~convened. Within 10 days following the date of the selection by the plain-~~
 39 ~~tiff or claimant of a health care provider, the defendant or, if no petition~~
 40 ~~has been filed, the party against whom the claim is made shall select a~~
 41 ~~health care provider. Within 10 days following the date of the selection~~
 42 ~~by the defendant or the party against whom the claim is made of a health~~
 43 ~~care provider, the parties shall jointly select a health care provider. If the~~

The plaintiff or claimant and the defendant or respondent shall each designate a health care provider licensed in the same profession as the defendant or respondent within 20 days of such party's receipt of notice of the convening of the screening panel. The parties shall jointly designate a health care provider licensed in the same profession as the defendant or respondent within 10 days after the individual designations have been made.

1 parties are unable to jointly select a health care provider within such 10
2 days after receipt of notice that a screening panel has been convened, the
3 judge of the district court or, if the district court has more than one
4 division, the chief judge of such court shall select such health care pro-
5 vider.

6 Sec. 8. K.S.A. 65-4904 is hereby amended to read as follows: 65-
7 4904. (a) Within ~~90~~ ~~120~~ days after the screening panel is commenced,
8 such panel shall make written recommendations on the issue of whether
9 the health care provider departed from the standard of care in a way
10 which caused the plaintiff or claimant damage. A concurring or dissenting
11 member of the screening panel may file a written concurring or dissenting
12 opinion. All written opinions shall be supported by corroborating refer-
13 ences to published literature and other relevant documents.

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14 (b) The screening panel shall notify all parties when its determination
15 is to be handed down, and, within seven days of its decision, shall provide
16 a copy of its opinion and any concurring or dissenting opinion to each
17 party and each attorney of record and to the judge of the district court
18 or, if the district court has more than one division, the chief judge of such
19 court.

20 (c) The written report of the screening panel shall be admissible in
21 any subsequent legal proceeding, and either party may subpoena any and
22 all members of the panel as witnesses for examination relating to the
23 issues at trial.

, provided the panel member or members otherwise meet the
qualifications of K.S.A. 60-3412, and amendments thereto

24 Sec. 9. K.S.A. 65-4907 is hereby amended to read as follows: 65-
25 4907. (a) Each health care provider member of the screening panel shall
26 be paid a total of ~~\$250~~ \$500 for all work performed as a member of the
27 panel exclusive of time involved if called as a witness to testify in court,
28 and in addition thereto, reasonable travel expense. The chairperson of
29 the panel shall be paid a total of ~~\$500~~ \$750 for all work performed as a
30 member of the panel exclusive of time involved if called as a witness to
31 testify in court, and in addition thereto reasonable travel expenses. The
32 chairperson shall keep an accurate record of the time and expenses of all
33 the members of the panel, and the record shall be submitted to the parties
34 for payment with the panel's report.

35 (b) Costs of the panel including travel expenses and other expenses
36 of the review shall be paid by the side in whose favor the majority opinion
37 is written. If the panel is unable to make a recommendation, then each
38 side shall pay 1/2 of the costs. Items which may be included in the taxation
39 of costs shall be those items enumerated by K.S.A. 60-2003 and amend-
40 ments thereto.

41 ~~Sec. 10. K.S.A. 65-4908 is hereby amended to read as follows: 65-~~
42 ~~4908. In those cases before a screening panel which have not been for-~~
43 ~~malized by filing a petition in a court of law, the filing of a memorandum~~

1 requesting the convening of a screening panel shall toll any applicable
2 statute of limitations and. Such statute of limitations shall remain tolled
3 until thirty (30) 30 days after the screening panel has issued its written
4 recommendations or 180 days after the convening of a screening panel,
5 whichever occurs first.

Renumber remaining sections accordingly.

6 Sec. 11. K.S.A. ~~60-3502, 60-3503, 60-3505, 60-3508, 60-3509, 65-~~
7 ~~4901, 65-4902, 65-4904, 65-4907 and 65-4908~~ are hereby repealed.

and

8 Sec. 12. This act shall take effect and be in force from and after its
9 publication in the statute book.

9-1

HOUSE BILL No. 2825

By Representative Kinzer

AN ACT concerning civil procedure; relating to court records and proceedings.

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

Section 1. (a) In a civil or criminal case, the court, upon the court's own motion, may hold a hearing or any party may request a hearing to seal or redact the court records or to close a court proceeding. ~~In a criminal case, the court, any party or any interested person may request a hearing to seal or redact the court records or to close a court proceeding.~~ Reasonable notice of a hearing to seal or redact court records or to close a court proceeding shall be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact court records or to close a court proceeding shall also be given to the victim, if ascertainable.

(b) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted or the court proceeding closed. If the court grants such an order, before closing proceedings or granting leave to file under seal, the court shall make and enter a written finding of good cause.

(c) In granting the order, the court shall recognize that the public has ~~an~~ a paramount interest in all that occurs in a case, whether at trial or during discovery and in understanding disputes that are presented to a public forum for resolution.

(d) Good cause to close a proceeding or seal or redact records, whether upon the motion of a party, or on the ~~court's~~ court's own motion, does not exist unless the court makes a finding on the record that there exists an identified ~~compelling~~ safety, property or privacy interest of a litigant or a public or private harm that predominates the case and such interest or harm outweighs the strong public interest in access to the court record and proceedings.

(e) Agreement of the parties ~~does not constitute a sufficient~~ shall be considered by the court but shall not constitute the sole basis for the sealing or redaction of court records or for closing the court proceeding.

