

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Vice Chairman Terry Bruce at 9:34 A.M. on March 18, 2008, in Room 123-S of the Capitol.

All members were present except:

John Vratil- excused  
Donald Betts- excused  
David Haley arrived, 9:45 A.M.

Committee staff present:

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

Conferees appearing before the committee:

Representative Joe Patton  
Jennifer Roth, Kansas Association of Criminal Defense Lawyers  
Callie Denton Hartle, Kansas Association for Justice

Others attending:

See attached list.

The Vice Chairman opened the hearing on **HB 2732–Sentencing, mitigating factors, departure limitations on crime of extreme sexual violence.**

Representative Joe Patton testified in support, stating his concern on departures from term limit guidelines by judges (Attachment 1). **HB 2732** would limit departures for the most serious crimes, and for those with the most serious criminal histories.

Jennifer Roth spoke in opposition, voicing several concerns regarding the bill (Attachment 2). Kansas has 15 years of case law representing the sentencing guidelines and the guidelines are respected as an example by many other states. Ms. Roth indicated there is no justification for the proposed changes and there is no statistical data to support the bill. The bill will conflict with existing law, may increase jury trials, and may cause a constitutional challenge.

Written testimony on **HB 2732** was submitted by:

Ed Klumpp, Support, KS Assn. of Chiefs of Police; KS Peace Officers' Assn. (Attachment 3 & 4)  
Peter Ninemire, Opposition, Families Against Mandatory Sentences (Attachment 5)

There being no further conferees, the hearing on **HB 2732** was closed.

The Vice Chairman opened the hearing on **HB 2825–Closing court proceedings and sealing court records; good cause finding on the record required.**

Callie Denton Hartle appeared in support. The bill reasonably balances the transparency and public access with the need to close proceedings or seal records when the need is demonstrated (Attachment 6).

Written neutral testimony on **HB 2825** was submitted by:

Anne Kindling, Kansas Association of Defense Counsel (Attachment 7).

The Vice Chairman called for final action on **HB 2643–Resolving a conflict between two statutes concerning service of process for garnishment on insurance companies.** Senator Bruce reviewed the bill and a proposed balloon amendment (Attachment 8).

Senator Journey moved, Senator Lynn seconded, to adopt the proposed balloon amendment. Motion carried.

Senator Goodwin moved, Senator Journey seconded, to recommend **HB 2643** as amended, favorably for passage. Motion carried.

The meeting adjourned at 10:24 A.M. The next scheduled meeting is March 19, 2008.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 18, 2008

NAME	REPRESENTING
Rody Neave	Judicial Council
Helen Pedigo	KSC
Bunda Harmon	KSC
Sean Miller	CAPITOR STRATEGIES
Koula Wertz	KSTJ
Dustin Meyer	Pinger, Smith, & Assoc
Jennifer Roth	KACDL
Whitney Damon	KS Bar Assn
Richard Soumireu	KDAVA
Ken Caches	GBBA
Joyce GROVER	KCSOU

STATE OF KANSAS

JOE PATTON  
REPRESENTATIVE, 54TH DISTRICT  
800 S.W. JACKSON #1414  
TOPEKA, KANSAS 66612



TOPEKA

HOUSE OF  
REPRESENTATIVES

COMMITTEE ASSIGNMENTS  
JUDICIARY  
HEALTH AND HUMAN SERVICES  
JOINT COMMITTEE ON ADMINISTRATIVE  
RULES AND REGULATIONS

STATE CAPITOL  
TOPEKA, KANSAS 66612  
(785) 296-7663  
patton@house.state.ks.us

March 14, 2008

Re: HB 2732

Mr. Chairman and Members of the Committee:

Thank you for the hearing. I am here in support of HB 2732. This legislation is the result of a series of community meetings this past summer in Topeka. In the community meetings citizens expressed alarm over certain cases including the following:

- Orlando Paul Cisneros, a 38-year-old Topeka man convicted by a jury of 17 counts of raping and sodomizing a 14-year-old girl, was granted only a three-year probation. He later had his probation revoked, after a public outcry.
- Probation was granted to Nicholas Lee Crites after he was convicted of aggravated indecent liberties against a 15-year-old girl. Sentencing guidelines called for a prison term of nearly five years.
- Frederico Mendoza, a 34-year-old man convicted of electronic solicitation of a child; Mendoza was only granted a three-year probation term.

