Approved: 4-3-09
Date

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairperson Pat Colloton at 1:30 p.m. on February 16, 2009, in Room 535-N of the Capitol.

All members were present.

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jackie Lunn, Committee Assistant

Conferees appearing before the committee:
Bob Stephan, Chair, Governor's Domestic Violence Fatality Review Board
Honorable Judge Flaigle, Governor's Violence Fatality Review Board
Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence
Tom Stanton, Deputy Reno District Attorney
Jennifer Roth, Kansas Assoc. Of Criminal Defense Lawyers
Ed Klumpp, Kansas Assoc. of Chiefs of Police & Kansas Peace Officers Assoc.
Kathy Porter, Judicial Administration
Mark Gleeson, Judicial Administration

Others attending:
See attached list.

HB 2335 - Repealing the crime of domestic battery; battery includes domestic battery; domestic violence designation on criminal offenses; pleas.

Chairperson Colloton opened the hearing on **HB 2335** and introduced Bob Stephan, Chair, Governor's Domestic Violence Fatality Review Board, to give his testimony as a proponent of the bill. Mr. Stephan provided written copy. (Attachment 1) Mr. Stephan stated the bill clearly changes the manner in which we would address domestic violence in the state. Currently, there is no systematic manner in which all crimes related to domestic violence can be tracked from the time of the arrest through the disposition of the case. The bill includes the definition for domestic violence, tracking of all crimes committed in an intimate relationship and requires an assessment of domestic offenders. The bill also amends the statute for written policies by law enforcement agencies by identifying the predominate aggressor. In closing, he stated the Governor's Domestic Violence Fatality Review Board believes this bill would be a step in creating a better approach for tracking domestic violence crimes occurring in intimate relationships.

Chairperson Colloton introduced Judge Flaigle, Governor's Domestic Violence Fatality Review Board, to give his testimony as a proponent of the bill. Judge Flaigle provided written copy of his testimony (Attachment 2). Judge Tatum stated that his experiences and continued work in this area have led him to believe that we must advocate for victims by seeking domestic violence law reform and holding all domestic violence offenders accountable. It is the intent of the bill to create a system in Kansas that will track and recognize all domestic violence related crimes and intervention for domestic violence offenders the first time a domestic violence offense is committed. In closing, he stated this bill will better serve domestic violence victims and hold all domestic violence offenders accountable. He urged the Committee to pass the bill out favorably.

Chairperson Colloton introduced Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence, to giver her testimony as a proponent of **HB 2335.** Ms. Barnett provided written copy of her testimony. (Attachment 3) Ms. Barnett stated the bill is, in some ways, the result of decades of conversation about the lack of information available within and between systems regarding the history of domestic violence offenses. The bill is designed to track information about all offenses that occur within the context of domestic violence, not just domestic battery. It is critical that each case is appropriately analyzed at the time of an arrest decision is being made. The bill is the first and best opportunity to appropriately identify abusers and prevent unintended consequences. In closing she stated the Kansas Coalition Against Sexual & Domestic Violence supports this bill with the protections of predominant aggressor language, training, and delayed implementation to make sure the unintended consequences are minimized and do not serve to undermine the

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intent of this law.

Questions and answers followed for the proponents of the bill.

Chairperson Colloton introduced Thomas Stanton, Deputy Reno County Attorney representing the Kansas County & District Attorneys Association. to give his testimony as an opponent of **HB 2335.** Mr. Stanton provided written copy of his testimony. (Attachment 4) He stated the Association has no quarrel with some of the public policy goals reflected y this legislation. However, the Association does oppose two specific precepts of this bill.

- The bill repeals K.S.A. 21-3412a. The bill, however, does not transfer the provisions of K.S.A. 21-3412a into any other statute. K.S.A. 21-3412a currently defines domestic violence battery, and it is what is known as a self-contained habitual violator statute.

- The bill is an attempt to control the prosecutor's decisions in the course of the prosecution of domestic violence cases. The legislation would require the prosecution of each domestic violence case in which a prima facie case could possibly be made, and would require that the case be prosecuted to the fullest possible extent of the law.

In closing, Mr. Stanton urged the Committee not to pass the bill out.

Chairperson Colloton introduced Jennifer Roth, Kansas Association of Criminal Defense Lawyers, to give her testimony as an opponent of **HB 2335.** Ms. Roth provided written copy of her testimony. (Attachment 5) Ms. Roth stated the bill creates a "domestic Violence designation" that would apply to any crime committed where the underlying facts include an act of domestic violence. The Kansas Association of Criminal Defense Lawyers has two problems with the bill.

- The domestic violence designation attaches at arrest. The allegation that an act was a "domestic violence offense" does not have to be charged in the complaint nor proved to a jury. The designation impacts not only plea options, but also sentencing.

- Two contexts collide when we talk about domestic violence. There are terms we us to describe what exists between two people in a relationship. T`here is a batterer who establishes a pattern of power and control over a person, called the survivor, who experiences that pattern. The designation impacts not only plea options, but also sentencing.

In closing she stated the Legislature needs to delve into the impact of this bill on survivors.

Chairperson Colloton introduced Ed Klumpp, Kansas Association of Chiefs of Police and Kansas Peace Officers Association, to give his testimony as a neutral party of **HB 2335.** Mr. Klumpp provided written copy of his testimony. (Attachment 6) Mr. Klumpp stated they have several concerns with the bill and offered eleven recommendations which address their concerns. In closing, he stated the bill, as written, will likely lead to confusion and an unnecessary potential for erroneous decisions by law enforcement.

Chairperson Colloton introduced Kathy Porter, office of Judicial Administration, to give her testimony as a neutral party of the bill. Ms. Porter provided written copy of her testimony. (Attachment 7) Ms. Porter stated they have concerns with the language of the bill. It will cause confusion because it is unclear on certain procedures. She reviewed their concerns and suggested the Committee change some of the language to make the intent of the bill more clear.

Upon the conclusion of Ms. Porter's testimony, Chairperson Colloton opened the floor for questions.

With no others wishing to testify, Chairperson Colloton closed the hearing on **HB 2335** and asked Ms. Porter and Mr. Klumpp to work with Jason Thompson, Revisor's Office, on an amendment to address their concerns with the bill. She announced due to the time, the hearing on **HB 2139** would be tomorrow and adjourned the meeting at 3:10 p.m. with next scheduled meeting to be February 17, 2009 at 1:30 p.m. in room 535 N.

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CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: Feb. 16, 2009

NAME	REPRESENTING
Ed Klumpp	KACP & KPOA
Brian Dempsey	SRS
Dennis Williams	DOC
	DOC
Jennifer Roth	KACDL

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OFFICE OF THE GOVERNOR

Kathleen Sebelius, Governor

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GOVERNOR'S DOMESTIC VIOLENCE FATALITY REVIEW BOARD

Testimony of
Robert T. Stephan, Chair
Governor's Domestic Violence Fatality Review Board
Before the House Committee on Corrections and Juvenile Justice
Domestic Violence Tag Bill
February 11, 2009

Chair Colloton and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of the Governor's Domestic Violence Fatality Review Board (FRB). Governor Kathleen Sebelius created the FRB by Executive Order 04-11 in October 2004. It is a 14 member board comprised of professionals working in the field of domestic violence. The FRB reviews all adult domestic violence related fatalities in Kansas and recommends improvements to prevent future fatalities. According to the KBI, 180 adult domestic violence-related fatalities have occurred in Kansas from 1999 through 2007.

