Approved: February 6, 2008
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 A.M. on January 22, 2008, in Room 123-S of the Capitol.

All members were present except:
Greta Goodwin- excused
Donald Betts- excused
David Haley arrived, 9:46 A.M.
Phil Journey arrived, 9:40 A.M.

Committee staff present:
Athena Andaya, Kansas Legislative Research Department
Bruce Kinzie, Office of Revisor of Statutes
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Richard Hayse, Past President, Kansas Bar Association
Ed Klumpp Kansas Association of Chiefs of Police; Kansas Peace Officers
Bob Keller, Johnson County Sheriff's Office
Mike Van Stratton, Kansas Bureau of Investigation
Eric N. Anderson, Attorney, Clark, Mize & Linville Chartered
Randy Hearrell, Kansas Judicial Council
Patricia Biggs, Kansas Parole Board

Others attending:
See attached list.

Bill Introductions

Senator Schmidt requested introduction of a bill to address a technical issue relating to the lines of reporting for the Office of the Inspector General. Senator Schmidt moved, Senator Umbarger seconded, to introduce the bill. Motion carried.

The Chairman opened the hearing on **SB 413–Collection of certain specimens, probable cause determination.**

Richard Hayse appeared in support, indicating the bill will create a fair balance between the need for law enforcement to utilize available and technologically-evolving investigative tools versus an individual's personal liberties (Attachment 1). Mr. Hayse stated **SB 413** is a reasonable proposal to insert the review of a magistrate in the collection of evidence by requiring a determination of probable cause before a sample is taken.

Ed Klumpp testified in opposition, stating current law is the best approach to the collection of DNA samples which allows for a clean consistent flow of DNA collection (Attachment 2 & 3). Enactment of **SB 413** would be counter productive by increasing costs, additional staff time, and problems ensuring positive identification of an individual. In addition, the current law includes a process to have the sample removed from records if there is a later finding of no probable cause.

Capt. Bob Keller spoke in opposition stating the proposed language is unnecessary and negatively impacts the booking procedure, complicates the identification process, and is an inefficient use of personnel and tax dollars (Attachment 4).

Mike Van Stratton appeared in a neutral capacity voicing the concerns of the KBI regarding the increased costs associated with enactment of **SB 413** (Attachment 5). The fiscal impact will require increased staff support of the DNA Databank, additional equipment, sample collection training, and increased travel costs.

There being no further conferees, the hearing on **SB 413** was closed.

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on January 22, 2008, in Room 123-S of the Capitol.

The hearing on **SB 412–Health care; medical assistance repayment; discretionary trusts** was opened.

Eric Anderson spoke in support, providing a brief summary on the history of the bill including work done during the interim. Mr. Anderson reported that an agreement on language had been reached with the Kansas Health Policy Authority. He encouraged enactment of **SB 412** (Attachment 6).

Randy Hearrell appeared in support, indicating the bill is similar to 2007 SB 32 as amended and passed by the Judiciary committee (Attachment 7). The Probate Law Advisory Committee has reviewed the bill and supports its passage.

There being no further conferees, the hearing on **SB 412** was closed.

The hearing on **SB 411--Factors affecting inmate's suitability for parole** was opened.

Patricia Biggs provided neutral testimony indicating **SB 411** expands the criteria for determination of parole suitability in three areas: risk factors, facility staff recommendations, and proportionality of time served (Attachment 8). Ms. Biggs stated, while not in the statute, the Parole Board does take into consideration identified risk factors and the recommendations of the Department of Corrections' staff however, proportionality of time served is not currently considered. Enactment of the bill would present several implementation concerns and create a significant workload impact. The Parole Board requested that should **SB 411** be passed, corresponding appropriation be made to accommodate the increased costs.

There being no further conferees, the hearing on **SB 411** was closed.