(f) The provisions of this section shall not apply to proceedings under the revised Kansas code for care of children, K.S.A. 2007 Supp. 38-2201 et seq., and amendments thereto, ~~or the revised Kansas juvenile justice code, K.S.A. 2007 Supp. 38-2301 et seq., and amendments thereto, the Kansas adoption and relinquishment act, K.S.A. 59-2111 et seq., and amendments thereto, or to supreme court rules which allow motions, briefs, opinions and orders of the court to identify parties by initials or by familial relationship. Nothing in this section shall be construed to prohibit the issuance of a protective order pursuant to subsection (c) of K.S.A. 60-226, and amendments thereto.~~

(g) The provisions of this section shall not preclude a court from allowing a settlement which includes a confidentiality clause to be filed under seal where the interests of justice would be served by such settlement being filed under seal.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

House Judiciary

Date 2-26-08

Attachment # 2

1 sentence. In this event, imposition of a prison sentence for the new crime
2 does not constitute a departure. *If the court sentences the offender to*
3 *imprisonment for the new conviction, the prosecutor for the new convic-*
4 *tion shall notify, in writing within 30 days of the imposition of the im-*
5 *prisonment sentence, the prosecutor in the county where the inmate was*
6 *convicted and placed on such probation or assigned to a community cor-*
7 *rectional services program. The notified prosecutor shall have 90 days*
8 *from the date of the imposition of the imprisonment sentence for the new*
9 *crime to personally serve on the offender any warrant issued by the court*
10 *pursuant to subsection (a) for violation of the offender's nonprison sanc-*
11 *tion, which warrant shall authorize all officers named in the warrant to*
12 *return the offender to the custody of such court. If the 90 day period has*
13 *passed and: (1) If the warrant has been issued but not personally served*
14 *pursuant to this subsection, the warrant shall become null and void and*
15 *service no longer permitted; or (2) if the warrant has not been issued, the*
16 *request for the warrant shall be denied and no warrant issued.*

17 (c) A defendant who is on probation, assigned to a community cor-
18 rectional services program, under suspension of sentence or serving a
19 nonprison sanction and for whose return a warrant has been issued by
20 the court shall be considered a fugitive from justice if it is found that the
21 warrant cannot be served. If it appears that the defendant has violated
22 the provisions of the defendant's release or assignment or a nonprison
23 sanction, the court shall determine whether the time from the issuing of
24 the warrant to the date of the defendant's arrest, or any part of it, shall
25 be counted as time served on probation, assignment to a community cor-
26 rectional services program, suspended sentence or pursuant to a nonpri-
27 son sanction.

28 (d) *Except as provided in subsection (b),* the court shall have 30 days
29 following the date probation, assignment to a community correctional
30 service program, suspension of sentence or a nonprison sanction was to
31 end to issue a warrant for the arrest or notice to appear for the defendant
32 to answer a charge of a violation of the conditions of probation, assign-
33 ment to a community correctional service program, suspension of sen-
34 tence or a nonprison sanction.

35 (e) Notwithstanding the provisions of any other law to the contrary,
36 an offender whose nonprison sanction is revoked and a term of impris-
37 onment imposed pursuant to either the sentencing guidelines grid for
38 nondrug or drug crimes shall not serve a period of postrelease supervision
39 upon the completion of the prison portion of that sentence. The provi-
40 sions of this subsection shall not apply to offenders sentenced to a non-
41 prison sanction pursuant to a dispositional departure, whose offense falls
42 within a border box of either the sentencing guidelines grid for nondrug
43 or drug crimes, offenders sentenced for a "sexually violent crime" as de-

, or the prosecutor if the
new conviction is in the
same county,

House Judiciary

Date 2-26-08

Attachment # 3

HOUSE BILL No. 2780

Proposed amendment
February 25, 2008

By Committee on Judiciary

2-6

crimes, punishment and

9 AN ACT concerning criminal procedure; ~~relating to conditional release;~~
10 amending K.S.A. 22-3716 and repealing the existing ~~section~~;

11 sections

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

13 Section 1. K.S.A. 22-3716 is hereby amended to read as follows: 22-

14 3716. (a) At any time during probation, assignment to a community cor-

15 rectional services program, suspension of sentence or pursuant to sub-

16 section (d) for defendants who committed a crime prior to July 1, 1993,

17 and at any time during which a defendant is serving a nonprison sanction

18 for a crime committed on or after July 1, 1993, or pursuant to subsection

19 (d), the court may issue a warrant for the arrest of a defendant for violation

20 of any of the conditions of release or assignment, a notice to appear to

21 answer to a charge of violation or a violation of the defendant's nonprison

22 sanction. The notice shall be personally served upon the defendant. The

23 warrant shall authorize all officers named in the warrant to return the

24 defendant to the custody of the court or to any certified detention facility

25 designated by the court. Any court services officer or community correc-

26 tional services officer may arrest the defendant without a warrant or may

27 deputize any other officer with power of arrest to do so by giving the

28 officer a written statement setting forth that the defendant has, in the

29 judgment of the court services officer or community correctional services

30 officer, violated the conditions of the defendant's release or a nonprison

31 sanction. The written statement delivered with the defendant by the ar-

32 resting officer to the official in charge of a county jail or other place of

33 detention shall be sufficient warrant for the detention of the defendant.

34 After making an arrest, the court services officer or community correc-

35 tional services officer shall present to the detaining authorities a similar

36 statement of the circumstances of violation. Provisions regarding release

37 on bail of persons charged with a crime shall be applicable to defendants

38 arrested under these provisions.

39 (b) Upon arrest and detention pursuant to subsection (a), the court

40 services officer or community correctional services officer shall immedi-

41 ately notify the court and shall submit in writing a report showing in what

42 manner the defendant has violated the conditions of release or assignment

43 or a nonprison sanction. Thereupon, or upon an arrest by warrant as

21-4503a, 21-4619 and

See attached amendments to KSA 21-4503a and 21-4619
Renumber remaining sections accordingly.