The FRB has two principal goals: (1) to inform the public about the insidious nature of domestic violence and motivate the public to find solutions to end it; and (2) to identify systemic changes within all organizations and agencies that work with domestic violence victims, offenders and families to learn new ways of reducing the number of fatalities by better identification of risk factors and improvement in the coordination of services that our state provides.

Since 2004 the FRB has reviewed, researched and discussed the tragedy of domestic violence crimes. It became very clear that there is not a systematic manner to track and report criminal data when it involves domestic violence related crimes. When I was Attorney General I requested and the 1991 Legislature passed a bill requiring all law enforcement agencies to have written policies regarding domestic violence and when probable cause existed an arrest must be made. However, through the years we have focused more on responding to the crime of domestic battery and not other crimes that batterers commit. Unfortunately, some homicides are not reported as domestic violence murders because the tracking of these crimes is not consistent and reliable.

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Unable to put together the criminal behavior of those that kill their intimate partner, the FRB in 2005 began researching what other states were doing to track and prosecute all crimes involving domestic violence.

This bill clearly changes the manner in which we would address domestic violence in the state. Currently, there is no systematic manner in which all crimes related to domestic violence can be tracked from the time of arrest through disposition of the case. This bill includes a definition for domestic violence, tracking of all crimes committed in an intimate relationship and requires an assessment of domestic violence offenders. The bill also amends the statute for written policies by law enforcement agencies by identifying the predominate aggressor. And the bill repeals the domestic battery statute.

We have communicated with other stakeholders in regard to this bill which includes the Attorney General, prosecutors, law enforcement, victim advocates as well as others. For the most part, there is a strong belief that this bill would bring about a fundamental change on how we view domestic violence and one in which we hold the offenders accountable for their crimes.

The FRB believes this bill would be a step in creating a better approach for tracking domestic violence crimes occurring in intimate relationships.

On behalf of the FRB, we would appreciate the Committee's support of this bill.

Judge Harold Flaigle will testify as to the bill itself and at the conclusion of his testimony we will be happy to answer any questions you might have.

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GOVERNOR'S DOMESTIC VIOLENCE FATALITY REVIEW BOARD

Testimony of
Judge Harold Flaigle
Governor's Domestic Violence Fatality Review Board
Before the House Committee on Corrections and Juvenile Justice
Domestic Violence Tag Bill
February 11, 2009

Chair Colloton and Members of the Committee:

Thank you for the opportunity to testify on behalf of the Governor's Domestic Violence Fatality Review Board (FRB) in support of the domestic violence tag bill. I have been a member of the FRB since its inception in 2004 and serve as the chair of the FRB legislative subcommittee. Addressing domestic violence has been a passionate interest of mine for many years, as a municipal court judge, serving on Attorney General Carla Stovall's Committee on Crimes Against Women and now as a district court judge in the 18th Judicial District. My experiences and continued work in this area have led me to believe that we must advocate for victims by seeking domestic violence law reform and holding all domestic violence offenders accountable.

In 2005 the FRB started researching other states' domestic violence laws in search of a model that if implemented in Kansas would ultimately recognize and better protect victims of all domestic violence crimes not just victims of domestic battery. The FRB chose Colorado for that model because its domestic violence laws comprehensively track and recognize all domestic violence related crimes and provide early domestic violence offender intervention. Colorado's law also has been in place for 15 years. In addition, prior to enacting significant changes to its domestic violence laws, Colorado had a law similar to Kansas' current domestic battery statute.

It is the intent of this bill to create a system in Kansas that will track and recognize all domestic violence related crimes and provide intervention for domestic violence offenders the first time a domestic violence offense is committed. Under the current Kansas domestic battery law, there are many instances in which a domestic violence

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offender is able to plead a domestic battery down to a disorderly conduct or other similar charges. The unfortunate result allows domestic violence offenders to avoid being identified by the court as a domestic violence offender. There also are incidents when defendants argue that they should only be charged with domestic battery not aggravated battery because the victim is a spouse or household member and the Kansas aggravated battery statute does not make specific reference to domestic violence relationships. These are the types of situations that allow domestic violence offenders to continue to victimize their partners without appropriate legal consequence or intervention. If enacted, the bill will alleviate these unintended and possibly tragic scenarios.

The bill requires that all legal documents in a domestic violence case have a specific domestic violence designation that will be present throughout the duration of the case. This will allow domestic violence offenses to be tagged starting with the arrest report and ending with the disposition of the offense.

The bill creates a new definition of domestic violence to include not only battery, as stated in current law, but any crime committed with the underlying factual basis of which is an intimate relationship. This new definition will allow all domestic violence crimes to be tracked and recognized. For example, if a boyfriend and girlfriend have an argument and he smashes the windshield on her car. Under current law he may be charged with criminal damage to property with no intervention or court recognition of the domestic violence issue required. Under the proposed legislation the charge would be criminal damage to property with a domestic violence tag and appropriate intervention thereby required.

Under the bill, any person convicted of a crime with a domestic violence tag will be required to undergo a domestic violence offender assessment and follow all court recommendations. This will allow domestic violence offenders to receive intervention the first time a domestic violence offense is committed. To ensure the treatment of domestic violence offenders is consistent throughout the State, the Attorney General's Office provides the oversight and certification process for batterer intervention programs and is currently working on a domestic violence offender assessment tool. The bill requires the offender to pay for the assessment and all court recommendations.

The bill allows only two narrow exceptions for defendants to plead away the domestic violence designation. The first is when the prosecutor cannot establish a prima facie case that an intimate relationship existed. The second is when the prosecutor cannot establish a prima facie case that the original crime was committed. The intent of the bill is to strictly limit when a domestic violence designation can be removed from a case so that domestic violence offenses in Kansas can be more accurately and comprehensively tracked and recognized.

The term intimate relationship as defined in this bill is modeled after Colorado. The intimate relationship definition in the bill is more narrow and specific than the current domestic battery statute that includes parent/child relationships and persons who are presently residing together or who have resided together in the past. The FRB decided to

focus on relationships that were intimate in nature and were more likely to be susceptible to the power and control characteristics. The current "residing together" language encompasses relationships that may be strictly friend/roommate situations and not intimate in nature nor display any power and control characteristics. There have been incidents where parties that are just roommates have been arrested under the domestic battery statute, which was never the purpose of the law. It is our intent to eliminate these situations from domestic violence crimes. The FRB also removed all variations of parent/child relationships. In addition, Kansas has child abuse laws that provide consequences for parents that choose to batter their children. If the situation is reversed and the child is the batterer, there is nothing in this bill or current Kansas law that would preclude adult child batterers from being charged with battery or any other crime that may be applicable.

Although the intimate relationship definition is narrower than that of current law it is the intent of the bill to include same sex couples and couples that have not engaged in sexual contact in the definition. When training on the intimate relationship definition, Colorado specifically includes these two types of relationships. Colorado also instructs law enforcement and prosecutors to evaluate whether there is a public holding out between the parties when interpreting the definition of intimate relationship. There is no case law in Colorado challenging the intimate relationship which was enacted in 1994.

