Approved: May 22, 2009
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Thomas C. (Tim) Owens at 9:30 a.m. on March 9, 2009, in Room 545-N of the Capitol.

All members were present except:
Senator Derek Schmidt - excused
Senator Jean Schodorf - excused

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Rep. Scott Schwab
Kristine Olsson, Forensic Scientist, Johnson County Sheriff's Office
Ed Klumpp, Kansas Association of Chiefs of Police & Kansas Peace Officers Association
Randy Hearrell, Kansas Judicial Council
Rep. Jeff King
Bob Keller, Johnson County Sheriff's Office
James M. Concannon, Professor of Law

Others attending:
See attached list.

The Chairman opened the hearing on **HB 2039 - Identification of defendant by unique DNA profile sufficient for reasonable certainty requirement of warrant.** Jason Thompson, staff revisor, reviewed the bill.

Rep. Scott Schwab appeared as sponsor of the bill allowing for an arrest warrant be issued on a DNA profile. Currently, arrest warrants are issued by name. This bill utilizes the technology of DNA to issue an arrest warrant and will lock in the statute of limitations on certain crimes. (Attachment 1)

Kristine Olsson testified in support stating DNA profiles will provide another means to identify offenders named as John Doe in arrest warrants. DNA profiles are unique descriptions of an individual and are legally accepted and used in the United States. Inclusion of the unique genetic profile in the language of the warrant will effectively identify a defendant with reasonable certainty and will assist in cases in which DNA evidence is available but a perpetrator's name is unknown. (Attachment 2)

Ed Klumpp spoke in support stating enactment of this bill will help law enforcement and prosecutors to assure the victims of crimes that every available tool is used to identify offenders. The bill will reinforce the legislative intent of K.S.A. 21-2304 while providing further guidance and clarity to the justice system. (Attachment 3)

There being no further conferees, the hearing on **SB 2039** was closed.

The Chairman opened the hearing on **HB 2059 - Proceeds derived from violation of the uniform controlled substances act or any substantially similar offense from another jurisdiction.** Jason Thompson, staff revisor, reviewed the bill.

Randy Hearrell spoke in favor stating **HB 2059** will address a gap in current law regarding possession of drug proceeds. The Judicial Council reviewed K.S.A. 65-4142 and agree with the proposed amendments contained in the bill. (Attachment 4)

Ed Klumpp appeared in support stating the bill will clarify the intent of K.S.A. 65-4142 and remedy an unintended loophole in the statute. The proposed amendments clearly does no harm and will allow prosecution of offenders regardless of where the actual act of illegal drug manufacturing or distribution is

taking place. (Attachment 5)

There being no further conferees, the hearing on **SB 2059** was closed.

The Chairman opened the hearing on **HB 2060 - Violation of battery against a law enforcement officer causing bodily harm, sentence is presumed imprisonment.** Jason Thompson, staff revisor, reviewed the bill.

Rep. Jeff King testified as sponsor of the bill which will apply to battery convictions that result in bodily harm to an officer. Although battery against law enforcement officers is a felony, only a small number of convicted offenders spend time in prison. Police officers put their lives on the line every day to protect Kansans, enactment of this bill will ensure that criminals who cause bodily harm to officers will spend time in prison. (Attachment 6)

Bob Keller spoke in support stating assaults on law enforcement officers is on the rise. The knowledge that imprisonment is the presumptive sentence for battering a law enforcement office will dissuade would-be attackers. In addition to providing a greater deterrent against attacks the bill is fiscally responsible. (Attachment 7)

Ed Klumpp appeared as a proponent stating the bill does not introduce a new crime or increase the severity level of the crime but simply adds a simple rule to make the sentence presumptive imprisonment and encouraged enactment of the bill. (Attachment 8)

There being no further conferees, the hearing on **SB 2060** was closed.