Currently under Kansas law, judges may depart from the guidelines set forth by the Legislature down to and including probation even for serious crimes.

HB 2732 would limit departures for the most serious crimes, and for those with the most serious criminal history. It would allow departures only for the reasons expressly stated in the law. The bill is intended to eliminate probation for crimes of extreme sexual violence and would not allow departures at all for such crimes without the agreement of the prosecutor. Some technical amendments will be offered so the language is clear.

I would appreciate your consideration and favorable passage of HB 2732.

Senate Judiciary

3-18-08  
Attachment 1

Senate Judiciary Committee  
March 18, 2008  
Kansas Association of Criminal Defense Lawyers  
**Opponent of House Bill 2732**

The Kansas Association of Criminal Defense Lawyers (KACDL) has over 275 members across the state. KACDL opposes HB 2732 because:

**1. There has been no demonstrated need for the changes proposed in HB 2732.**

**A. Only one of four Shawnee County cases consistently cited as the impetus for HB 2732 could have had different results had HB 2732 been in place at the relevant times.** *State v. Mendoza*: an electronic solicitation case involving a fictional girl. Defendant was a criminal history I and received departure to probation. The State did not appeal the sentence. This case did not involve a "crime of extreme sexual violence" or a defendant with a criminal history of A or B. *State v. Crites*: an aggravated indecent liberties case involving a 15-year-old girl. Defendant was a criminal history I and received departure to probation. The State did not appeal sentence. This case did not involve a defendant with a criminal history A or B and it is doubtful it could have survived the test of "crime of extreme sexual violence" pursuant to K.S.A. 21-4716(c)(3)(F)(i). *State v. Cliver*: a drug possession case where defendant received a departure to probation. The State did not appeal the sentence; in fact, it stood silent at sentencing pursuant to plea agreement. This case involved a defendant with a criminal history of A or B, but HB 2732 deals only with person felonies. *State v. Cisneros*: defendant convicted after jury trial of rape, aggravated criminal sodomy and aggravated indecent liberties involving a 14-year-old girl. Defendant was a criminal history I and received a departure to probation. *Cisneros* is the only case that could have had a different result had HB 2732 been in existence and, in that case, he would have received the sentence he is now serving. (Note: Mr. Cisneros violated his probation and is now serving his 155-month presumptive sentence. The State did appeal that sentence but voluntarily dismissed its appeal after Mr. Cisneros was sentenced to prison.)

**B. It is important to note that NONE of the cases repeatedly cited as the impetus for HB 2732 involved a departure granted to someone convicted of a person felony (severity level 1-4) with a criminal history of A or B.**

**2. There are remedies in place for dealing with judges who abuse their discretion.** Kansas appellate courts have reversed judges for abusing their discretion in granting departures – both upward and downward. This is the process *Cisneros* was undergoing before the State dismissed its appeal. Furthermore, Kansas law is clear that non-statutory factors are subject to stricter scrutiny than statutory factors. Lastly, judges are subject to retention proceedings and the public can vote its disapproval.

**3. Restricting departure factors to those set out in the statute will undo 15 years of sentencing case law and result in negative consequences.** Every case and every defendant is unique. In a guidelines system of sentencing, this fact of life has to be balanced against the multitude of grid boxes and presumptions therein. The statute does not include factors that have been recognized by our appellate courts for over 10 years such as: age of prior convictions, type



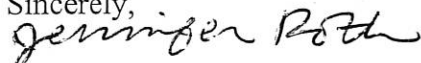
of prior convictions (i.e. violent vs. nonviolent or juvenile adjudications vs. adult convictions), victim's family in favor of departure, rehabilitative/treatment efforts, family responsibilities, etc. If these factors cannot be considered, then many unjust, unnecessary, disproportionate sentences will result. Please remember this is not just about departures to probation – it is about durational departures as well. Furthermore, K.S.A. 21-4716(e) provides for “substantial assistance” as a mitigating factor in considering a departure. Let's say a defendant charged with aggravated robbery (a severity level 3 person felony) was a witness to murder or some other offense. If that defendant has a criminal history A or B, he/she is unable to ask for a departure under HB 2732. He/she has no incentive to help the state solve the other crime – why would he/she risk his/her safety or reputation to tell on someone if it yields no consideration?