The FRB decided not to include juvenile offenders because the juvenile domestic violence offender assessment and treatment is different from that of adults and has yet to be developed at the state level. If this bill is adopted, the juvenile piece is something that the FRB will continue to research.

The FRB researched whether adding the domestic violence tag triggers a requirement to prove the elements of the domestic violence definition beyond a reasonable doubt. We reviewed Colorado case law and again consulted with their prosecutors. The Colorado case, People v. Goldfuss, 02CA1412 (Colo. App. 5-6-2004), states, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Adding the domestic violence tag to a crime committed does not increase the penalty of the crime rather it requires the court to order a domestic violence offender assessment, therefore most jurisdictions in Colorado do not require the domestic violence definition to be proved beyond a reasonable doubt.

We are asking that the domestic battery statute be repealed. The proposed legislation provides for a domestic violence tag to be added to any crime which encompasses battery. The bill does not include the enhanced penalty language in the current domestic battery since only two domestic battery offenders are serving prison time under the third offense provision in the domestic battery statute. Too often the enhanced penalty is used to plea to a crime other than domestic battery.

Finally, the bill also addresses the critical issue of dual arrest by inserting predominate aggressor language into K.S.A. 22-2307 regarding law enforcement written policies. This language offers guidance to law enforcement officers when they are confronted with

difficult domestic violence situations that require a determination as to which party is the offender and which party is the victim. Currently, 30 states have statutes addressing predominant or primary physical aggressors and 17 states have language similar to that proposed in the bill.

If this bill is adopted, we will work closely with the domestic violence training efforts currently provided throughout Kansas to ensure that judges, prosecutors, law enforcement, advocates, corrections and others in the criminal justice system are properly trained. The bill allows for a delayed implementation date of April 1, 2010 for training and development of the assessment tool for domestic violence offenders.

The FRB has dedicated an extensive amount of time and research on domestic violence laws and related issues. The FRB has concluded that Colorado's model, that was enacted 15 years ago and has met very little legal resistance successfully serves and protects victims of all domestic violence crimes while providing early intervention for offenders.

On behalf of the FRB, we believe this bill will better serve domestic violence victims and hold all domestic violence offenders accountable. We ask for your favorable consideration of the bill and I would be willing to answer any questions.

Kansas Coalition Against Sexual and Domestic Violence

UNITED AGAINST VIOLENCE

634 SW Harrison Topeka, Kansas 66603
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HB 2335
House Committee on Corrections and Juvenile Justice
February 16, 2009

PROPONENT

Madam Chair and Members of the Committee;

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a statewide non-profit organization whose membership is the 30 sexual and domestic violence programs serving victims across Kansas.

KCSDV has a seat on the Domestic Violence Fatality Review Board (DVFRB) and very much appreciates the depth of thought and consideration that has gone into the crafting of HB 2335. KCSDV has expressed concerns about unintended consequences of this approach and the DVFRB has addressed those in several ways throughout this process. Additionally, I am included several suggested amendments that became apparent once this proposed legislation was in Bill form.

Introduction:
On its surface, HB 2335 is a piece of legislation that seeks to identify abusers to make sure that prosecutors and courts can easily identify them and use appropriate charging and sentencing structures. HB 2335 does indeed do that, but there are likely to be some unintended consequences that concern KCSDV. Therefore, KCSDV is a proponent of HB 2335 because it contains three critical pieces:

1) Protection against making inappropriate arrests by requiring law enforcement officers to perform a predominant aggressor analysis prior to making an arrest decision.
2) Delayed implementation date because time is needed to develop and train on reliable assessment and intervention procedures and programs.
3) A process in place to help train law enforcement officers how to apply the predominant aggressor analysis.

HB 2335 is, in some ways, the result of decades of conversation about the lack of information available within and between systems regarding the history of domestic violence offenses. In many places in Kansas, misdemeanor domestic violence offenses are charged under municipal ordinances. This leaves a gap in information when subsequent charges rise to the level of a felony. Additionally, even when information is available, offenses that occurred in the context of domestic violence are not easily

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recognized except for the charge of domestic battery due to its distinct statute number. Further, HB 2335 is designed to track information about **all** offenses that occur within the context of domestic violence, not just domestic battery.

Domestic violence is a complex issue:
Domestic violence is a complex issue that encompasses conduct that may or may not be criminal but certainly has long-term impact on the victim, family members, and the community. Attached to this testimony is the Power and Control Wheel, a chart that demonstrates typical tactics used by an abuser. Those tactics may include many criminal acts, such as threats of violence, sexual assault/rape, destruction of property, arson, battery and aggravated battery, kidnapping, strangulation, and murder. However, with our current information systems only battery is easily identified. It is critical to note that an abusive and battering relationship is created when a pattern of these tactics are used to create a sense of fear, disempowerment, isolation, and entrapment – **context matters**. Because of these tactics and the broader impact of each individual incident, domestic violence does and should receive different treatment under the law.

Addressing Unintended Consequences--Context matters:
KCSDV recognizes the value in prosecutors and courts having access to more complete criminal histories when determining appropriate charges and dispositions. That information can lead to better outcomes and increased safety for victims, families, and communities. However, KCSDV has also had some trepidation about the approach of "tagging" all offenses that occur when a certain relationship exists. Today, there are people who are arrested in situations where they may have used illegal violence but are not engaged in a pattern of abusive tactics. That was not the intent of the preferred arrest policy passed by Kansas so many years ago. We really do not know how many of these people are currently getting swept up into the system. Some estimates indicate that five to twenty-five percent of all those arrested for crimes against a family member or intimate partner have used violence in a single situation or as self-defense with no pattern of tactics. We recognize that there may still need to be a response from the criminal justice system to the use of illegal violence but it does not warrant lifelong "tagging" of someone who is not an abuser. A domestic violence "tag" is also likely to have an impact on many civil cases such as protection orders, custody, and parenting time. Where a domestic violence abuser is appropriately identified, those consequences are appropriate; but, where an incident has occurred that does not meet this definition of abuse, they are not. Making sure that only appropriate arrests are made under the Kansas preferred arrest scheme can minimize these unintended consequences. Therefore, it is critical that law enforcement officers use the predominant aggressor analysis set out in section 8. At least 30 states have similar language in their domestic violence statutes.