House Judiciary
Date 2-26-08
Attachment # 4

1 provided in this section, the court shall cause the defendant to be brought
2 before it without unnecessary delay for a hearing on the violation charged.
3 The hearing shall be in open court and the state shall have the burden of
4 establishing the violation. The defendant shall have the right to be rep-
5 resented by counsel and shall be informed by the judge that, if the de-
6 fendant is financially unable to obtain counsel, an attorney will be ap-
7 pointed to represent the defendant. The defendant shall have the right
8 to present the testimony of witnesses and other evidence on the defend-
9 ant's behalf. Relevant written statements made under oath may be ad-
10 mitted and considered by the court along with other evidence presented
11 at the hearing. Except as otherwise provided, if the violation is estab-
12 lished, the court may continue or revoke the probation, assignment to a
13 community correctional services program, suspension of sentence or non-
14 prison sanction and may require the defendant to serve the sentence
15 imposed, or any lesser sentence, and, if imposition of sentence was sus-
16 pended, may impose any sentence which might originally have been im-
17 posed. Except as otherwise provided, no offender for whom a violation
18 of conditions of release or assignment or a nonprison sanction has been
19 established as provided in this section shall be required to serve any time
20 for the sentence imposed or which might originally have been imposed
21 in a state facility in the custody of the secretary of corrections for such
22 violation, unless such person has already at least one prior assignment to
23 a community correctional services program related to the crime for which
24 the original sentence was imposed, except these provisions shall not apply
25 to offenders who violate a condition of release or assignment or a non-
26 prison sanction by committing a new misdemeanor or felony offense. The
27 provisions of this subsection shall not apply to adult felony offenders as
28 described in subsection (a)(3) of K.S.A. 75-5291, and amendments
29 thereto. The court may require an offender for whom a violation of con-
30 ditions of release or assignment or a nonprison sanction has been estab-
31 lished as provided in this section to serve any time for the sentence im-
32 posed or which might originally have been imposed in a state facility in
33 the custody of the secretary of corrections without a prior assignment to
34 a community correctional services program if the court finds and sets
35 forth with particularity the reasons for finding that the safety of the mem-
36 bers of the public will be jeopardized or that the welfare of the inmate
37 will not be served by such assignment to a community correctional serv-
38 ices program. When a new felony is committed while the offender is on
39 probation or assignment to a community correctional services program,
40 the new sentence shall be imposed pursuant to the consecutive sentenc-
41 ing requirements of K.S.A. 21-4608 and amendments thereto, and the
42 court may sentence the offender to imprisonment for the new conviction,
43 even when the new crime of conviction otherwise presumes a nonprison

1 sentence. In this event, imposition of a prison sentence for the new crime
 2 does not constitute a departure. *If the court sentences the offender to*
 3 *imprisonment for the new conviction, the prosecutor for the new conviction*
 4 *shall notify, in writing within 30 days of the imposition of the im-*
 5 *prisonment sentence, the prosecutor in the county where the inmate was*
 6 *convicted and placed on such probation or assigned to a community cor-*
 7 *rectional services program. The notified prosecutor shall have 90 days*
 8 *from the date of the imposition of the imprisonment sentence for the new*
 9 *crime to personally serve on the offender any warrant issued by the court*
 10 *pursuant to subsection (a) for violation of the offender's nonprison sanc-*
 11 *tion, which warrant shall authorize all officers named in the warrant to*
 12 *return the offender to the custody of such court. If the 90 day period has*
 13 *passed and: (1) If the warrant has been issued but not personally served*
 14 *pursuant to this subsection, the warrant shall become null and void and*
 15 *service no longer permitted; or (2) if the warrant has not been issued, the*
 16 *request for the warrant shall be denied and no warrant issued.*

17 (c) A defendant who is on probation, assigned to a community cor-
 18 rectional services program, under suspension of sentence or serving a
 19 nonprison sanction and for whose return a warrant has been issued by
 20 the court shall be considered a fugitive from justice if it is found that the
 21 warrant cannot be served. If it appears that the defendant has violated
 22 the provisions of the defendant's release or assignment or a nonprison
 23 sanction, the court shall determine whether the time from the issuing of
 24 the warrant to the date of the defendant's arrest, or any part of it, shall
 25 be counted as time served on probation, assignment to a community cor-
 26 rectional services program, suspended sentence or pursuant to a nonpri-
 27 son sanction.

28 (d) *Except as provided in subsection (b),* the court shall have 30 days
 29 following the date probation, assignment to a community correctional
 30 service program, suspension of sentence or a nonprison sanction was to
 31 end to issue a warrant for the arrest or notice to appear for the defendant
 32 to answer a charge of a violation of the conditions of probation, assign-
 33 ment to a community correctional service program, suspension of sen-
 34 tence or a nonprison sanction.

35 (e) Notwithstanding the provisions of any other law to the contrary,
 36 an offender whose nonprison sanction is revoked and a term of impris-
 37 onment imposed pursuant to either the sentencing guidelines grid for
 38 nondrug or drug crimes shall not serve a period of postrelease supervision
 39 upon the completion of the prison portion of that sentence. The provi-
 40 sions of this subsection shall not apply to offenders sentenced to a non-
 41 prison sanction pursuant to a dispositional departure, whose offense falls
 42 within a border box of either the sentencing guidelines grid for nondrug
 43 or drug crimes, offenders sentenced for a "sexually violent crime" as de-

or a "sexually motivated crime"

1 fined by K.S.A. 22-3717, and amendments thereto, ~~or whose nonprison~~
 2 sanction was revoked as a result of a conviction for a new misdemeanor
 3 or felony offense. The provisions of this subsection shall not apply to
 4 offenders who are serving or are to begin serving a sentence for any other
 5 felony offense that is not excluded from postrelease supervision by this
 6 subsection on the effective date of this subsection. The provisions of this
 7 subsection shall be applied retroactively. The department of corrections
 8 shall conduct a review of all persons who are in the custody of the de-
 9 partment as a result of only a revocation of a nonprison sanction. On or
 10 before September 1, 2000, the department shall have discharged from
 11 postrelease supervision those offenders as required by this subsection.

12 (f) Offenders who have been sentenced pursuant to K.S.A. 21-4729,
 13 and amendments thereto, and who subsequently violate a condition of
 14 the drug and alcohol abuse treatment program shall be subject to an
 15 additional nonprison sanction for any such subsequent violation. Such
 16 nonprison sanctions shall include, but not be limited to, up to 60 days in
 17 a county jail, fines, community service, intensified treatment, house arrest
 18 and electronic monitoring.

19 Sec. 2. K.S.A. 22-3716 ~~is~~ hereby repealed.

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

offenders sentenced pursuant to K.S.A. 21-4704, and
 amendments thereto, wherein the sentence is presumptive
 imprisonment but a nonprison sanction may be imposed
 without a departure or offenders
 [Part of HB 2901, requested by KS County and District
 Attorneys Assn.]

are

21-4503a , 21-4619 and

Sec. 2. K.S.A. 21-4503a is hereby amended to read as follows: 21-4503a. (a) A person who has been convicted of a felony may, in addition to the sentence authorized by law, be ordered to pay a fine which shall be fixed by the court as follows:

(1) For any off-grid felony crime or any felony ranked in severity level 1 of the drug grid as provided in K.S.A. 21-4705 and amendments thereto, a sum not exceeding \$500,000.