**4. The changes proposed to K.S.A. 21-4719 – eliminating dispositional departures and limiting durational departures in “crimes of extreme sexual violence” – conflict with existing law and will result in constitutional challenges.** First, it is not explained in HB 2732 how the new K.S.A. 21-4719 would square with Jessica's Law's provisions regarding departures. (As a side note, Jessica's Law does provide for departures for first offenses and does not limit the departure factors that may be considered.) Second, the concept and definition of “crimes of extreme sexual violence” as contained in K.S.A. 21-4716(c)(3)(F)(i) pertains to an upward departure because a person is a “predatory sex offender” who has both a current and prior conviction for a crime of extreme sexual violence. HB 2732 proposes to use this language of “crime of extreme sexual violence” in the context of denying dispositional departures and limiting durational departures to not less than 50% of the offender's presumptive grid box sentence. A “predatory sex offender” departure has to be submitted to a jury – a court cannot make this finding. Therefore, using language from K.S.A. 21 4716(c)(3)(F)(i) to deny or limit departures is arguably a new twist on the *Apprendi* issue. At the very least, it would be subject to constitutional challenges.

**5. The elimination or restriction of departures will result in an increase in jury trials and the associated monetary and emotional expenses.** Once the possibility of departures is eliminated or limited, a defendant has nothing to lose in having a jury trial -- there will be no incentive to plead. Jury trials mean expenses in terms of judges, prosecutors, defense attorneys, experts, etc. as well as expense to victims. It will take longer to get closure and victims will have to testify in trials. This consequence of HB 2732 is not addressed in the fiscal note.

The House Judiciary Committee minutes for February 12, 2008, state that Rep. Joe Patton, primary sponsor of HB 2732, explained the bill's “intent is to eliminate probation for extreme sexual violent types of crimes.” If that is the case, then HB 2732 needs to be carefully tailored to that end. As it is current drafted, HB 2732 casts too wide a net without any showing of necessity accompanying its reach. We urge this Committee to reject HB 2732.

Sincerely,



Jennifer Roth, Legislative Chairperson  
Kansas Association of Criminal Defense Lawyers

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The two changes proposed by HB 2732:

Section 1. K.S.A. 21-4716 is hereby amended to read as follows: . . . .

(2) *Subject to the provisions of subsections (c)(4) and (e), for any person felony ranked in severity levels 1 through 4 of the nondrug grid as provided in K.S.A. 21-4704, and amendments thereto, and for any offender who has a criminal history score category of A or B, the following exclusive list of mitigating factors may be considered in determining whether substantial and compelling reasons for a departure exists:*

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

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

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

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

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

Sec. 2. K.S.A. 21-4719 is hereby amended to read as follows: (new language from the House in bold – the language deleted by the House is indicated by strikethrough)

21-4719. (a) When a departure sentence is appropriate, the sentencing judge may depart from the sentencing guidelines as provided in this section. **The sentencing judge shall not impose a downward dispositional departure sentence for any crime of extreme sexual violence, as defined in K.S.A. 21-4716, and amendments thereto.** *The sentencing judge shall not impose a downward dispositional or durational departure sentence without a signed written agreement by the prosecutor for any crime of extreme sexual violence, as defined in K.S.A. 21-4716, and amendments thereto. Such downward durational departure sentence shall be no, to less than 50% of the center of the range of the sentence for such crime.*

**Note:** K.S.A. 21-4716 defines "crime of extreme sexual violence":

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

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

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

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

## SENTENCING RANGE - NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3+ Person Felonies	2 Person Felonies	1 Person & Nonperson Felonies	1 Person Felony	3+ Nonperson Felonies	2 Nonperson Felonies	Nonperson Felony	2+ Misdemeanor	Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

**Probation Terms are:**

- 36 months recommended for felonies classified in Severity Levels 1-5
- 24 months recommended for felonies classified in Severity Levels 6-7
- 18 months (up to) for felonies classified in Severity Level 8
- 12 months (up to) for felonies classified in Severity Levels 9-10

**Postrelease Supervision Terms are:**

- 36 months for felonies classified in Severity Levels 1-4
- 24 months for felonies classified in Severity Level 5-6
- 12 months for felonies classified in Severity Levels 7-10

**Postrelease for felonies committed before 4/20/95 are:**

- 24 months for felonies classified in Severity Levels 1-6
- 12 months for felonies classified in Severity Level 7-10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

4-2





**OFFICERS**

Bob Sage  
President  
Rose Hill Police Dept.