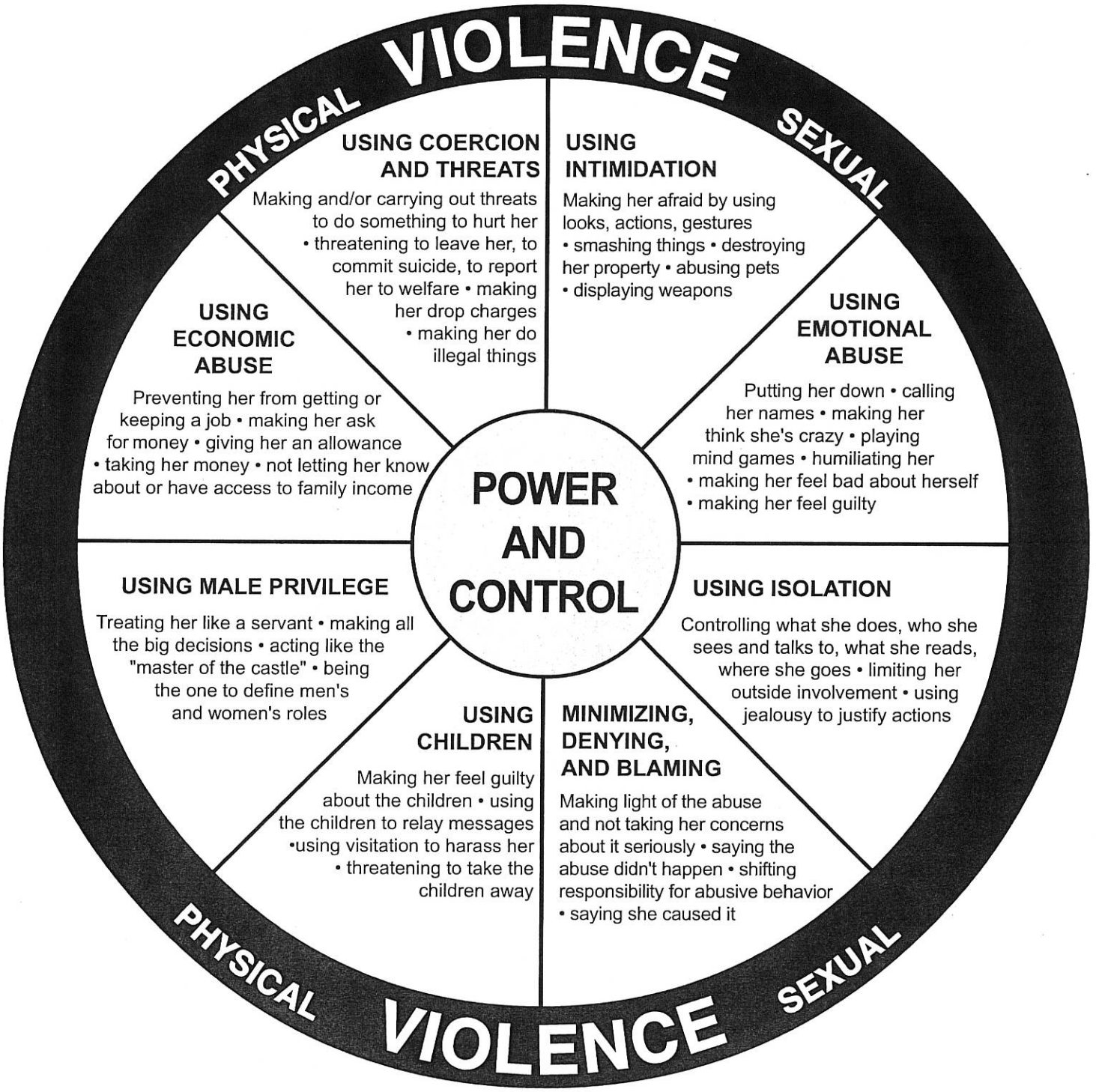
Delayed Implementation Date:
Kansas has not developed a network of trained professionals who can help assess those who are arrested for domestic violence crimes. Nor have we developed appropriate batterers intervention programs across the state. Best practice recommendations that will inform a training and certification program in the Office of the

Attorney General have been developed by a multi-disciplinary group and reviewed and adopted by the DVFRB. Time is needed to develop and implement that training and to develop a model assessment tool. Prosecutors and courts in other states have come to rely on the recommendations from such assessments in determining dispositions on domestic violence cases. We would like to see this system available to Kansas courts.

Training related to the predominant aggressor analysis:
This issue relates back to the unintended consequences of HB2335. It is **critical** that each case is appropriately analyzed at the time an arrest decision is being made. This is the first and best opportunity to appropriately identify abusers and prevent unintended consequences. There are 30 other states that have similar language already in place concerning the predominant aggressor analysis. Nonetheless, training to help law enforcement apply the predominant aggressor analysis when they are in very difficult, and sometimes volatile, situations is key. A grant project under the Grants to Encourage Arrest Program, Office on Violence Against Women, U.S Justice Department, awarded to the office of Governor Kathleen Sebelius has brought together a multi-disciplinary team of professionals that developed curricula for law enforcement, prosecutors, corrections, and advocates. Regional teams of trainers are currently organizing local trainings. Should HB 2335 pass, we are prepared to amend the curricula and training to include these provisions. However, since this project is funded through a grant, if it is not renewed or is substantially reduced other resources will have to be directed toward this training.

Summary:
KCSDV does support HB 2335 but only with the protections of predominant aggressor language, training, and delayed implementation to make sure the unintended consequences are minimized and do not serve to undermine the intent of this law.

Submitted by:
Sandra Barnett
Executive Director



Developed by Domestic Abuse Intervention Project, Duluth, MN

Provided by: Kansas Coalition Against Sexual and Domestic Violence
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Upon reviewing HB 2335, we are suggesting the amendments set out below.

Clarifying the purpose of HB 2335:
Because it is so important to reduce the possible unintended consequences that may happen if HB 2335 is passed, KCSDV suggests adding a clear statement of intent to the preferred arrest and predominant aggressor section of K.S.A. 22-2307.

Currently, many law enforcement officers tell us that because Kansas has a preferred or "mandatory" arrest statement in K.S.A. 22-2307, they believe they have been directed to make an arrest when they respond to a domestic violence incident regardless of the context of the incident. HB 2335 attempts to correct that perception by offering guidance to law enforcement officers by requiring the predominant aggressor analysis when the arrest decision is made. KCSDV believes it would also be helpful to clearly articulate the purpose of the predominant aggressor analysis when the arrest decision is made. Taken from Florida law, KCSDV suggests adding the following language on page 18, line 4:

> "Arrest is the preferred response only with respect to the predominant aggressor and not the preferred response with respect to a person who acts in a reasonable manner to protect or defend oneself or another family or household member from domestic violence as defined in K.S.A. 21-3110(7), and amendments thereto."

Moving Predominant Aggressor Analysis to Law Enforcement Policies Statute:
Currently, HB 2335 places the predominant aggressor analysis in the statute that sets out the general arrest authority given to law enforcement officers (K.S.A. 22-2401; Section 8, page 19, lines 16-39).

KCSDV does not believe this is the correct place for this statutory language. The intent of this predominant aggressor analysis is to guide law enforcement officers in their responses to domestic violence calls. If the predominant aggressor analysis stays in the general arrest authority statute, KCSDV believes it will defeat the requirement that officers complete this analysis when responding to the domestic violence incident. It also separates this as a policy and protocol issue for which K.S.A. 22-2307 was intended.

Suggested amendment:
Move lines 16 through 39 in Section 8, page 19 to line 3, Section 7, page 18, adding language as set out in the balloon.