The Chairman opened the hearing on **HB 2250 - Rules of evidence; admissibility of prior acts or offenses of sexual misconduct.**

James Concannon provided neutral testimony regarding HB 2250 indicating he feels the bill goes beyond the problem of pedophilia. It makes a sweeping change applicable in every sex crime prosecution. The bill is nearly verbatim of the Federal Rule of Evidence 413 which has been highly criticized by evidence scholars on policy grounds and for poor drafting. Only a few States have adopted Rule 413 due to potential problems. Mr. Concannon indicated the United States Judicial Council has proposed alternative language and recommended no change to Kansas statutes without input from Judicial Council. (Attachment 9)

The next meeting is scheduled for March 10, 2009.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-9-09

NAME	REPRESENTING
PATRICIA A. SCALIA	BIDS
Tom Bartee	KACDL
SEAN MILLER	CAPITOL STRATEGIES
Joseph Molina	KS Bar Assn.
Mike Heath	Judicial Branch
Richard Sanders/10	Kearny Lassel.
Sandy Barnett	KCSDV
James M Concannon	—
Kris Ailslieger	KSAG
Clay Britton	KSAG
Kristine Olsson	JCSO
Bob Keller	JCSO
Rep Schwab	Self

STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: ELECTIONS
MEMBER: AGING AND LONG TERM CARE
COMMERCE AND LABOR
HEALTH AND HUMAN SERVICES

Dear Madam Chair and members of the committee,

I introduced HB 2039 to help utilize technology to execute on justice. The bill allows for a warrant of arrest to be issued to a person who meets a DNA profile. Currently we can issue such a warrant for an individual by name. This would all by DNA.

So, if an individual has committed a crime and left their DNA, we could then issue a warrant. If his name is Dave Smith, the DNA is actually more accurate than the name on identifying the individual.

Also, if that warrant is issued and 12 years later their DNA shows up in the national data base and a warrant is attached, the individual with that profile can be detained or extradited, depending to the situation. This would also lock in the statute of limitations on certain crimes because a warrant was issued.

I stand for questions.

Thank you and I will take questions.

Senate Judiciary
3-9-09
Attachment 1

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DAVID A. BURGER
UNDERSHERIFF

KEVIN D. CAVANAUGH
UNDERSHERIFF

Date: March 9, 2009

To: Chairperson Owens, Vice-Chairperson Schmidt, and distinguished members of the Senate Judiciary Committee.

My name is Kristine Olsson and I am a Forensic Scientist with the Johnson County Sheriff's Office. I offer testimony today in support of House Bill 2039, which seeks to amend K.S.A 22-2304 to specify that a defendant may be identified in a warrant by a description of the defendant's unique DNA profile.

The Fourth Amendment to the United States Constitution and K.S.A 22-2304 require an arrest warrant to contain the name of the defendant or, if the name is unknown, any name or description by which the defendant can be identified with reasonable certainty. John Doe warrants, in which a description of a DNA profile is used as a unique description of the defendant when the name of the individual is unknown, have been legally accepted in the United States and are used increasingly. The DNA profile is searched in national DNA databases continuously in the hopes that a match to a convicted offender or a match to genetic material in other criminal cases will be made.

Legal challenges demand the inclusion of specific language regarding an individual's unique genetic profile in the language of a warrant. On March 28, 2008 the Supreme Court of the State of Kansas handed down an opinion in the case of State vs. Douglas S. Belt, in which the Supreme Court upheld the defense assertion that the defendant, Mr. Belt, was not identified with reasonable certainty in the original "John Doe" warrant. The defense effectively argued the fact that in the John Doe warrant the mere listing of DNA loci, or genetic locations at which a DNA profile is developed for forensic identification purposes, was not sufficient to identify Mr. Belt. The court determined that the actual description of the perpetrator DNA profile that was developed at these genetic locations is necessary for identification with reasonable certainty, a fact that the Johnson County Sheriff's Office agrees with. Charges against Mr. Belt were dropped in six sexual assault cases from three Kansas counties as a result of the opinion determining that the statute of limitations had run out due to inefficient identification in the warrant. House Bill 2039 seeks to specify information needed in a warrant to identify a defendant with reasonable certainty in order to toll, or suspend, the statute of limitations and commence prosecution.