Jay Reyes  
Vice President  
Derby Police Dept.

Todd Ackerman  
Sergeant at Arms  
Marysville Police Dept.

Mike Keller  
Treasurer  
Andover Police Dept.

Janet Thiessen  
Recording Secretary  
Olathe Police Dept.

James Hill  
SACOP Representative  
Salina Police Dept.

William "Mike" Watson  
Immediate Past President  
Riley County Police Dept.-Ret

Doyle King  
Executive Director  
KACP

**REGIONAL REPRESENTATIVES**

Gus Ramirez  
Region I  
Johnson Co Comm. College

Sam Budreau  
Region II  
Chanute Police Dept.

Ronnie Grice  
Region III  
KSU Public Safety Dept.

Jim Daily  
Region IV  
Newton Police Dept.

Frank Gent  
Region V  
Beloit Police Dept.

Vernon Ralston  
Region VI  
St. John Police Dept.

**TESTIMONY TO THE SENATE JUDICIARY  
COMMITTEE  
IN SUPPORT OF HB2732  
Presented by Ed Klumpp**

March 18, 2008

This testimony is in support of the provisions of HB2732. Downward departures have their place and they are necessary to allow the courts flexibility to apply appropriate sentences in unusual cases. But like any good thing, they can be bad if taken to an excess. This bill seeks to provide limits to the downward departures of serious crimes and for the worst of criminals. It is not only reasonable, it is necessary to protect from the worst of judicial decisions.

It is reasonable to limit the mitigating factors the court may consider in determining if a downward departure will be granted. When this is applied to the worst crimes (those in severity levels 1-4) and for the worst criminals (those in criminal history categories A and B) it assures the worst criminals and those committing the worst crimes will not be granted a downward departure for reasons the court creates.

Justifiable departures for violent sexual offenders should be extremely rare. With the passage of this bill, downward departures for these offenders will be limited to no less than 50% of the mid-range of the sentence for the given crime and criminal history.

Justice requires balance. In the case of departures, that balance is between what is best for the defendant, the victim, and the public. This bill assures the scales of justice don't tip too far in departures favoring the serious convicted felon and assures the weight of the safety of the public is appropriately applied.

We encourage you to recommend this bill favorably to pass.

Ed Klumpp  
Chief of Police-Retired, Topeka Police Department

Legislative Committee Chair  
E-mail: eklumpp@cox.net  
Phone: (785) 235-5619  
Cell: (785) 640-1102

Senate Judiciary

3-18-08

Attachment 3



**BOARD OF GOVERNORS**

**GOVERNORS AT LARGE**

JOHN GREEN  
KS Law Enforcement Training Center  
Hutchinson, KS 67504

STEVE CULP  
Kansas C-POST  
Wichita, KS 67203

ALAN SILL  
Liberal Police Dept.  
Liberal, KS 67901

SAM BRESHEARS  
Kansas City Police Dept.  
Kansas City, KS 66101

**DISTRICT 1**

CARL ALVANO  
Johnson County Sheriff's Office  
Olathe, KS 66061

LONNIE STITES  
Olathe Police Dept.  
Olathe, KS 66061

GINA HUNTER  
BNSF Railroad Police  
Kansas City, KS 66101

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HERMAN JONES  
Kansas Highway Patrol  
Topeka, KS 66603

GARY EICHORN  
Lyon County Sheriff's Office  
Emporia, KS 66801

MIKE LOPEZ  
Emporia Police Dept.  
Emporia, KS 66801

**DISTRICT 3**

DAVE SMITH  
Ellsworth Police Dept.  
Ellsworth, KS 67439

CHUCK DUNN  
Clay County Sheriff's Office  
Clay Center, KS 67432

DENNIS GASSMAN  
Kansas Highway Patrol  
Salina, KS 67401

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Hays Police Dept.  
Hays, KS 67601