The meeting adjourned at 10:31 A.M. The next scheduled meeting is January 23, 2008.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: JANUARY 22, 2008

NAME	REPRESENTING
KEN DANIEC	MIDWAY WHOLESALE
MARK BORANYAK	CAPITOL STRATEGIES
Richard Sommerlad	Kennedy & Assoc.
Ron Seeber	Hein Law Firm
Austin Hayden	Hein Law Firm
Ed Cross	KIOGA
BOB Totten	KS Contractors Assoc.
Jennie Rose	KCSL
Mike Reed	ACEC
Chad Austin	KS Hosp Assoc.
Robert E. Blecha	KBI
Laura Graham	KBI
Eric Stafford	AGC of KS
DAN MORGAN	Builders' Assn
Tom WHITAKER	KS MOTOR CARRIERS ASSN
Callie Hartle	KS Asso. for Justice (KSAJ)

KANSAS BAR ASSOCIATION

TESTIMONY

TO: **The Honorable John Vratil, Chair**
And Members of the
Senate Committee on Judiciary

FROM: **The Kansas Bar Association**

RE: **SB 413 - An Act concerning crimes; criminal procedure and punishment; concerning collection of certain specimens.**

DATE: **January 22, 2008**

Chairman Vratil and Members of the Senate Committee on Judiciary:

The Kansas Bar Association (KBA) would like to express its support to the Committee for SB 413, which would prohibit the collection of DNA from an individual prior to a judicial determination of probable cause.

The KBA believes this legislation creates a fair balance between the need for law enforcement to utilize available and technologically-evolving investigative tools vs. an individual's personal liberties, including the right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.

During the 2007 interim, the Kansas Bar Association expressed its support to the Special Committee on Judiciary for a change in current law to require blood or other biological samples to be submitted at the time of arrest only after a determination of probable cause is made by a magistrate judge.

The KBA believes the removal of DNA from an individual is a search of that person; and, a DNA sample is much more intrusive than the collection of a finger print.

SB 413 is a reasonable proposal that inserts the review of a magistrate into the collection of evidence process by requiring a determination of probable cause be made by an independent third party (the magistrate) before the taking of a DNA sample.

Opponents to this legislation have argued that by delaying the collection of a DNA sample to a time after a probable cause determination is made creates an undue hardship for law enforcement, who would have to essentially handle the defendant twice: Once at arrest, where fingerprints are collected (and when law enforcement would prefer to collect a DNA sample) and at a later time when a magistrate considers the probable cause issue. It has also been suggested that the defendant may not appear to provide a sample after their arrest.

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We would respectfully note for the Committee that under SB 413, the magistrate is required to include as a condition of bond the collection of a DNA sample if a probable cause determination is made to support the initial arrest. We believe this requirement should address the concerns expressed by the law enforcement community in this regard.

On behalf of the Kansas Bar Association, we respectfully request the Committee pass SB 413 as proposed by the Special Committee on Judiciary.

Thank you.

###

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants 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.

###

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 7,000 members, including lawyers, judges, law students, and paralegals.

TESTIMONY TO THE SENATE JUDICIARY COMMITTEE IN OPPOSITION OF SB 413

Presented by Ed Klumpp

January 22, 2008

This testimony is in opposition to the provisions of SB413 requiring a finding of probable cause prior to the collection of DNA samples. Last year, the legislature made a decision in passing SB103 to begin the collection of DNA without probable cause findings. That bill, the current law, contains a system to assure a process to remove DNA from the database if there is a later finding of no probable cause, an expungement, a finding of not guilty, or if the case is dismissed. We believe this is the best approach to the concerns.

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 an identity factor collected through 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. Under the provisions of this bill, all on view or probable cause arrests would require waiting for a probable cause finding by the court or magistrate prior to the collection of the sample.
3. Waiting to collect the sample until after a probable cause finding creates difficulty for law enforcement in several ways: 1) It is much more time efficient and cost effective to collect the sample at the time of arrest when the booking process including taking defendant's fingerprints and palmprints. 2) In practice the collection of the sample following a probable cause hearing presents identity problems in those cases where the person has been released on bond prior to the probable cause finding. The personnel and materials to collect this sample are not normally available at the court house. This can be further compounded if the preliminary hearing is waived. 3) Taking the sample later presents a challenge in assuring

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the person coming in for the sample is indeed the person who was originally arrested. It is vital law enforcement assure the sample came from the person arrested. The only way to do this is to again take fingerprints to match back with those taken at time of arrest. Without this precaution, we could easily have a DNA sample from someone else allowing the intended defendant from being identified in future matters. Such duplication of fingerprinting is time consuming and costly to the law enforcement agencies. Municipal law enforcement and courts have extensive experience with these difficulties in collecting fingerprints from A and B misdemeanants who were not booked at time of arrest.