(2) For any felony ranked in severity levels 1 through 5 of the nondrug grid as provided in K.S.A. 21-4704 and amendments thereto or in severity levels 2 or 3 of the drug grid as provided in K.S.A. 21-4705 and amendments thereto, a sum not exceeding \$300,000.

(3) For any felony ranked in severity levels 6 through 10 of the nondrug grid as provided in K.S.A. 21-4704 and amendments thereto ~~or~~ in severity level 4 of the drug grid as provided in K.S.A. 21-4705 and amendments thereto, or any nongrid offense of the sentencing guidelines grid for nondrug crimes a sum not exceeding \$100,000.

(b) A person who has been convicted of a misdemeanor, in addition to or instead of the imprisonment authorized by law, may be sentenced to pay a fine which shall be fixed by the court as follows:

(1) For a class A misdemeanor, a sum not exceeding \$2,500.

(2) For a class B misdemeanor, a sum not exceeding \$1,000.

(3) For a class C misdemeanor, a sum not exceeding \$500.

(4) For an unclassified misdemeanor, any sum authorized by the statute that defines the crime. If no penalty is provided in such law, the fine shall not exceed the fine provided herein for a class C misdemeanor.

(c) As an alternative to any of the above fines, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.

(d) A person who has been convicted of a traffic infraction may be sentenced to pay a fine which shall be fixed by the court, not exceeding \$500.

(e) A person who has been convicted of a cigarette or tobacco infraction shall be sentenced to pay a fine of \$25.

(f) The provisions of this section shall apply to crimes committed on or after July 1, 1993.

[FOR INFORMATION ONLY: The following are nongrid offenses of sentencing guidelines, and the fine imposed by the statute:

1. K.S.A. 8-1567 DUI, based upon number of conviction, \$500 to \$2500

2. K.S.A. 21-3412a, Domestic battery, third or subsequent w/in 5 years, fine \$1000 to \$2500

3. K.S.A. 21-4310, Cruelty to animals, second or subsequent violation of (d)(2), no fine established

4. K.S.A. 21-4318, Harming or killing law enforcement dogs, \$500 to \$5000]

Sec. 3. K.S.A. 21-4619 is hereby amended to read as follows: 21-4619.

(a) (1) Except as provided in subsections (b) and (c), any person convicted in this state of a traffic infraction, cigarette or tobacco infraction, misdemeanor or a class D or E felony, or for crimes committed on or after July 1, 1993, nondrug crimes ranked in severity levels 6 through 10 or any felony ranked in severity level 4 of the drug grid, may petition the convicting court for the expungement of such conviction or related arrest records if three or more years have elapsed since the person: (A) Satisfied the sentence imposed; or (B) was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or

a suspended sentence.

(2) Except as provided in subsections (b) and (c), any person who has fulfilled the terms of a diversion agreement may petition the district court for the expungement of such diversion agreement and related arrest records if three or more years have elapsed since the terms of the diversion agreement were fulfilled.

(b) Except as provided in subsection (c), no person may petition for expungement until five or more years have elapsed since the person satisfied the sentence imposed, the terms of a diversion agreement or was discharged from probation, a community correctional services program, parole, postrelease supervision, conditional release or a suspended sentence, if such person was convicted of a class A, B or C felony, or for crimes committed on or after July 1, 1993, if convicted of an off-grid felony or any nondrug crime ranked in severity levels 1 through 5 or any felony ranked in severity levels 1 through 3 of the drug grid, or:

(1) Vehicular homicide, as defined by K.S.A. 21-3405, and amendments thereto, or as prohibited by any law of another state which is in substantial conformity with that statute;

(2) driving while the privilege to operate a motor vehicle on the public highways of this state has been canceled, suspended or revoked, as prohibited by K.S.A. 8-262, and amendments thereto, or as prohibited by any law of another state which is in substantial conformity with that statute;

(3) perjury resulting from a violation of K.S.A. 8-261a, and amendments thereto, or resulting from the violation of a law of another state which is in substantial conformity with that statute;

(4) violating the provisions of the fifth clause of K.S.A. 8-142, and amendments thereto, relating to fraudulent applications or violating the provisions of a law of another state which is in substantial conformity with that statute;

(5) any crime punishable as a felony wherein a motor vehicle was used in the perpetration of such crime;

(6) failing to stop at the scene of an accident and perform the duties required by K.S.A. 8-1602, 8-1603 or 8-1604, and amendments thereto, or required by a law of another state which is in substantial conformity with those statutes;

(7) violating the provisions of K.S.A. 40-3104, and amendments thereto, relating to motor vehicle liability insurance coverage; or

(8) a violation of K.S.A. 21-3405b, prior to its repeal.

(c) There shall be no expungement of convictions for the following offenses or of convictions for an attempt to commit any of the following offenses: (1) Rape as defined in K.S.A. 21-3502, and amendments thereto; (2) indecent liberties with a child as defined in K.S.A. 21-3503, and amendments thereto; (3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504, and amendments thereto; (4) criminal sodomy as defined in subsection (a)(2) or (a)(3) of K.S.A. 21-3505, and amendments thereto; (5) aggravated criminal sodomy as defined in K.S.A. 21-3506, and amendments thereto; (6) indecent solicitation of a child as defined in K.S.A. 21-3510, and amendments thereto; (7) aggravated indecent solicitation of a child as defined in K.S.A. 21-3511, and amendments thereto; (8) sexual exploitation of a child as defined in K.S.A. 21-3516, and amendments thereto; (9) aggravated incest as defined in K.S.A. 21-3603, and amendments thereto; (10) endangering a child as defined in K.S.A. 21-3608, and amendments thereto; (11) aggravated endangering a child, as defined in K.S.A. 21-3608a, and amendments thereto; (12) abuse of a child as defined in K.S.A. 21-3609, and amendments thereto; ~~(12)~~ (13) capital murder as defined in K.S.A. 21-3439, and amendments thereto; ~~(13)~~ ~~(14)~~ murder in the first