RICH SCHNEIDER  
Trego County Sheriff's Office  
Wakeeney, KS 67672

DELBERT HAWEL  
KS Bureau of Investigation  
Hays, KS 67601

**DISTRICT 5**

JOHN ANDREWS  
Finney County Sheriff's Office  
Garden City, KS 67846

LARRY COLE  
Kansas Highway Patrol  
Garden City, KS 67846

MATT COLE  
Garden City Police Dept.  
Garden City, KS 67846

**DISTRICT 6**

WARREN PETERSON  
Barton County Sheriff's Office  
Great Bend, KS 67530

STEVE BILLINGER  
Kansas Highway Patrol  
Ellinwood, KS 67526

VERNON "SONNY" RALSTON  
St. John Police Dept.  
St. John, KS 67576

**DISTRICT 7**

DON READ  
Cowley County Sheriff's Office  
Winfield, KS 67156

BILL EDWARDS  
Park City Police Dept.  
Park City, KS 67219

DAVE FALLETTI  
KS Bureau of Investigation  
Winfield, KS 67156

**DISTRICT 8**

SANDY HORTON  
Crawford County Sheriff's Office  
Girard, KS 66743

STEVE BERRY  
Caney Police Dept.  
Caney, KS 67333

KEITH RATHER  
KS Dept. of Wildlife & Parks  
Chanute, KS 66720

# Kansas Peace Officers' Association

INCORPORATED

TELEPHONE 316-722-8433 • FAX 316-722-1988

WEB & EMAIL KPOA.org

P.O. BOX 2592 • WICHITA, KANSAS 67201



## TESTIMONY TO THE SENATE JUDICIARY COMMITTEE IN SUPPORT OF HB2732 Presented by Ed Klumpp

March 18, 2008

The Kansas Peace Officers Association supports the provisions of HB2732. This bill is the result of the work of Representative Patton, who has worked hard to find a way to avoid the gross deviation from the sentencing guidelines through unreasonable application of downward departures.

This bill, as amended in the House, will offer assurances the downward departures can still be applied, but for reasons that are well founded and reasonable for the most serious of crimes and the worst of the repeat offenders. It will also assure that no person convicted of a sexually violent crime will receive a downward departure to less than 50% of the midrange of the appropriate box on the sentencing grid.

When used appropriately, downward departures serve to allow limited judicial discretion to address unusual circumstances. Most departures would not exceed the limits this bill establishes. But it will assure the occasional downward departure based on inappropriate reasoning will be difficult to approve. This bill is not only reasonable, it is necessary to protect from the worst of judicial decisions. This bill will assure an appropriate balanced approach is taken to assure the scales of justice don't tip too far in departures favoring the person convicted of the most serious of felonies and assures the weight of the safety of the public is appropriately applied.

We encourage you to recommend this bill favorably to pass.

Ed Klumpp  
Chief of Police-Retired, Topeka Police Department

Legislative Committee Chair

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*In Unity There Is Strength*

Senate Judiciary

3-18-08

Attachment 4

March 18, 2008

Dear Chairman Vratil and Members of the Senate Judiciary Committee:

My name is Peter Ninemire and I represent Families Against Mandatory Minimums (FAMM), which opposes House Bill 2732. FAMM is the national voice for fair and proportionate sentencing laws. We work to ensure that sentencing is individualized, humane and sufficient but not greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. **FAMM opposes HB 2732 because it would radically restrict the ability of judges to tailor sentences according to the circumstances of the offense and the history and characteristics of the defendant.** If enacted, the Guidelines will essentially be guidelines in name only for many offenders because the guideline sentence will be presumptive in all but a handful of circumstances. Such mandatory sentencing is anathema to an ordered and nuanced system of justice and should be rejected.

Currently, Kansas judges may depart from the sentencing guidelines for a variety of reasons. Downward departures may be dispositional -- that is to probation -- or durational -- that is to a shorter term. Downward departures are an important mechanism to avoid unwarranted uniformity in situations where one-size-fits-all does not fit the particular case. They also operate to ensure that judges can avoid imposing sentences that are longer than necessary to meet the ends of justice. Departures serve as an important safety valve in our guideline system.