The Johnson County Sheriff's Office supports House Bill 2039 and the amendment to K.S.A 22-2304. The field of forensic science currently utilizes state-of-the-art PCR/STR DNA analysis technology that can provide a description of a specific perpetrator genetic profile identifying an individual to a reasonable degree of scientific certainty. An individual's genetic profile is unchanged throughout the lifetime of the individual. Genetic profiles are generated every day as part of forensic DNA analysis and are easily included in or attached to a warrant. Inclusion of the unique genetic profile in the language of the warrant will effectively identify a

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defendant with reasonable certainty and will toll the statute of limitations in cases in which DNA evidence is available but a perpetrator name is unknown. Including a description of the unique genetic profile in a warrant will preserve the statute of limitations in many different types of criminal cases, including serious violent crimes such as the sexual assaults involving Douglas Belt.

I encourage the committee to vote favorably on HB2039 and recommend passage to the full House. I am happy to stand for your questions.

Respectfully,

Kristine Olsson
Forensic Scientist
Johnson County Criminalistics Laboratory
Johnson County Sheriff's Office

Kansas Association of Chiefs of Police
PO Box 780603, Wichita, KS 67278 (316)733-7301

Kansas Peace Officers Association
PO Box 2592, Wichita, KS 67201 (316)722-8433

March 9, 2009

Testimony to the Senate Judiciary Committee
In Support of HB 2039
Arrest Warrants Using DNA Identification

Senator Owens and committee members,

The Kansas Association of Chiefs of Police and the Kansas Peace Officers Association support the amendments to K.S.A. 22-2304 as proposed in HB 2039. Today's use of DNA, coupled with the capability of computerized national DNA offender database comparisons, provides opportunities to bring previously unidentified offenders to justice. DNA evidence provides methods to positively and uniquely identify the perpetrator even without knowing the name or other common identifiers. In 2008, the Kansas Supreme Court ruled DNA identifiers meet the constitutional and statutory tests for identification purposes in arrest affidavits and warrants. In State v. Belt the court states that "an arrest warrant's or a supporting affidavit's inclusion of a unique DNA profile can qualify as a description by which a defendant can be identified with reasonable certainty; mere listing of DNA loci in the warrant or in a supporting affidavit cannot." While specifying the DNA loci was insufficient, the court did not specify what had to be present in the DNA descriptor to be "a unique DNA profile." The court does state that a complete description was available but not used in the Belt case which offers insight into what the court requires. The court's terminology is not foreign to DNA scientists and practitioners who believe the proposed language captures the level of identification required by the court in the Belt case.

The proposed amendment will not only help law enforcement and prosecutors to assure the proper information is included in the affidavit and arrest warrant, but it will also help the courts in determining if an acceptable standard is met. More importantly, this bill will do no harm. While it establishes a standard that appears to meet the level of identification the court required in Belt, we may not know for sure until another case reaches appellate courts. However, it will not have caused any harm and may support a positive appellate court outcome since it sets a standard above that used in the Belt case.

This is an important issue for law enforcement and for public safety. The public and the victims deserve to see the accused tried in court on the factual merits of the evidence. They do not deserve to have a potentially dangerous felon turned loose on society due to a technical shortfall. We cannot afford to replicate this outcome. The Belt case represents exactly what the legislature intended to prevent when passing the current language of K.S.A. 21-2304. This bill will reinforce that legislative intent while providing further guidance and clarity to the criminal justice system.

At our Joint Law Enforcement Legislative Conference the Kansas Association of Chiefs of Police, the Kansas Peace Officers Association, and the Kansas Sheriffs Association identified this bill as one of six legislative priorities for the 2009 session.