(1) A statement directing that the officers shall make an arrest when they have probable cause to believe that a crime is being committed or has been committed ~~*in accordance with K.S.A. 22-2401, and amendments thereto*~~;

(2) a statement defining domestic violence *in accordance with K.S.A. 21-3110, and amendments thereto*;

(3) a statement describing the dispatchers' responsibilities;

(4) a statement describing the responding officers' responsibilities and procedures to follow when responding to a domestic violence call and the suspect is at the scene;

(5) a statement regarding procedures when the suspect has left the scene of the crime;

(6) procedures for both misdemeanor and felony cases;

(7) procedures for law enforcement officers to follow when handling domestic violence calls involving court orders, including protection from abuse orders, restraining orders and a protective order issued by a court of any state or Indian tribe;

(8) a statement that the law enforcement agency shall provide the following information to victims, in writing:

(A) Availability of emergency and medical telephone numbers, if needed;

(B) the law enforcement agency's report number;

(C) the address and telephone number of the prosecutor's office the victim should contact to obtain information about victims' rights pursuant to K.S.A. 74-7333 and 74-7335 and amendments thereto;

(D) the name and address of the crime victims' compensation board and information about possible compensation benefits;

(E) advise the victim that the details of the crime may be made public;

(F) advise the victim of such victims' rights under K.S.A. 74-7333 and 74-7335 and amendments thereto; and

(G) advise the victim of known available resources which may assist the victim; and

(9) whether an arrest is made or not, a standard offense report shall be completed on all such incidents and sent to the Kansas bureau of investigation.

Sec. 8. K.S.A. 22-2401 is hereby amended to read as follows: 22-2401. *(a)* A law enforcement officer may arrest a person under any of the following circumstances:

~~(a)~~ *(1)* The officer has a warrant commanding that the person be arrested.

~~(b)~~ *(2)* The officer has probable cause to believe that a warrant for the person's arrest has been issued in this state or in another jurisdiction

Arrest is the preferred response only with respect to the predominant aggressor and not the preferred response with respect to a person who acts in a reasonable manner to protect or defend oneself or another family or household member from domestic violence as defined in K.S.A. 21-3110(7), and amendments thereto.

(b) (1) When a law enforcement officer determines that there is probable cause to believe that a crime or offense involving domestic violence, as defined in K.S.A. 21-3110, and amendments thereto, has been committed, the officer shall, without undue delay, arrest the person suspected of its commission pursuant to the provisions of paragraph (2). Nothing in this subsection shall be construed to require a law enforcement officer to arrest both parties involved in an alleged act of domestic violence when both claim to have been victims of such domestic violence. Additionally, nothing in this subsection shall be construed to require a law enforcement officer to arrest either party involved in an alleged act of domestic violence when the law enforcement officer determines there is no probable cause to believe that a crime or offense has been committed.

(2) If a law enforcement officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine if a crime has been committed by the predominant aggressor. In determining whether a crime has been committed by a predominant aggressor, the officer shall consider the following:

(A) The possibility that one of the persons acted in self-defense;

(B) any prior complaints of domestic violence;

(C) the relative severity of the injuries inflicted on each person;

(D) the likelihood of future injury to each person;

(E) information from witnesses; and

(F) physical evidence.

for a felony committed therein.

~~(c)~~ *(3)* The officer has probable cause to believe that the person is committing or has committed:

~~(1)~~ *(A)* A felony; or

~~(2)~~ *(B)* a misdemeanor, and the law enforcement officer has probable cause to believe that:

~~(A)~~ *(i)* The person will not be apprehended or evidence of the crime will be irretrievably lost unless the person is immediately arrested;

~~(B)~~ *(ii)* the person may cause injury to self or others or damage to property unless immediately arrested; or

~~(C)~~ *(iii)* the person has intentionally inflicted bodily harm to another person.

~~(d)~~ *(4)* Any crime, except a traffic infraction or a cigarette or tobacco infraction, has been or is being committed by the person in the officer's view.

~~*(b) (1) When a law enforcement officer determines that there is probable cause to believe that a crime or offense involving domestic violence, as defined in K.S.A. 21-3110, and amendments thereto, has been committed, the officer shall, without undue delay, arrest the person suspected of its commission pursuant to the provisions of paragraph (2). Nothing in this subsection shall be construed to require a law enforcement officer to arrest both parties involved in an alleged act of domestic violence when both claim to have been victims of such domestic violence. Additionally, nothing in this subsection shall be construed to require a law enforcement officer to arrest either party involved in an alleged act of domestic violence when the law enforcement officer determines there is no probable cause to believe that a crime or offense has been committed.*~~

(2) If a law enforcement officer receives complaints of domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine if a crime has been committed by the predominant aggressor. In determining whether a crime has been committed by a predominant aggressor, the officer shall consider the following:

(A) The possibility that one of the persons acted in self-defense;

(B) any prior complaints of domestic violence;

(C) the relative severity of the injuries inflicted on each person;

(D) the likelihood of future injury to each person;

(E) information from witnesses; and

(F) physical evidence.

Sec. 9. K.S.A. 22-3210 is hereby amended to read as follows: 22-3210. (a) Before or during trial a plea of guilty or *nolo contendere* may be accepted when:

(1) The defendant or counsel for the defendant enters such plea in

Licensing of Teachers who Commit Domestic Violence Crime Against Minor or Student

On page 24, lines 27-28, HB 2335 removed a conviction for domestic battery as a reason to deny a license to a teacher who has committed such an offense against a minor or a student. This was done because HB 2335 repeals the crime of domestic battery. KCSDV suggests adding the following language in substitution for the deleted language:

"or a criminal offense that includes the domestic violence designation, pursuant to section 1, and amendments thereto,"

amendments thereto;

(16) involuntary manslaughter, as defined in K.S.A. 21-3404, and amendments thereto;

(17) involuntary manslaughter while driving under the influence of alcohol or drugs, as defined in K.S.A. 21-3442, and amendments thereto;

(18) sexual battery, as defined in K.S.A. 21-3517, and amendments thereto, when, at the time the crime was committed, the victim was less than 18 years of age or a student of the person committing such crime;

(19) aggravated sexual battery, as defined in K.S.A. 21-3518, and amendments thereto;

(20) attempt under K.S.A. 21-3301, and amendments thereto, to commit any act specified in this subsection;

(21) conspiracy under K.S.A. 21-3302, and amendments thereto, to commit any act specified in this subsection;

(22) an act in another state or by the federal government that is comparable to any act described in this subsection; or

(23) an offense in effect at any time prior to the effective date of this act that is comparable to an offense as provided in this subsection.