Kansas guidelines are designed to channel, not eliminate judicial sentencing discretion. *See State v. Richardson*, 20 Kan.App.2d 932, 941 (1993). This system reflects the Legislature's understanding that one set of rules cannot account for the circumstances of particular cases and individual defendants. Judges must be free to do justice in individual cases and retaining flexibility is essential to that job. The integrity of our sentencing system would be compromised and judicial independence undermined if HB 2732 is enacted. Moreover, when the Legislature established the departure authority, and enunciated a list of non-exclusive departures, it was in part to encourage the development of a Kansas common-law of sentencing. *See Richardson* at 941. This common law operates like a sensitive feedback mechanism, as judges test and refine the impact of judicial discretion. These are the hallmarks of a healthy sentencing system.

Kansas trial courts have departed from guideline sentences from time to time for a variety of non-statutory reasons. For example, age, the presence of young children and significant rehabilitation efforts have been upheld as appropriate non-statutory bases for departure. *See State v. Crawford*, 21 Kan.App.2d 859, 860 (1995) (mother of three young children sentenced by way of downward departure to shorter sentence for methamphetamine offense given children's youth, her impressive employment record and success at rehabilitation). In *Crawford*, the court announced that "under the totality of the circumstances this judge at this time just cannot believe that a just and merciful sentence requires that this defendant be incarcerated for 50 some months . . . ." The court also found compelling the fact that the defendant's husband, who was at least as culpable as she, received only probation, recognizing that significant differences in culpability or in sentences for equally culpable defendants is an appropriate consideration.

Kansas courts of appeal routinely review downward departures such as that granted in *Crawford* to determine if there is sufficient evidence to justify the departure and if the reasons on

Senate Judiciary

3-18-08

Attachment 5

which the departure are based are substantial and compelling. In *Richardson*, the appellate court considered the departure warranted under the totality of the circumstances because the guideline sentence would be “vindictive” and would “benefit no one.” 20 Kan.App.2d at 940.

HB 2732 would prohibit a court from accounting for these considerations, whether alone or in combination (and would eliminate departures for certain crimes altogether). Instead, HB 2732 would transform a non-exclusive list of statutory departure grounds to an exclusive list of extraordinary features:

- Victim was aggressor or participant in the crime
- Defendant played a passive or minor role or was motivated by duress or compulsion
- Defendant lacked the capacity for judgment by virtue of mental or physical impairment (excluding voluntary intoxication or drug use)
- Defendant or defendant’s children suffered “continuing pattern of physical or sexual abuse” by the victim and the instant offense was a response to that abuse
- The degree of harm or loss was significantly less than typical for such offenses.

Other considerations would be prohibited. While these are certainly worthy considerations, they are hardly sufficient.

Appellate courts in Kansas are more than competent to evaluate the appropriateness of a downward departure and reject unwarranted departures. The substantial and compelling standard is hardly a deferential standard of review and downward departures are not infrequently vacated. *See, e.g., State v. Haney*, 34 Kan.App.2d 232 (extent of departure was abuse of discretion; relative culpability; small degree of harm and willing participation of victim), *State v. Grady*, 258 Kan.App.2d 410 (1995) (downward departure for lack of premeditation rejected); *State v. Heath*, 21 Kan.App.2d 410 (1995) (downward departure based on court’s disagreement with guidelines rejected).

Kansas has recently been characterized by the Pew Center on the States as on the cutting edge of corrections and sentencing policy among the states. Pew approvingly cited Kansas as one of the states that is “diversifying their menu of sanctions with new approaches that save money but still ensure that the public is protected and that offenders are held accountable.” Pew Center on the States, *One in 100: Behind Bars in America* 2008, 4.

Stripping judges of their departure authority in all but the most limited of cases will lead to unduly long sentences and a reversal of Kansas’ well deserved reputation as a leader in sentencing reform efforts. We urge you to reject this bill.