degree as defined in K.S.A. 21-3401, and amendments thereto; ~~(14)~~ (15) murder in the second degree as defined in K.S.A. 21-3402, and amendments thereto; ~~(15)~~ (16) voluntary manslaughter as defined in K.S.A. 21-3403, and amendments thereto; ~~(16)~~ (17) involuntary manslaughter as defined in K.S.A. 21-3404, and amendments thereto; ~~(17)~~ (18) involuntary manslaughter while driving under the influence of alcohol or drugs as defined in K.S.A. 21-3442, and amendments thereto; ~~(18)~~ (19) sexual battery as defined in K.S.A. 21-3517, and amendments thereto, when the victim was less than 18 years of age at the time the crime was committed; ~~(19)~~ (20) aggravated sexual battery as defined in K.S.A. 21-3518, and amendments thereto; ~~(20)~~ (21) a violation of K.S.A. 8-1567, and amendments thereto, including any diversion for such violation; ~~(21)~~ (22) a violation of K.S.A. 8-2,144, and amendments thereto, including any diversion for such violation; or ~~(22)~~ (23) any conviction for any offense in effect at any time prior to the effective date of this act, that is comparable to any offense as provided in this subsection.

(d) When a petition for expungement is filed, the court shall set a date for a hearing of such petition and shall cause notice of such hearing to be given to the prosecuting attorney and the arresting law enforcement agency. The petition shall state: (1) The defendant's full name; (2) the full name of the defendant at the time of arrest, conviction or diversion, if different than the defendant's current name;

(3) the defendant's sex, race and date of birth;

(4) the crime for which the defendant was arrested, convicted or diverted;

(5) the date of the defendant's arrest, conviction or diversion; and

(6) the identity of the convicting court, arresting law enforcement authority or diverting authority. There shall be no docket fee for filing a petition pursuant to this section. All petitions for expungement shall be docketed in the original criminal action. Any person who may have relevant information about the petitioner may testify at the hearing. The court may inquire into the background of the petitioner and shall have access to any reports or records relating to the petitioner that are on file with the secretary of corrections or the Kansas parole board.

(e) At the hearing on the petition, the court shall order the petitioner's arrest record, conviction or diversion expunged if the court finds that:

(1) The petitioner has not been convicted of a felony in the past two years and no proceeding involving any such crime is presently pending or being instituted against the petitioner;

(2) the circumstances and behavior of the petitioner warrant the expungement; and

(3) the expungement is consistent with the public welfare.

(f) When the court has ordered an arrest record, conviction or diversion expunged, the order of expungement shall state the information required to be contained in the petition. The clerk of the court shall send a certified copy of the order of expungement to the Kansas bureau of investigation which shall notify the federal bureau of investigation, the secretary of corrections and any other criminal justice agency which may have a record of the arrest, conviction or diversion. After the order of expungement is entered, the petitioner shall be treated as not having been arrested, convicted or diverted of the crime, except that:

(1) Upon conviction for any subsequent crime, the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed;

(2) the petitioner shall disclose that the arrest, conviction or diversion occurred if asked about previous arrests, convictions or diversions:

(A) In any application for licensure as a private detective, private detective agency, certification as a firearms trainer pursuant to K.S.A. 2007 Supp. 75-7b21, and amendments

thereto, or employment as a detective with a private detective agency, as defined by K.S.A. 75-7b01, and amendments thereto; as security personnel with a private patrol operator, as defined by K.S.A. 75-7b01, and amendments thereto; or with an institution, as defined in K.S.A. 76-12a01, and amendments thereto, of the department of social and rehabilitation services;

(B) in any application for admission, or for an order of reinstatement, to the practice of law in this state;

(C) to aid in determining the petitioner's qualifications for employment with the Kansas lottery or for work in sensitive areas within the Kansas lottery as deemed appropriate by the executive director of the Kansas lottery;

(D) to aid in determining the petitioner's qualifications for executive director of the Kansas racing and gaming commission, for employment with the commission or for work in sensitive areas in parimutuel racing as deemed appropriate by the executive director of the commission, or to aid in determining qualifications for licensure or renewal of licensure by the commission;

(E) to aid in determining the petitioner's qualifications for the following under the Kansas expanded lottery act: (i) Lottery gaming facility manager or prospective manager, racetrack gaming facility manager or prospective manager, licensee or certificate holder; or (ii) an officer, director, employee, owner, agent or contractor thereof;

(F) upon application for a commercial driver's license under K.S.A. 8-2,125 through 8-2,142, and amendments thereto;

(G) to aid in determining the petitioner's qualifications to be an employee of the state gaming agency;

(H) to aid in determining the petitioner's qualifications to be an employee of a tribal gaming commission or to hold a license issued pursuant to a tribal-state gaming compact;

(I) in any application for registration as a broker-dealer, agent, investment adviser or investment adviser representative all as defined in K.S.A. 17-12a102, and amendments thereto;

or

(J) in any application for employment as a law enforcement officer as defined in K.S.A. 22-2202 or 74-5602, and amendments thereto;

(3) the court, in the order of expungement, may specify other circumstances under which the conviction is to be disclosed;

(4) the conviction may be disclosed in a subsequent prosecution for an offense which requires as an element of such offense a prior conviction of the type expunged; and

(5) upon commitment to the custody of the secretary of corrections, any previously expunged record in the possession of the secretary of corrections may be reinstated and the expungement disregarded, and the record continued for the purpose of the new commitment.

(g) Whenever a person is convicted of a crime, pleads guilty and pays a fine for a crime, is placed on parole, postrelease supervision or probation, is assigned to a community correctional services program, is granted a suspended sentence or is released on conditional release, the person shall be informed of the ability to expunge the arrest records or conviction. Whenever a person enters into a diversion agreement, the person shall be informed of the ability to expunge the diversion.

(h) Subject to the disclosures required pursuant to subsection (f), in any application for employment, license or other civil right or privilege, or any appearance as a witness, a person whose arrest records, conviction or diversion of a crime has been expunged under this statute may state that such person has never been arrested, convicted or diverted of such crime, but the

expungement of a felony conviction does not relieve an individual of complying with any state or federal law relating to the use or possession of firearms by persons convicted of a felony.