(b) Except as provided in subsection (c), the state board of education shall not knowingly issue a license to or renew the license of any person who has been convicted of, or has entered into a criminal diversion agreement after having been charged with:

(1) A felony under the uniform controlled substances act;

(2) a felony described in any section of article 34 of chapter 21 of the Kansas Statutes Annotated, other than an act specified in subsection (a), or a battery, as described in K.S.A. 21-3412, and amendments thereto, ~~or domestic battery, as described in K.S.A. 21-3412a, and amendments thereto,~~ if the victim is a minor or student;

(3) a felony described in any section of article 35 of chapter 21 of the Kansas Statutes Annotated, other than an act specified in subsection (a);

(4) any act described in any section of article 36 of chapter 21 of the Kansas Statutes Annotated, other than an act specified in subsection (a);

(5) a felony described in article 37 of chapter 21 of the Kansas Statutes Annotated;

(6) promoting obscenity, as described in K.S.A. 21-4301, and amendments thereto, promoting obscenity to minors, as described in K.S.A. 21-4301a, and amendments thereto, or promoting to minors obscenity harmful to minors, as described in K.S.A. 21-4301c, and amendments thereto;

(7) endangering a child, as defined in K.S.A. 21-3608, and amendments thereto;

(8) driving under the influence of alcohol or drugs in violation of K.S.A. 8-1567 or 8-2,144, and amendments thereto, when the violation is punishable as a felony;

or a criminal offense that includes the domestic violence designation, pursuant to section 1, and amendments thereto,

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TO: The Honorable Representatives of the Committee on Corrections and Juvenile Justice

FROM: Thomas R. Stanton
Deputy Reno County District Attorney
President, KCDAA

RE: House Bill 2335

DATE: February 16, 2009

Chairwoman Colloton and Members of the Committee:

Thank you for giving me the opportunity to testify regarding House Bill 2335. The Kansas County and District Attorneys Association opposes this legislation.

This legislation appears to be designed to modify the law to reflect the proponent's public policy positions. The bill modifies the definitions of "domestic violence," Domestic Violence offender," and "domestic violence offense." The legislation requires a domestic violence offender to undergo a domestic violence assessment upon conviction for a domestic violence crime. The bill also seeks to modify the duties and responsibilities of law enforcement regarding the decision make arrests in domestic violence situations. This legislation limits the authority of prosecutors to charge and enter into plea negotiations in domestic violence cases. Finally, the bill repeals K.S.A. 21-3412a, the domestic battery statute.

The KCDAA has no quarrel with some of the public policy goals reflected by this legislation. However, our organization does oppose two specific precepts of this bill. First, and foremost, this legislation repeals K.S.A. 21-3412a. The bill, however, does not transfer the provisions of K.S.A. 21-3412a into any other statute. K.S.A. 21-3412a currently defines domestic violence battery, and it is what is known as a self-contained habitual violator statute. In other words, there are provisions for increased penalties for second and third, or subsequent,

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offenses. The statute also requires fines for violations of the act. HB 2335 repeals K.S.A. 21-3412a without transferring these provisions to the simple battery statute, K.S.A. 21-3412. This means these penalty provisions will also be repealed, reducing the consequences faced by those who commit domestic violence crimes. Attempting to expand the definition of domestic violence crimes to other situations should not result in the dismantling of the current domestic violence battery statute.

The second issue the KCDAA has with the bill is the attempt to control the prosecutor's decisions in the course of the prosecution of domestic violence cases. The legislation would require the prosecution of each domestic violence case in which a prima facie case could possibly be made, and would require that the case be prosecuted to the fullest possible extent of the law. This provision would deprive the prosecutor of the discretion which is an integral part of the prosecutor's duties. No two domestic violence cases are alike, and it is not possible to require a certain outcome in every case. Domestic violence has characteristics not present in other types of cases, one of which is a high level of reluctance on the part of victims to pursue the case to conviction. This legislation requires the prosecutor to represent to the court that there is not a prima facie case present to abandon a domestic violence prosecution, but every case charged meets this standard. However, a prima facie case is not necessarily a case which can be proven to a jury beyond a reasonable doubt, especially in those cases where a victim has refused to cooperate in the prosecution of the defendant. The legislature should not engage in an attempt to control the discretion of prosecutors regarding the prosecution of domestic violence cases.

Respectfully submitted,

Thomas R. Stanton
President, KCDAA

K.S.A. 21-3412a:

(a) Domestic battery is:

(1) Intentionally or recklessly causing bodily harm by a family or household member against a family or household member; or

(2) intentionally causing physical contact with a family or household member by a family or household member when done in a rude, insulting or angry manner.

(b)(1) Upon a first conviction of a violation of domestic battery, a person shall be guilty of a class B person misdemeanor and sentenced to not less than 48 consecutive hours nor more than six months' imprisonment and fined not less than $200, nor more than $500 or in the court's discretion the court may enter an order which requires the person enroll in and successfully complete a domestic violence prevention program.

(2) If, within five years immediately preceding commission of the crime, a person is convicted of a violation of domestic battery a second time, such person shall be guilty of a class A person misdemeanor and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $500 nor more than $1,000. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the person shall be required to enter into and complete a treatment program for domestic violence prevention.

(3) If, within five years immediately preceding commission of the crime, a person is convicted of a violation of domestic battery a third or subsequent time, such person shall be guilty of a person felony and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,000 nor more than $7,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The court shall require as a condition of parole that such person enter into and complete a treatment program for domestic violence. If the person does not enter into and complete a treatment program for domestic violence, the person shall serve not less than 180 days nor more than one year's imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program.

(c) As used in this section:

(1) Family or household member means persons 18 years of age or older who are spouses, former spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or who have lived together at any

time. Family or household member also includes a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time; and

(2) for the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing under this section:

(A) "Conviction" includes being convicted of a violation of this section or entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(B) "conviction" includes being convicted of a violation of a law of another state, or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits or entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings in a case alleging a violation of such law, ordinance or resolution;

(C) only convictions occurring in the immediately preceding five years including prior to the effective date of this act shall be taken into account, but the court may consider other prior convictions in determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offender, whichever is applicable; and

(D) it is irrelevant whether an offense occurred before or after conviction for a previous offense.

(E) A person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section or an ordinance of any city or resolution of any county which prohibits the acts that this section prohibits only twice during any three-year period.

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Testimony of the Kansas Association of Criminal Defense Lawyers
Opponent of House Bill 2335

Chairperson Colloton and Members of the Committee:

HB 2335 creates a "domestic violence designation" that would apply to any crime committed where the underlying facts include an act of domestic violence. The case would be designated as such upon arrest and remain so tagged through disposition, unless the prosecution represents to the court that they cannot make a prima facie case as to the relationship between the victim and defendant. **KACDL opposes HB 2335 for two reasons: 1) the provisions arguably violate the U.S. Constitution and 2) the negative consequences of the domestic violence designation to survivors of domestic violence who use acts considered crimes under our laws to resist or survive the coercive control perpetrated by their partners.**

First, the domestic violence designation attaches at arrest. The allegation that an act was a "domestic violence offense" does not have to be charged in the complaint nor proved to a jury. In fact, the only mechanism to remove the designation appears to be if the prosecutor says he/she cannot prove the two people involved are not/have ever been intimate partners. The designation impacts not only plea options, but also sentencing. Furthermore, given that a person is then deemed a "domestic violence offender," it begs the question what sort of bearing this will have in future criminal cases (such as a sentence enhancement). This bill raises serious constitutional questions.

Second, two contexts collide when we talk about domestic violence. There are the terms we use to describe what exists between two people in a relationship (there is a batterer who establishes a pattern of power and control over a person, called the survivor, who experiences that pattern) versus the terms we may use to evaluate a moment in time when a criminal act has allegedly occurred (there is the victim against whom a crime has occurred and an offender who is accused of that act). An issue gaining more attention is the "survivor-defendant" – when a person in an abusive relationship uses violence or criminal acts against his/her batterer in order to survive the abuse.