Sincerely,

Peter Ninemire  
Families Against Mandatory Minimums  
Midwest Regional/Trainer Organizer  
Wichita, KS 67211  
Ph: (316)651-5852  
E-mail: pninemire@famm.org

*Your rights. Our mission.*

To: Senator John Vratil, Chairman  
Members of the Senate Judiciary Committee

From: Callie Denton Hartle  
Kansas Association for Justice

Date: March 18, 2008

Re: HB 2825 Code of Civil Procedure as amended—**SUPPORT**

The Kansas Association for Justice is a statewide, nonprofit organization of attorneys who serve Kansans seeking justice. We appreciate the opportunity to submit written comments on HB 2825. KsAJ supports HB 2825 as amended by the House and urges the Senate Judiciary Committee to recommend it favorably for passage.

Fairness requires that the civil justice system be a “level playing field” for all parties to a dispute. Fairness also requires transparency and public access to information generated at trial or during discovery. HB 2825 emphasizes these policies by requiring the court’s recognition of the public’s interest in disputes brought to a public forum for resolution. However, HB 2825 reasonably balances the need to close proceedings, seal or redact records, when there is an identified safety, property, or privacy interest that is demonstrated to outweigh the public’s right to information. The amendments made in the House reflect relevant case law and should be retained.

We believe HB 2825 as amended by the House embodies an appropriate public policy and direction to Kansas courts. Thank you for permitting us to provide you with our comments and express our support for HB 2825.

Senate Judiciary

3-18-08

Attachment 6





**KANSAS ASSOCIATION OF DEFENSE COUNSEL**

825 S. Kansas Avenue, Suite 500 • Topeka, KS 66612

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**MEMORANDUM**

**TO: Senate Judiciary Committee**

**FROM: Anne M. Kindling**  
**President, Kansas Association of Defense Counsel**

**DATE: March 17, 2008**

**RE: HB 2825**

Chairman Vratil and Members of the Committee:

My name is Anne Kindling and I submit this written testimony on behalf of the Kansas Association of Defense Counsel. The KADC consists of more than 220 practicing attorneys who devote a substantial portion of their professional time to the defense of civil lawsuits. The KADC maintains a strong interest improving the adversary system and the efficient administration of justice. We are submitting this testimony specifically in support of subsection (g) of HB 2825, which was added by the House Judiciary Committee to remedy an unintended consequence of the legislation.

Subsection (g) permits a court to allow a settlement agreement to be filed under seal where the agreement includes a confidentiality clause and the interests of justice are served by filing the agreement under seal.

In furtherance of judicial economy, a large number of lawsuits are now settled by agreement of the parties rather than proceeding to trial. Frequently, such settlements include confidentiality provisions governing disclosure of the settlement and limiting the persons to whom the settlement can be disclosed. These provisions can benefit plaintiffs and defendants alike and are a matter of negotiation as the settlement is entered into. Sometimes confidentiality clauses are "dealbreakers" without which the settlement will not be agreed to.

Once a confidentiality clause is agreed to, the settlement document is generally placed under seal if it is submitted to the court for approval. Medical malpractice settlements must be approved by the court under K.S.A 40-3410 if the settlement involves a payment from the Kansas Health Care Stabilization Fund. The typical process where a confidentiality clause is part of the settlement is to submit the settlement agreement to the court for an "in camera" review and approval. The parties then ask the court to place the settlement document in a sealed envelope so that the confidentiality is maintained.

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As originally proposed, HB 2825 stated in subsection (e) that agreement of the parties would not be sufficient grounds to seal the proceedings. This provision could have inadvertently impacted the finality of settlement agreements. If the court does not place the settlement agreement under seal despite agreement of the parties, then the parties may well have the right to void the settlement. In that case, the validity of the entire settlement will be called into question. The effect is that the settlement may need to be re-negotiated, the matter may proceed to trial, or fewer cases may be settled in the long run.

Subsection (e) was, therefore, amended to allow agreement of the parties as *a* factor to be considered by the court but not the *sole* factor. In addition, subsection (g) makes it clear that a settlement which includes a confidentiality clause may be filed under seal where the interests of justice would be served.

If this committee passes HB 2825 favorably, the KADC urges that the provisions of subsection (g) remain in place.