(i) Whenever the record of any arrest, conviction or diversion has been expunged under the provisions of this section or under the provisions of any other existing or former statute, the custodian of the records of arrest, conviction, diversion and incarceration relating to that crime shall not disclose the existence of such records, except when requested by:

(1) The person whose record was expunged;

(2) a private detective agency or a private patrol operator, and the request is accompanied by a statement that the request is being made in conjunction with an application for employment with such agency or operator by the person whose record has been expunged;

(3) a court, upon a showing of a subsequent conviction of the person whose record has been expunged;

(4) the secretary of social and rehabilitation services, or a designee of the secretary, for the purpose of obtaining information relating to employment in an institution, as defined in K.S.A. 76-12a01, and amendments thereto, of the department of social and rehabilitation services of any person whose record has been expunged;

(5) a person entitled to such information pursuant to the terms of the expungement order;

(6) a prosecuting attorney, and such request is accompanied by a statement that the request is being made in conjunction with a prosecution of an offense that requires a prior conviction as one of the elements of such offense;

(7) the supreme court, the clerk or disciplinary administrator thereof, the state board for admission of attorneys or the state board for discipline of attorneys, and the request is accompanied by a statement that the request is being made in conjunction with an application for admission, or for an order of reinstatement, to the practice of law in this state by the person whose record has been expunged;

(8) the Kansas lottery, and the request is accompanied by a statement that the request is being made to aid in determining qualifications for employment with the Kansas lottery or for work in sensitive areas within the Kansas lottery as deemed appropriate by the executive director of the Kansas lottery;

(9) the governor or the Kansas racing and gaming commission, or a designee of the commission, and the request is accompanied by a statement that the request is being made to aid in determining qualifications for executive director of the commission, for employment with the commission, for work in sensitive areas in parimutuel racing as deemed appropriate by the executive director of the commission or for licensure, renewal of licensure or continued licensure by the commission;

(10) the Kansas racing and gaming commission, or a designee of the commission, and the request is accompanied by a statement that the request is being made to aid in determining qualifications of the following under the Kansas expanded lottery act: (A) Lottery gaming facility managers and prospective managers, racetrack gaming facility managers and prospective managers, licensees and certificate holders; and (B) their officers, directors, employees, owners, agents and contractors;

(11) the Kansas sentencing commission;

(12) the state gaming agency, and the request is accompanied by a statement that the request is being made to aid in determining qualifications: (A) To be an employee of the state gaming agency; or (B) to be an employee of a tribal gaming commission or to hold a license issued

pursuant to a tribal-gaming compact;

(13) the Kansas securities commissioner or a designee of the commissioner, and the request is accompanied by a statement that the request is being made in conjunction with an application for registration as a broker-dealer, agent, investment adviser or investment adviser representative by such agency and the application was submitted by the person whose record has been expunged;

(14) the Kansas commission on peace officers' standards and training and the request is accompanied by a statement that the request is being made to aid in determining certification eligibility as a law enforcement officer pursuant to K.S.A. 74-5601 et seq., and amendments thereto;

(15) a law enforcement agency and the request is accompanied by a statement that the request is being made to aid in determining eligibility for employment as a law enforcement officer as defined by K.S.A. 22-2202, and amendments thereto; or

(16) the attorney general and the request is accompanied by a statement that the request is being made to aid in determining qualifications for a license to carry a concealed weapon pursuant to the personal and family protection act.

HOUSE BILL NO. _____

By Representative O'Neal

AN ACT concerning the Kansas administrative procedure act; relating to the office of administrative hearings; presiding officers; amending K.S.A. 77-502, 77-516 and 77-526 and K.S.A. 2007 Supp. 75-37,121, 77-514 and 77-551 and repealing the existing sections; also repealing K.S.A. 2007 Supp. 74-599, K.S.A. 2003 Supp. 77-514, as amended by section 39 of chapter 145 of the 2004 Session Laws of Kansas, and K.S.A. 77-551, as amended by section 43 of chapter 145 of the 2004 Session Laws of Kansas.

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

New Section 1. The presiding officer from the office of administrative hearings, on such presiding officer's own motion or the motion of any party, may order certification of policy issues to an agency of this state when it appears to the presiding officer that there are involved in the proceeding before such presiding officer questions of policy which may be determinative of the proceeding then pending and it appears to the presiding officer that there are no established policies in statutes, rules and regulations or agency precedents which are determinative of such questions of policy.

Sec. 2. K.S.A. 2007 Supp. 75-37,121 is hereby amended to read as follows: 75-37,121. (a) There is created the office of administrative hearings within the department of administration, to be headed by a director appointed by the secretary of administration. The director shall be in the unclassified service under the Kansas civil service act.

(b) The office may employ or contract with presiding officers, court reporters and other support personnel as necessary to conduct proceedings required by the Kansas administrative procedure act for adjudicative proceedings of the state agencies, boards and commissions specified in subsection (h). The office shall conduct adjudicative proceedings of any state agency which is specified in subsection (h) when requested by such agency. Only a person admitted to practice law in this state or a person directly supervised by a person admitted to practice law in this state may be employed as a presiding officer. The office may employ regular part-time personnel.

House Judiciary

Date 2-26-08Attachment # 5

Persons employed by the office shall be under the classified civil service.

(c) If the office cannot furnish one of its presiding officers within 60 days in response to a requesting agency's request, the director shall designate in writing a full-time employee of an agency other than the requesting agency to serve as presiding officer for the proceeding, but only with the consent of the employing agency. The designee must possess the same qualifications required of presiding officers employed by the office.

(d) The director may furnish presiding officers on a contract basis to any governmental entity to conduct any proceeding other than a proceeding as provided in subsection (h).

(e) The secretary of administration may adopt rules and regulations:

(1) To establish procedures for agencies to request and for the director to assign presiding officers. An agency may neither select nor reject any individual presiding officer for any proceeding except in accordance with the Kansas administrative procedure act;

(2) to establish procedures and adopt forms, consistent with the Kansas administrative procedure act, the model rules of procedure, and other provisions of law, to govern presiding officers; and

(3) to facilitate the performance of the responsibilities conferred upon the office by the Kansas administrative procedure act.