4. The current statute allows for a clean consistent flow of collecting the sample and sending it to the KBI at the time of arrest.

Last year, this committee heard testimony from Kyle Smith of the KBI providing detailed explanation of why the case laws cited by the bar association should not be problematic to the Kansas law as passed. I certainly can't be as eloquent as Kyle in a detailed legal explanation. But it was clear from his testimony that the key element in these laws is clarifying the purpose of the sample collection is identification, and the more you remove it from identification purposes, and the more we alter the rules from our other identification processes, the more legally challenging the matter becomes. He further explained why collection at the time of fingerprinting helps clarify the purpose as identification.

The current law, passed last year, includes a process to have the sample removed from the database if there is a later finding of no probable cause. In my law enforcement experience, the finding of no probable cause is a rare event. In addition, the current law allows for the removal of the sample from the database even if the charges are later dismissed or expunged.

We oppose the passage of this bill. But if the legislative decision is to change current law passed last year and not yet put into practice, we recommend the language on page 3, lines 21-25 be stricken since probable cause will have already been found. In addition, we recommend page 3, lines 26-30 be stricken to align the DNA identifier retention rules so they are the same as fingerprints and palmprints. As to the expungement language in this section, expungement happens after a conviction. The presence of the DNA in the database can be maintained with the specific charge leading to the collection removed from the database. Expungement records are already greatly restricted in KSA 22-2410 and the provisions on page 4 lines 20-30 already restrict all DNA data for use only by law enforcement for identification purposes.

In summary, we see no need to change the current language as passed last year. We strongly urge you to <u>not</u> recommend SB 413 to be passed.

Ed Klumpp

Ed Klumpp
Chief of Police-Retired
Topeka Police Department

Legislative Committee Chair
Kansas Association of Chiefs of Police
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Kansas Peace Officers' Association

INCORPORATED
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WEB & EMAIL KPOA.org
P.O. BOX 2592 • WICHITA, KANSAS 67201

TESTIMONY TO THE SENATE JUDICIARY COMMITTEE IN OPPOSITION OF SB 413
Presented by Ed Klumpp

January 22, 2008

The Kansas Peace Officers' Association is opposed to the provisions of SB413 requiring a finding of probable cause prior to the collection of DNA samples. It is our opinion the 2007 legislature got it right last year when they passed SB103. The proposals in SB413 are counter productive to efficiency in law enforcement. They will add staff time to the identification process which adds cost. It also opens opportunities for accuracy problems when DNA has to be collected from a defendant who has been released on bond prior to a probable cause finding allowing the DNA collection.

If we are to avoid the problems other states have encountered in the case laws cited by the Bar Association, it is vital we maintain a system clearly handling DNA collection as an identification process and use. Last year, we were fortunate to have Kyle Smith address this Committee on the matter and carefully explain why the process laid out in SB103 was the right direction to follow. He also covered why the cases cited were not applicable with this approach.

When suspects are first booked is the best time to take fingerprints and collect DNA for identification purposes. When this is delayed beyond the defendant bonding out, it requires having the defendant return to have the DNA sample collected. This opens opportunities for the defendant to have someone attempt to appear in their place to provide the sample. To assure this doesn't happen, law enforcement will have to take some measure to assure the person appearing is the right person. This could entail duplicating some sort of fingerprinting again or other method to assure the sample collected is accurately related to the proper person. If a defendant is successful in having another person submit a sample, the real defendant escapes the identification process that could take a violent offender off the street as quickly as possible. The speed at which the tools available to law enforcement allow the identification of an active criminal is directly related to the ability to prevent future victimization. Every day an active criminal is on the street potential victims are at risk. DNA identification can shorten the time it takes for law enforcement to identify dangerous criminals substantially. These problems can be easily avoided by not altering the law passed last year.

We strongly urge you to not recommend SB413 to pass.