The domestic violence designation stems from an alleged criminal act that occurs in a specific moment in time. The designation begins with a police officer's arrest. Generally speaking, a police officer is responsible for arresting a person who has committed a crime in the officer's presence or who the officer has probable cause to believe has committed a crime. If a person admits to a crime, the officer arrests him/her. If the person does not dispute the allegations of the alleged victim, the officer arrests the alleged perpetrator. The officer is evaluating a moment in time and deciding whether an act was illegal. The officer has very little discretion to consider the larger context of these two people's lives and simply walk away from an arrest because one person is using illegal acts to resist or survive. A law that results in survivors of domestic violence being tagged as domestic violence offenders only furthers a batterer's goals of power and control. People who

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batter say: *you are just as bad as me. If people find out what you did, they will not help you. You are the abuser, not me.*

If survivors are tagged with domestic violence designations at arrest, it will put up more barriers for them: they may not be able to access services (and would a "batterer-victim" be eligible for those services instead?), if they are women they may lose their jobs in traditionally "women's work" (ex. nursing, teaching, child care), they may have the tag used against them in custody cases, etc. Even if the designation is somehow removed later (which there is not really a mechanism for unless the question is the parties' relationship), many negative consequences occur at arrest, regardless of whether charges are ever filed.

Our members have represented clients (usually women) who are charged with crimes against their batterers. Again, two worlds collide – for example, the criminal legal system's definition of what constitutes self-defense versus the genuine feelings of self-defense a survivor was acting upon when she committed an offense.

We acknowledge that domestic violence includes acts of violence against people as well as acts against property. We appreciate the desire to have more comprehensive statistics about domestic violence. But issues surrounding domestic violence are not easily solved. The Legislature has a duty not to make things worse. The criminal legal system posits everyone as equal under the law, but we know that is not true in the context of an abusive relationship. Batterers assume power and control over their partners by changing them from people with the power to act, reflect and act again into things that are acted upon. Before further criminalizing acts concerning domestic violence, the Legislature needs to delve into the impact of this proposal on survivors.

Thank you for your time and consideration.

Sincerely,

Jennifer Roth
Legislative Committee Chair, on behalf of the
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February 16, 2009

Testimony to the House Corrections and Juvenile Justice Committee In a Neutral Position on HB2335 Domestic Violence

The Kansas Association of Chiefs of Police and the Kansas Peace Officers Association support any effort to decrease the acts of domestic violence. Domestic violence calls are one of the most hazardous assignments for law enforcement. Anything we do to stop domestic violence and abuse and any steps to decrease repeat occurrences is to our advantage.

The provisions in section 1 of this bill relating to "tagging" reports as domestic violence cases is not a problem for law enforcement. In fact, our reports already have that provision. We cannot speak for any concerns by prosecutors or courts, including municipal prosecutors and municipal courts.

We are concerned that some other provisions of this bill, as written, are unclear and will present problems with law enforcement application, consistency, and interpretation. The following summarizes those concerns and offers potential solutions.

Concern 1: Our first concern is the definition of the term "domestic violence" on page 2, line 43 through page 3, line 8. That definition uses the term "act of violence" (page 2, line 43) which is not defined in the statutes. One could turn to the definition of "domestic violence offense" for help. But no help is found there since that definition simply refers back to the term "domestic violence." To be clear, the term "domestic violence" is currently defined in the mandated policies for each Kansas law enforcement agency and prosecutor's office. Of course this also leads to inconsistency across the state. This bill appears to attempt to centralize that determination and to negate the local practices developed by law enforcement and prosecutors in response to current law.

Since whatever crimes intended to be included in the second sentence of the proposed definition is limited by the words "any *other* crime" on page 2, line 2, whatever is intended to be included as an act of violence in the first sentence has no apparent application in the second sentence. It appears the first sentence of the definition applies to crimes committed directly against "*a person with whom the offender is involved or has been involved in an intimate relationship.*" And it appears the second sentence applies to a crime committed against any person (including the intimate partner) or any person's property, but only when committed to coerce, control, punish, intimidate or inflict revenge on the offender's intimate partner.

Recommendation 1: We recommend striking the word "other" on page 2, line 2. We believe this will allow law enforcement to enforce whatever is determined to be "acts of violence" to both the first and second sentences of the definition. It also maintains the provision to allow for any crime that is not an act of violence to be included in the second sentence when committed for the stated purpose.

Concern 2: But that change still leaves the central question left to inconsistent interpretation: What is intended by the term "act of violence?" That answer appears to be elusive. We believe the statute needs to clearly state which crimes are considered an "act of violence." This is a legislative policy decision that must be made. The only other place in Kansas statutes where we found this term is in K.S.A. 74-50,193 concerning licensing sanctions for certain professional licenses. We couldn't find a definition of the term relative to that statute either. Black's Law Dictionary defines violence as "The use of physical force, usually accompanied by fury, vehemence, or outrage; especially physical force unlawfully exercised with the intent to harm." Black's also defines "violent offense" as, "A crime characterized by extreme physical force, such as a murder, forcible rape, and assault and battery with a dangerous weapon." We believe these definitions are more limiting than the bill authors intend. We also believe the definitions in the bill are insufficient to clearly define what is meant and will lead to challenging interpretation by law enforcement and create inconsistencies in arrests. And of course the understanding by law enforcement is critical since this is the first step in protecting the domestic violence victim and initiating the criminal justice process.

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Recommendation 2: We recommend "act of violence" be more specifically defined. For example, it might include a list of specific crimes; a designation of any person crime; it might include a list of articles of chapter 21, such as articles 34 and 35, or a combination of the last two providing person crimes in chapter 21, articles 34 and 35. Although we caution you that anything short of listing specific crimes may include some things that don't make sense, such as K.S.A. 21-3416, unlawful interference with a firefighter.

Concern 3: The next problem we see is with the definition of "intimate relationship." More specifically, we are concerned about the term "past or present unmarried couples" on page 3, line 28. The intent is unclear concerning when two people cross the line to become a "couple." We could find no statutory or law dictionary definition of the term "couple." The remainder of the definition is clear.

Other states have further defined this relationship by using terminology such as that found in Nebraska to limit the interpretation of the term "couple":

Recommendation 3: Consider moving the term "past or present unmarried couple" to a separate sentence and add an exclusion statement applicable to that provision such as that found in Nebraska statute 28-323 which states, ". . .but does not include a casual relationship or an ordinary association between persons in a business or social context."

Concern 4: We are concerned with the provisions starting on page 11, lines 2, concerning the ordering of domestic violence offender assessment. The word "shall" on page 11, line 4 mandates the court take an action based on the designation as a domestic violence case by law enforcement or a prosecutor or "any other person drafting legal documents" relative to the case (page 1, lines 19-22) without any judicial discretion to review the accuracy and basis for such determination. This is compounded if you understand the investigative process. An officer taking the original complaint may not have all the facts of the case. As the investigation unfolds it might later be determined it was not a case of domestic violence. Additionally, as witnesses testify under oath new facts may be learned by the court and it can be discovered that the information provided to law enforcement was not accurate.