(f) The director may implement the provisions of this section and rules and regulations adopted under its authority.

(g) The secretary of administration may adopt rules and regulations to establish fees to charge a state agency for the cost of using a presiding officer.

(h) Except as provided in subsection (j), the following state agencies, boards and commissions shall utilize the office of administrative hearings for conducting adjudicative hearings,

as defined in K.S.A. 77-502, and amendments thereto, under the Kansas administrative procedures procedure act ~~in--which--the presiding--officer--is-not-the-agency-head-or-one-or-more-members of-the-agency-head:~~

(1) On and after July 1, 2005: Department of social and rehabilitation services, juvenile justice authority, department on aging, department of health and environment, Kansas public employees retirement system, Kansas water office, Kansas animal health department and Kansas insurance department.

(2) On and after July 1, 2006: Emergency medical services board, emergency medical services council, Kansas health policy authority and Kansas human rights commission.

(3) On and after July 1, 2007: Kansas lottery, Kansas racing and gaming commission, state treasurer, pooled money investment board, and Kansas department of wildlife and parks ~~and-state board-of-tax-appeals.~~

(4) On and after July 1, 2008: Department of human resources, ~~state--corporation--commission,~~ state conservation commission, agricultural labor relations board, department of administration, department of revenue, board of adult care home administrators, Kansas state grain inspection department, board of accountancy and Kansas wheat commission.

(5) On and after July 1, 2009, all other Kansas administrative-procedure-act-hearings state agencies, boards or commissions not mentioned in subsections (1), (2), (3) and (4).

(i) (1) ~~Effective--July--1,--2005,--any-presiding-officer-in agencies-specified-in-subsection-(h)(1)--which--conduct--hearings pursuant-to-the-Kansas-administrative-procedure-act,--except--those exempted--pursuant--to--K.S.A.-77-551--and--amendments--thereto,--and support--personnel--for--such--presiding--officers,--shall--be transferred--to--and--shall--become--employees--of--the-office-of administrative-hearings.--Such-personnel--shall--retain--all--rights under--the--state--personnel-system--and--retirement-benefits--under the-laws-of-this-state--which--had--accrued--to--or--vested--in--such personnel--prior--to--the--effective--date--of--this-section.--Such~~

person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment had occurred.

(2) Effective July 17, 2006, any presiding officer in agencies specified in subsection (h)(2) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551 and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment had occurred.

(3) Effective July 17, 2007, any presiding officer in agencies specified in subsection (h)(3) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551 and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such

~~personnel--prior--to--the--effective--date--of--this--section--Such
person's--services--shall--be--deemed--to--have--been--continuous--All
transfers--of--personnel--positions--in--the--classified--service--under
the--Kansas--civil--service--act--shall--be--in--accordance--with--civil
service--laws--and--any--rules--and--regulations--adopted--thereunder.
This--section--shall--not--affect--any--matter--pending--before--an
administrative--hearing--officer--at--the--time--of--the--effective--date
of--the--transfer,--and--such--matter--shall--proceed--as--though--no
transfer--of--employment--had--occurred.~~

(4) Effective July 1, 2008, any full-time presiding officer in agencies specified in subsection (h)(4) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551 and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment had occurred.

(5) (2) Effective July 1, 2009, any full-time presiding officer in agencies specified in subsection (h)(5) which conduct hearings pursuant to the Kansas administrative procedure act, except those exempted pursuant to K.S.A. 77-551, and amendments thereto, and support personnel for such presiding officers, shall be transferred to and shall become employees of the office of administrative hearings. Such personnel shall retain all rights under the state personnel system and retirement benefits under

the laws of this state which had accrued to or vested in such personnel prior to the effective date of this section. Such person's services shall be deemed to have been continuous. All transfers of personnel positions in the classified service under the Kansas civil service act shall be in accordance with civil service laws and any rules and regulations adopted thereunder. This section shall not affect any matter pending before an administrative hearing officer at the time of the effective date of the transfer, and such matter shall proceed as though no transfer of employment occurred.

(j) Except as provided in K.S.A. 77-551, and amendments thereto, the provisions of this section shall not apply to the state board of tax appeals and the state corporation commission.

Sec. 3. K.S.A. 77-502 is hereby amended to read as follows:
77-502. As used in this act:

(a) "State agency" means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches of state government and political subdivisions of the state, which is authorized by law to administer, enforce or interpret any law of this state.

(b) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the state agency is vested by any provision of law.

(c) "License" means a franchise, permit, certification, approval, registration, charter or similar form of authorization required by law for a person to engage in a profession or occupation.

(d) "Order" means a state agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interest of one or more specific persons.

(e) "Party to state agency proceedings," or "party" in context so indicating, means:

(1) A person to whom an order is specifically directed; or

(2) a person named as a party to a state agency proceeding or allowed to intervene as a party in the proceeding.

(f) "Person" means an individual, partnership, corporation, association, political subdivision or unit thereof or public or private organization or entity of any character, and includes another state agency.

(g) "Political subdivision" means political or taxing subdivisions of the state, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups or administrative units thereof, receiving or expending and supported in whole or in part by public funds.

(h) "Adjudicative hearing" means any hearing or proceeding requiring resolution of disputed facts to formulate and issue a decision or order. Notwithstanding the use of any other term, if the hearing or proceeding requires resolution of disputed facts it shall be deemed an adjudicative hearing.

Sec. 4. K.S.A. 2007 Supp. 77-514 is hereby amended to read as follows: ~~77-514. (a) For agencies listed in subsection (h) of K.S.A. 75-37,121, and amendments thereto, the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings shall be the presiding officer. For all other agencies, the agency head, one or more members of the agency head, a presiding officer assigned by the office of administrative hearings, or, unless prohibited by K.S.A. 77-551, and amendments thereto, one or more other persons designated by the agency head shall be the presiding officer.~~ (a) (1) Notwithstanding any other provision of law to the contrary, on and after July 1, 2008, through June 30, 2009, for agencies listed in subsections (h)(1), (h)(2), (h)(3) and (h)(4) of K.S.A. 75-37,121, and amendments thereto, a presiding officer assigned by the office of administrative hearings shall be the presiding officer for all adjudicative hearings. The presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527, and amendments thereto.