Ed Klumpp

Ed Klumpp
Legislative Committee Chair
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E-mail:eklumpp@cox.net

In Unity There Is Strength

Senate Judiciary
1-22-08
Attachment 3

FRANK P. DENNING
SHERIFF

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DUTY HONOR SERVICE
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WWW.JOCOSHERIFF.ORG

DAVID A. BURGER
UNDERSHERIFF

KEVIN D. CAVANAUGH
UNDERSHERIFF

To: Chairperson Vratil, Vice-chairperson Bruce, and distinguished members of the Senate Judiciary Committee.

From: Frank P. Denning, Sheriff

Date: January 22, 2008

Chariperson Vratil and Committee Members,

My name is Frank Denning and I am the Sheriff of Johnson County Kansas. I appear before you today in opposition of Senate Bill No. 413. The proposed language is unnecessary and negatively impacts: the booking procedure, complicates the identification process, and is an inefficient use of personnel and tax dollars.

Presently, a DNA sample is collected at the time an individual is fingerprinted and photographed pursuant to the booking procedure. The current method guarantees that the DNA sample is collected from the same person that was fingerprinted and photographed. I am able to use existing jail deputies to collect the sample, and don't have to staff and equip an area outside of the jail.

It is not unusual for someone to claim another's identity when they are booked into jail. I fully expect the same problem to occur with post-release DNA sample collection. To avoid impersonators, it would be necessary to fingerprint the individuals and confirm their identity before taking the sample. This is not an efficient use of personnel or public safety funding dollars.

The bills language assumes that every magistrate will remember to order every charged felon to supply a DNA sample as a condition of bond. This adds another task to magistrates who are already burdened with heavy case loads and too little time.

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The current statute, K.S.A. 21-2511, already contains language that directs the Kansas Bureau of Investigation to expunge both the DNA sample and profile record of such person if there was not probable cause for the arrest.

In closing, the language in the current statute is clear, straightforward, and easy to administer. I would encourage you to not recommend SB 413 to be passed out of committee.

Frank Denning

Sheriff Frank Denning

Kansas Bureau of Investigation

Robert E. Blecha
Director

Paul Morrison
Attorney General

January 18, 2008

Cheri Froetschner
Division of the Budget
Room 504
State Capitol Building
Topeka, Kansas 66612
Fax (785) 296-0231

RE: Fiscal Note for SB 413

Dear Ms. Froetschner:

On behalf of the Kansas Bureau of Investigation (KBI), I respectfully submit the following note for SB 413.

I. Analysis of Proposed Legislation

SB 413 amends K.S.A. 21-2511, repealing section (e)(1), replacing it with the following requirement. The bill would require that a magistrate, as defined by K.S.A. 22-2202 and amendment thereto, has made a determination of probable cause to support an arrest, charge or placement in custody. If the magistrate makes a probable cause determination, the magistrate shall, as a condition of bond, require such person to submit a specimen or sample for DNA databank (CODIS) entry.

II. Impact on KBI Responsibilities.

The DNA Databank is currently supporting the agencies required to submit samples from convicted individuals and agencies required to submit samples from arrested individuals. This has had a significant impact on staffing because it requires the DNA Databank staff to support over 200 different agencies (sheriff offices, community corrections, etc) using two different sample collection kits,

1. blood for convicted offenders and
2. oral swabs for arrested individuals.

This multiple sample support has required 2 different robotic systems, 2 different profiling procedures, and 2 different training programs, all of which required more staff time and has introduced inefficiencies into the database program.

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Beginning July 2008 the qualifying crimes for arrestees will mimic the qualifying crimes for convicted offenders, so in theory all qualifying individuals will be *collected upon arrest* (oral samples) and the agencies collecting samples from convicted individuals (blood) will no longer have to perform this function. The required DNA Databank support to different agencies will decrease from over 200 to less than 100 (primarily county jails). More importantly the DNA Databank will return to functioning efficiently with only one type of sample, oral samples.

If K.S.A. 21-2511 is amended as proposed in SB 413, then the DNA Databank will be required to provide the needed equipment and training to approximately 150 agencies that currently collect blood on convicted individuals to switch to oral sample collection. This would be in response to the booking agencies inability to collect on those individuals that are released without samples being collected because of the lag time for determination of probable cause by a magistrate. Current practice in some jurisdictions is for arrestees to be bonded immediately after arrest, without review for probable cause by a magistrate and are summoned to court at a later date. Those individuals, at the time of their appearance in court, plead guilty or not guilty. At no time during this process do the arrestees return to a correctional facility, where the required collection of the DNA sample could be completed. Since these individuals potentially would not be collected upon arrest, they would be required to be collected upon conviction. This causes the DNA Database to need to continue to support agencies collecting upon conviction.