Recommendation 4: Consider changing this to where the court must make a determination on the record of whether or not the offense for which the person is convicted was a case of domestic violence, and if it is, then require the assessment.

Concern 5: We are puzzled by the purpose of the provisions on lines 28-39 on page 19 since it adds further considerations slightly different than probable cause the person committed the crime. We feel that this area is adequately covered in lines 16-27 on page 19 if our previously suggested amendments to that section are adopted. If it is not felt that section adequately covers the determination by law enforcement based on probable cause, it is possible to add some simple clarification to that section. We see no need to add this new demand on law enforcement to apply different standards than those used for probable cause to determine this new arrest standard of predominant aggressor.

Recommendation 5: Consider deleting lines 28-39 on page 19 and adding something like the following after the word "violence" on line 23, page 19: "The officer must consider all available information and evidence to determine if more than one distinct criminal act was committed and if so, who committed each act. The rule of arrest in this section shall apply to each criminal act."

Concern 6: <u>If the previous recommendation is adopted, the following concerns and recommendations will be moot. However, if the previous recommendation is rejected, we request the following be considered</u>:

We are troubled by the words "arrest the person suspected of its commission" on page 19, line 19. As written it demands law enforcement arrest based on suspicion and not on probable cause. This also appears to conflict with the requirement to make the arrest pursuant to section (8) subsection (a) which requires probable cause the person committed the crime, not the mere suspicion.

Recommendation 6: Strike the words "suspected" on page 19, line 19 and "of its commission" on page 19, line 20.

Concern 7: When determining probable cause for an arrest without a warrant law enforcement must apply the standards on page 19, lines 2-15. Those standards require establishing the person has committed a crime, not merely that a crime has been committed. The language on page 19, line 26 and 27 refers to no probable cause that a crime was committed, but the real test is if no probable cause exists to believe <u>the person</u> committed a crime. The current language could imply incorrectly that if there is probable cause the <u>crime</u> is committed an arrest will have to be made even without probable cause the <u>person</u> committed the crime. Current language also could be interpreted to say the provisions of subsection (a)(3) does not apply to domestic violence arrests since it establishes a different standard.

Recommendation 7: Delete the words "that a crime or offense has been committed" and replace them with "that the person has committed a crime or offense" on page 19, line 27. Change the reference to "paragraph (2)" on page 19, line 20 to "subsection (a)."

Concern 8: We have some concern with the predominant aggressor concept on page 19, lines 28-39. We know several states have implemented this term in their statute. This will be a new concept for Kansas law enforcement and prosecutors. Cross accusations are not uncommon in domestic violence calls. The standard law enforcement has applied is that of the aggressor versus acting in self defense. We wonder if the sentence starting on page 19, line 31 is intended to say, "In determining whether a person is the predominant aggressor. . ." rather than the current language, "In determining whether a crime has been committed by a predominant aggressor. . ." This is consistent with the language on page 19, lines 30-31.

Recommendation 8: Delete "whether the crime has been committed by a" and replace them with "which person is the" on page 19 lines 31 and 32.

Concern 9: In that same section there is a list of factors on lines 34-39 that appear to be an inclusive list, or at least seem to be subject to interpretation to be an inclusive list. We suggest adding a general term at the end of the list to allow other factors to be considered.

Recommendation 9: Add after line 39, "(G) Any other information or evidence available to the officer at the time of the decision offering assistance in making the determination."

Concern 10: We also have a concern with items (B) and (C) in that list. Item (B) on page 19, line 35, requires the officer to consider "prior complaints of domestic violence." This seems to imply if there are past complaints against one of the parties law enforcement can use that as a factor in determining who committed the current crime, and as a result who will be arrested. This seems to discount the existence or results of such complaints that might not be known to the officer. We fear this might lead to misunderstanding and overdependence on such information by the officer. If there is something relevant in a prior complaint known to the officer, the new section (G) as suggested above would cover it.

But the more problematic of the two is paragraph (C) on page 19, line 36. This section directs the officer to use the "relative severity of injuries inflicted" in determining which person was the predominant aggressor. We believe this is very dangerous since it is not uncommon to have the aggressor receive the worst injuries as a result of the other person's acts of self defense. It seems the determination of the predominant aggressor should be based more on who initiates the aggressive action and who is acting in self defense than who causes the most injury. Of course, if a person defending their self declines to stop inflicting injury after the threat is stopped, level of injury might be a factor as a separate distinct crime. We feel this item on the list will encourage misunderstanding and bad decisions by the officer.

Recommendation 10: Delete lines 35 and 36 on page 19, but only if item (G) in the above recommendation is adopted.

Concern 11: We also want to be sure you retain the authority for municipal courts to handle these domestic violence cases if they choose to. Many of our cities have found the municipal court process is much more efficient in dealing with these crimes, particularly the more minor crimes. Of course all felony cases must be handled by the district courts. We believe the current language does retain this authority.

CONCLUSION: We hope that you see from our concerns and a potential solution to each that we are not trying to negate the positive changes the proponents of this bill are trying to accomplish. Nor are we trying to kill this bill. But it seems like many of the really tough decisions have been passed on to the interpretation by law enforcement, prosecutors and the courts. We also believe the bill as written will likely lead to confusion and an unnecessary potential for erroneous decisions by law enforcement.

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6-3

State of Kansas

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House Corrections and Juvenile Justice Committee

Neutral Testimony Concerning 2009 HB 2335

Monday, February 16, 2009

Kathy Porter

Thank you for the opportunity to appear as a neutral conferee on 2009 HB 2335. I appear today with questions about two sections of the bill, and hope that some clarification on these issues might be of assistance to those who will be charged with implementing the bill. However, I first want to make it clear that the Judicial Branch appreciates the efforts of all who work to provide assistance to those in need of domestic violence services.

The first question arises from the language in New Section 1, which requires a domestic violence designation on the cover sheets of all legal criminal documents, from arrest through disposition, generated in connection with a domestic violence offense. This applies to court officials.

By Supreme Court Rule, cover sheets are required on all new filings in the district courts. These cover sheets are designed to obtain, in one document, case filing information that is needed for statistical and other purposes. Another purpose of the cover sheet is to protect personal identifiers, such as Social Security numbers, from any potential abuse. Sensitive information is taken from the cover sheets, entered into the case management system, and then the cover sheets are destroyed after a reasonable period of time. However, other than this cover sheet, other documents filed with the court, such as orders, journal entries, and other documents, do not currently have cover sheets. Generating a new cover sheet or form for every document filed in a case would be burdensome. Moreover, the term "all legal criminal documents" that is used in the bill could include notices to parties and witnesses and other documents of a more routine nature. It would appear that more direction would be helpful to all involved.

A second area of concern is Section 5(o) of the bill, which requires a domestic offender assessment for all offenders convicted of an offense that includes the domestic violence designation. The bill does not specify who is to perform this assessment. One concern is that, if court services officers are expected to perform this duty, they are not provided with specific training in this area. In addition, the Judicial Branch is not staffed in a manner that would allow us to perform this additional duty. Although the bill provides that the offender shall be required to pay for the assessment and recommendations, no provision is made for those offenders who cannot pay. It is unclear what procedure would be followed in those cases.

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