(2) Notwithstanding any other provision of law to the contrary, except as provided in K.S.A. 77-551, and amendments thereto, on and after July 1, 2009, for all state agencies, a presiding officer assigned by the office of administrative hearings shall be the presiding officer for all adjudicative hearings. The presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527, and amendments thereto.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.

(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

(f) If the office of administrative hearings cannot provide a presiding officer, a state agency may enter into agreements with another state agency to provide presiding officers to conduct proceedings under this act.

(g) Prior to July 1, 2009, as applicable, notwithstanding any quorum requirements, if the agency head of a professional or occupational licensing agency is a body of individuals, the agency head, unless prohibited by law, may designate one or more members of the agency head to serve as presiding officer and to render a final order in the proceeding.

Sec. 5. K.S.A. 77-516 is hereby amended to read as follows: 77-516. The presiding officer designated to conduct the hearing may conduct a prehearing conference. If the conference is

conducted:

(a) Prior to July 1, 2009, as applicable, the state agency may assign a presiding officer, if such agency is not required to use a presiding officer from the office of administrative hearings, for the prehearing conference, exercising the same discretion as is provided by K.S.A. 77-514, and amendments thereto, concerning the selection of a presiding officer for a hearing.

(b) The presiding officer for the prehearing conference shall set the time and place of the conference and give reasonable notice to all parties and to all persons who have filed written petitions to intervene in the matter.

(c) The notice shall include:

(1) The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(2) the name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the state agency;

(3) the official file or other reference number, the name of the proceeding and a general description of the subject matter;

(4) a statement of the time, place and nature of the prehearing conference;

(5) a statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

(6) the name, official title, mailing address and telephone number of the presiding officer for the prehearing conference;

(7) a statement that at the prehearing conference the proceeding, without further notice, may be converted into a conference hearing or a summary proceeding for disposition of the matter as provided by this act; and

(8) a statement that a party who fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding may be held in default under this act.

(d) The notice may include any other matters that the

presiding officer considers desirable to expedite the proceedings.

Sec. 6. K.S.A. 77-526 is hereby amended to read as follows:
77-526. (a) Except as provided in K.S.A. 77-514, and amendments thereto, if the presiding officer is the agency head or designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto, the presiding officer shall render a final order.

(b) Except as provided in K.S.A. 77-514, and amendments thereto, if the presiding officer is neither the agency head nor designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with K.S.A. 77-527 and amendments thereto.

(c) A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration, administrative review or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order. If the presiding officer has been designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto, the final order shall so state. Any final order, for which a petition for reconsideration is not a prerequisite for seeking judicial review, and any initial order, for which further administrative review is not available, shall state the agency officer to receive service of a petition

for judicial review on behalf of the agency.

(d) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

(e) If a substitute presiding officer is appointed pursuant to K.S.A. 77-514 and amendments thereto, the substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order or initial order pursuant to this section shall be rendered in writing and served within 30 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown. If extended for good cause, such good cause shall be set forth in writing on or before expiration of the 30 days.

(h) The presiding officer shall cause copies of the order to be served on each party and, if the order is an initial order, on the agency head in the manner prescribed by K.S.A. 77-531 and amendments thereto.

(i) Notwithstanding the other provisions of this section, if the presiding officer in a hearing before the state corporation commission is not the agency head, the presiding officer shall not render an initial order but shall make written findings and recommendations to the commission. The commission shall render and serve a final order within 60 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown. If extended for good cause, such good cause shall be set forth in writing on or before expiration of the 60 days.

Sec. 7. K.S.A. 2007 Supp. 77-551 is hereby amended to read

as follows: 77-551. ~~(a) Except as provided in subsection (b), in all hearings of any state agency specified in subsection (h) of K.S.A. 75-37,121, and amendments thereto, that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings.~~ (a) (1) Notwithstanding any other provision of law to the contrary, except as provided in subsection (b), on and after July 1, 2008, through June 30, 2009, in all adjudicative hearings of any state agency specified in subsections (h)(1), (h)(2), (h)(3) and (h)(4) of K.S.A. 75-37,121, and amendments thereto, that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be a presiding officer assigned by the office of administrative hearings.

(2) Notwithstanding any other provision of law to the contrary, except as provided in subsection (b), on and after July 1, 2009, in all adjudicative hearings of any state agency that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be a presiding officer assigned by the office of administrative hearings.

(b) (1) The provisions of this section shall not apply to the employment security law, pursuant to K.S.A. 44-701 et seq., and amendments thereto, or article 5 of chapter 44, and amendments thereto, except K.S.A. 44-532 and 44-5,120, and amendments thereto, concerning the workers compensation act.

(2) Notwithstanding any other provision of law to the contrary, in all hearings of the state board of tax appeals and the state corporation commission that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be the agency head or one or more members of the agency head. If the agency head or one or more members of the agency head is not the

presiding officer, an officer assigned by the office of administrative hearings shall serve as the presiding officer.

(c) ~~Notwithstanding~~ Subject to the provisions of subsection (a) the agency head or one or more members of the agency who will serve as a presiding officer may designate any other person to serve as a presiding officer to determine procedural matters that may arise prior to the hearing on the merits, including but not limited to conducting prehearing conferences pursuant to K.S.A. 77-516 and 77-517 and amendments thereto.

(d) This section shall be part of and supplemental to the Kansas administrative procedure act.

Sec. 8. On and after July 1, 2009, K.S.A. 77-551, as amended by section 43 of chapter 145 of the 2004 Session Laws of Kansas, and K.S.A. 2003 Supp. 77-514, as amended by section 39 of chapter 145 of the 2004 Session Laws of Kansas are hereby repealed.

Sec. 9. K.S.A. 77-502, 77-516 and 77-526 and K.S.A. 2007 Supp. 74-599, 75-37,121, 77-514 and 77-551 are hereby repealed.

Sec. 10. This act shall take effect and be in force from and after its publication in the Kansas register.