An additional impact of the proposed amendment will be a *decrease* in the number of samples submitted to the DNA Database. Some arrestees will not be collected due to the lag time waiting on the determination of probable cause and for various reasons they will not be convicted, therefore, their samples will never be collected. These samples will be unavailable for submission into the database, thereby potentially compromising public safety.

Fiscal Impact for KBI DNA Databank

Item	Quantity	Cost	Total Cost
2D Bar code Printers	150	$500 each	$75,000
DNAC (software)	150	$50	$7,500
Training	8 sites across Kansas	$300	$2,400

Total $84,900

NOTE: This does not include the cost to agencies that do not currently have access to Kansas criminal history files, which they are required to search prior to taking samples.

III. Potential Unintended Consequence

By current statute, are community corrections, court services, probation, parole, department of corrections, juvenile services, and juvenile detention centers considered to be an arresting, charging or custodial law enforcement agencies? Since these agencies will continue to be responsible for sample collection if SB 413 is adopted, additional changes to statutes may be required to permit and require them to collect the needed samples.

Respectfully submitted,

Robert E. Blecha, Director
Kansas Bureau of Investigation

CLARK, MIZE & LINVILLE
CHARTERED

PETER L. PETERSON
JOHN W. MIZE
GREG A. BENGTSON
MICKEY W. MOSIER
PAULA J. WRIGHT
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MICHAEL P. ALLEY
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C.L. CLARK (1908 – 2004)
JAMES P. MIZE (1910 – 1988)

AUBREY G. LINVILLE
L.O. BENGTSON
RETIRED

January 18, 2008

To: Kansas Senate Judiciary Committee
From: Eric N. Anderson, Esq.
RE: Senate Bill 412

Thank you for the opportunity to submit testimony on SB 412. As you know, I had the privilege of testifying before this Committee twice last Spring and once during the House/Senate Conference Committee concerning SB 32, which was part of the 2007 Session. It is now my privilege to testify on SB 412.

As a brief reminder, the purpose of SB 412 is to clear up some unintended consequences of changes made to K.S.A. 39-709(e)(3) in 2004. Those unintended consequences greatly constrained the ability of parents of children with special needs to adequately plan for their children. In addition, for irrevocable supplemental needs trusts prepared before 2004 that did not specifically state an intent distributions were to be supplemental to "medicaid, medical assistance or title XIX of the social security act," those trusts were not permitted to be amended notwithstanding a clear intent by the Settlor of the Trust that the trust was to be supplemental to governmental benefits.

I'm happy to say that after all of the testimony on SB 32 and numerous additional discussions with Reid Stacey and Brian Vazquez of The Kansas Health Policy Authority ("KHPA"), we came to an agreement as to language that would solve the problems inherent in 39-709(e)(3). We presented the agreed upon language to the Probate Section of The Kansas Judicial Council in September 2007, and I understand the Judicial Council submitted its recommendations to the legislature consistent with the joint proposal from KHPA and me.

We now have SB 412 which is substantially similar to our joint proposal. I understand that KHPA is taking a neutral position on this bill, but from my perspective that is positive. In my opinion, SB 412 is a good piece of legislation and I heartily support its passage because it solves all of the criticisms that I had concerning the 2004 version of K.S.A. 39-709(e)(3). With the changes SB 412 makes to K.S.A. 39-709(e)(3):

- A supplemental needs trust must state a clear intent that it be supplemental to public assistance, but the trust does not need to specifically use the words "medicaid, medical assistance or title XIX of the social security act" when referring to public assistance;
- Supplemental needs trusts may be amended;
- Parents of minor children can nominally fund a supplemental needs trust although the parents still owe a duty of support to their minor children; and
- Full funding of a supplemental needs trust is still permitted by a person when that person owes no duty of support to the disabled beneficiary.

Overall, I am very satisfied with the language of SB 412 and would urge this Committee to vote in favor of this Bill.

Thank you very much for your consideration on this matter.

Very truly yours,

CLARK, MIZE & LINVILLE, CHTD.