Testimony on HB 2825

1. Anne Kindling
2. Risk Management Advisor at Stormont-Vail HealthCare in Topeka
3. Attorney in private practice for 12 years defending lawsuits, including medical malpractice lawsuits.
4. currently the President of the Kansas Association of Defense Counsel.
5. KADC is association of over 200 attorneys who spend their professional time defending civil lawsuits.
6. Neutral on HB 2825
7. But want to highlight the provisions of subsection (e) which have an unintended consequence.
8. Since large part of my practice has been defending medical malpractice suits, I have been involved with a number of settlements in that arena.
9. Under Kansas law, certain settlements require court approval. This would be where moneys of the HCSF are involved or involving minors.
10. Also, court has to approve attorney fees in medical malpractice cases and frequently the settlement terms need to be disclosed to the judge.
11. In those events, and where the parties have agreed to confidentiality provisions, it is reasonable to exclude such cases from HB 2825.

# HOUSE BILL No. 2643

By Committee on Judiciary

1-17

9 AN ACT concerning civil procedure; relating to answers of garnishment;  
10 amending K.S.A. 60-736 and repealing the existing section;

11  
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 60-736 is hereby amended to read as follows: 60-  
14 736. This section shall apply if the garnishment is to attach intangible  
15 property other than earnings of the judgment debtor.

16 (a) The answer of the garnishee shall be substantially in compliance  
17 with the forms set forth by the judicial council.

18 (b) Within 10 days after service, other than that required pursuant  
19 to K.S.A. 40-218, and amendments thereto, upon a garnishee of an order  
20 of garnishment the garnishee shall complete the answer in accordance

21 with the instructions accompanying the answer form stating the facts with  
22 respect to the demands of the order and file the completed answer with  
23 the clerk of the court. The clerk shall cause a copy of the answer to be  
24 mailed promptly to the judgment creditor and judgment debtor at the  
25 addresses listed on the answer form. The answer shall be supported by  
26 unsworn declaration in the manner set forth on the answer form.

27 Sec. 2. K.S.A. 60-736 is hereby repealed.

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

Proposed Amendment

Prepared by: Revisor of Statutes Office  
Bruce Kinzie  
March 6, 2008

and K.S.A. 2007 Supp. 40-218

sections

See Attachment #1

and K.S.A. 2007 Supp. 40-218 are

Renumber remaining sections accordingly;

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Attachment 8



Sec. 2. K.S.A. 2007 Supp. 40-218 is hereby amended to read as follows: 40-218. Every insurance company, or fraternal benefit society, on applying for authority to transact business in this state, and as a condition precedent to obtaining such authority, shall file in the insurance department its written consent, irrevocable, that any action or garnishment proceeding may be commenced against such company or fraternal benefit society in the proper court of any county in this state in which the cause of action shall arise or in which the plaintiff may reside by the service of process on the commissioner of insurance of this state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation. Such consent shall be executed by the president and secretary of the company and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers authorizing the president and secretary to execute the same. The summons or order of garnishment, accompanied by a fee of \$25, shall be directed to the commissioner of insurance, and shall require the defendant or garnishee to answer or otherwise respond by a certain day, not less than 40 days from its-date the date the summons or order of garnishment is served on the commissioner.

Service on the commissioner of insurance of any process, notice or demand against an insurance company or fraternal benefit society shall be made by delivering to and leaving with the commissioner or the commissioner's designee, the original of the process and two copies of the process and the petition, notice of demand, or the clerk of the court may send the original process and two copies of both the process and petition, notice or demand directly to the commissioner by certified mail, return receipt requested. In the event that any process, notice or demand is served on the commissioner, the commissioner shall immediately cause a copy thereof to be forwarded by certified mail, return receipt requested to the insurance company or fraternal benefit society address to its general agent if such agent resides in this state or to the secretary of the insurance company or fraternal benefit society sued at its registered or principal office in any state in which it is domesticated. The commissioner of insurance shall make return of the summons to the court from whence it issued, showing the date of its receipt, the date of forwarding such copies, and the name and address of each person to whom a copy was forwarded. Such return shall be under the hand and seal of office, and shall have the same force and effect as a due and sufficient return made on process directed to a sheriff. The commissioner of insurance shall keep a suitable record in which shall be docketed every action commenced against an insurance company, the time when commenced, the date and manner of service; also the date of the judgment, its amount and costs, and the date of payment thereof, which shall be certified from time to time by the clerk of the court.