Eric N. Anderson

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1-22-08
Attachment 6

KANSAS JUDICIAL COUNCIL

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judicial.council@ksjc.state.ks.us
www.kscourts.org/kansas-courts/judicial-council

TO: **Senate Judiciary Committee**
FROM: **Kansas Judicial Council - Randy M. Hearrell**
DATE: **January 22, 2008**
SUBJECT: **2008 Senate Bill 412**

I am appearing to testify in support of 2008 Senate Bill 412. SB 412 is very similar to 2007 SB 32 as it was amended by the Senate Judiciary Committee last session. The Legislature assigned the study of SB 32 to the Judicial Council and the study was conducted by the Council's Probate Law Advisory Committee (PLAC).

As passed by the Senate, Senate Bill No. 32 proposed amendments to K.S.A. 2006 Supp 39-709(e)(3) to clarify that resources from a trust executed on or after July 1, 2004, would be considered an available resource in determining eligibility of a trust beneficiary for medical assistance unless the trust is funded more than nominally from resources of a person who owed no duty of support and who intended the trust to be supplemental to public assistance. The amendments struck the requirement of K.S.A. 39-709(e) that "the intent that the trust be supplemental to public assistance be contemporaneous" and struck the requirement that language in the trust make specific reference to "medicaid, medical assistance or title XIX of the Social Security Act." K.S.A. 2006 Supp. 39-709 (e) was also amended to add a new subsection (5) which provided, "Any trust created before July 1, 2004, can be amended if such amendment is permitted by the Kansas Uniform Trust Code."

The PLAC considered copies of the written testimony of Eric Anderson, Reid Stacey and Molly Woods before the Special Committee on the Judiciary. In addition, Mr. Anderson and Mr. Stacey attended the September 19, 2007 meeting of the PLAC to discuss Senate Bill 32. The Committee was prepared to hear a discussion of their differences, but when they appeared they had reached a compromise on those differences and jointly proposed amendments to K.S.A. 2006 Supp. 39-709 (c)(3) very similar to those now contained in 2008 Senate Bill 412. In addition, the PLAC independently prepared proposed amendments to the same section that are very similar to SB 412. After consulting with the PLAC, they take the position that the version of the amendments they drafted is not significantly different from SB 412 and the Probate Law Advisory Committee supports passage of the bill.

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Attachment 7

KANSAS
PAROLE BOARD

Kathleen Sebelius, Governor
Libby Scott, Administrator
and ReEntry Liaison
www.dc.state.ks.us

MEMORANDUM

TO: SENATE JUDICIARY COMMITTEE, SENATOR VRATIL, CHAIRMAN

FROM: KANSAS PAROLE BOARD

DATE: JANUARY 22, 2008

RE: 2008-SB 411

INTRODUCTION

2008-SB 411 relates to factors considered by the Kansas Parole Board when making determinations regarding parole suitability (amending K.S.A. 22-3717). The Kansas Parole Board's position is neutral in regard to this proposed policy change.

ANALYSIS AND CONSIDERATION

Presently, the Board considers seven factors when determining parole suitability for an offender. SB 411 expands the criteria by adding the following three new factors:

1. **risk factors revealed by any risk assessment of the inmate;**
2. **any recommendation by the staff of the facility where the inmate is incarcerated;**
3. **proportionality of the time the inmate has served to the sentence a person would receive under the Kansas sentencing guidelines for the conduct that resulted in the inmate's incarceration.**

Although not already included in statute, the Board does consider presently risk factors identified by risk assessment instruments as well as the recommendations of Department of Corrections' staff. Proportionality of time served as compared to that called for under Kansas Sentencing Guidelines, however, is not considered presently. Consideration of proportionality, as set forth in this bill, raises implementation concerns and carries with it staffing and fiscal implications.

Challenges in determining the appropriate guidelines sentence arise at least the in the following seven areas:

- **Criminal History.** Indeterminate cases (pre-guidelines) do not include a Criminal History Worksheet. It is the Criminal History Worksheet which categorizes the defendant's criminal history into the Guidelines' A-I categories. To assess proportionality to Sentencing Guidelines, a Criminal History Worksheet would have to be completed. Information to complete the Criminal History Worksheet may or may not be available, accurate or complete based on the Presentence Investigation alone.
    - Although the Presentence Investigation ("PSI") contains a listing of prior contacts with the criminal justice system, it will be challenging to locate the offender on the horizontal axis of the Sentencing Grid based on the PSI information. Following factors influence this:
        - Person/Non-Person categorization generally is not available in the PSI information,
        - Felony, misdemeanor, or municipal infraction generally is not available in the PSI information,
        - Case disposition is not available routinely,
        - Challenges to the criminal history as recorded on the PSI, and likely then converted to a Criminal History Worksheet are assumed to fall under the provisions of K.S.A. 2005 Supp. 21-4715 (c) wherein the offender has the right to object or dispute to his/her calculated criminal history score and the prosecutor would have to prove disputed elements. This would have an impact not only on the Board but on state-wide pros offices as well.

- **Crime Severity Level.** Severity Levels for some crimes have changed over the history of Kansas Sentencing Guidelines.
  - For example, Intentional 2nd Degree Murder
- **Elements of Offense.** Definitional requirements for statute violation have changed over the history of the Kansas Sentencing Guidelines
  - As an example, Battery against a Law Enforcement Officer (K.S.A. 21-3413) was expanded to include uniformed university or campus police officer in 2005. Review of historical information contained in an offender file does not always yield sufficient information to ascertain if such an expansion applies in a particular case or not. It would then be unclear is an indeterminate Battery conviction would "convert" to a guidelines sentence for Battery or Battery against a law enforcement officer unless the Board knew the victim was a campus police officer in uniform.
- **Stability of Guideline Sentences.** The term of incarceration called for under sentencing guidelines has changed over the history of the Kansas Sentencing Guidelines.
  - For example, non-drug severity levels 1 and 2 incarceration terms were doubled, Criminal History category A and B incarceration terms were doubled, severity level 1, 2, and 3 incarceration terms were reduced by 20%. This leads to question regarding which grid to use when attempting to consider proportionality.
- **Sentencing Departures.** The Kansas Sentencing Guidelines allow the Judge the discretion to depart from the term called for under the Guidelines in certain circumstances so long as the substantial and compelling reasons for that departure are stated on the record. It is unclear how SB 411 would expect the Board to address issues related to departures when considering the proportionality of sentence.
- **Sentencing Guidelines Special Rules.** The Sentencing Guidelines allow a judge to impose a special rule at sentencing which may effect the duration called for by the guidelines. A particular example of this is the special rule applicable to persistent sex offenders (K.S.A. 21-4704(j)) where the judge could impose a doubling of the maximum duration called for by the guidelines. The Board would have to speculate regarding the imposition of such special rules to estimate the proportional guidelines sentence.
- **Post Incarceration Supervision: Term of supervision, Term of Revocation, Determination of Suitability following a Revocation**. It is unclear to the Board at this time if the provisions of SB 411 would apply also to the term of Post Incarceration Supervision and the term of revocation when an offender is found in violation of conditions of his/her post incarceration supervision. This is further complicated when an offender has had multiple post incarceration revocations and is being re-heard with regard to parole suitability determination.

CONCLUSION

While the Parole Board understands that not all these issues can be resolved with specificity in legislation, the Board does request that the legislature take under consideration the impact on operations this requirement will have on Board operations. Further, it is anticipated that the number of litigations against the Board based on this new, quantifiable factor will increase substantially.

The Board's initial estimate regarding workload impact assumed that one sentence-computation type staff person would have to be added to the Board or assumed by the Department of Corrections for a duration of approximately two years to compute the equivalent guidelines sentence for the indeterminate incarcerated and post-release supervision populations. The associated cost for salary and benefits was estimated at approximately $30,000 and had additional one-time fixed costs of approximately $8,000 for work space, computer, chair and the like.

However, upon further examination and reflection, particularly when taking into account the complexity of issues surrounding the transfer of old-law offenses into their present day counterparts and the anticipation of substantial increase in litigation against the Board, we assume that an Attorney II would be a more appropriate classification. Salary and benefits would be assumed to total approximately $63,000/year. Fixed, one-time costs associated with the position would remain at $8,000.

Should the Legislature determine SB 411 suitable for passage, the Board requests that the corresponding appropriation be made for the coming fiscal years.