We encourage you to recommend this bill favorably for passage to the full House.

Ed Klumpp

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Kansas Association of Chiefs of Police Legislative Committee Chair
Kansas Peace Officers Association Legislative Committee Chair
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3-9-09
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MEMORANDUM

TO: **Senate Judiciary Committee**
FROM: **Kansas Judicial Council - Randy M. Hearrell**
DATE: **March 9, 2009**
RE: **2009 HB 2059 Relating to Sales Derived from Violation of Uniform Controlled Substances Act**

In June 2008, Rep. Mike O'Neal, then Chair of the House Judiciary Committee, requested that the Judicial Council study K.S.A. 65-4142 which relates to unlawful acts involving proceeds derived from violations of the uniform controlled substances act. The request for a study came from the Shawnee County District Attorney's Office because of an apparent gap in K.S.A. 65-4142 which came to the attention of the District Attorney as the result of the Shawnee County District Court case, *State v. Jose Dominguez-Pena*. The Judicial Council assigned the bill to the Council's Criminal Law Advisory Committee (a copy of the Committee members appears at the end of this testimony) .

In the *State v. Jose Dominguez-Pena* case, the defendant was arrested after a drug dog alerted on his truck and officers subsequently found a large quantity of U.S. currency in a false compartment in the truck's trailer. The state charged the defendant with possession of drug proceeds in violation of K.S.A. 65-4142. The defendant filed a motion to dismiss the case arguing that possessing drug proceeds was not illegal in Kansas unless the proceeds were derived from a violation of the Kansas Uniform Controlled Substance Act (UCSA). K.S.A. 65-4142 currently provides in pertinent part that:

> "(a) It is unlawful for a person knowingly or intentionally to receive or acquire proceeds, or engage in transactions involving proceeds, known to be derived from any violation of the uniform controlled substances act, K.S.A. 65-4101 *et seq.* and amendments thereto." (Emphasis added.)

The Court reviewed the statute and acknowledged that there does appear to be a gap in the law. In its current form, the statute indicates that possession of drug proceeds is only a violation if the proceeds relate to a violation or an intended violation of the Kansas Uniform Controlled

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Substance Act. The Court subsequently held that the State had failed to present sufficient evidence to establish probable cause to believe that the defendant transported the alleged drug proceeds with either the intent to use it to commit a violation of the Kansas UCSA or with the knowledge that the money had been used to violate the Kansas UCSA. Therefore, the defendant's motion to dismiss was granted.

After careful review of the statute in question, the *State v. Jose Dominguez-Pena* case and considerable discussion on the issue, the Criminal Law Advisory Committee and the Judicial Council are in agreement with the District Court's opinion and interpretation of K.S.A. 65-4142 and proposed the amendments contained in 2009 HB 2059.

Because of our location, large quantities of drugs are transported through Kansas from Mexico, California and the southwestern United States to Chicago, Philadelphia, New Jersey, New York and the eastern seaboard, and the proceeds of such sales are often transported back through Kansas.

Kansas law enforcement officers have become proficient at detecting, stopping and securing evidence of drug traffic and confiscating large amounts of drug money, which, if forfeited, can be a great benefit to the budgets of Kansas law enforcement agencies. Kansas does not want to be known as a "safe harbor" for transportation of proceeds of drug sales.

Under K.S.A. 21-3701, possession of stolen property is a crime regardless of where the property was stolen. Drug proceeds should be treated similarly. Passage of HB 2059 will close the gap that was revealed by the *Jose Dominguez-Pena* case.

KANSAS JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE

Stephen E. Robison, Chair, Wichita;
James W. Clark, Lawrence;
Edward G. Collister, Lawrence;
Jim D. Garner, Topeka;
Patrick M. Lewis, Olathe;
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Hon. Michael Malone, Lawrence;
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Loren L. Taylor, Kansas City;
Debra J. Wilson, Topeka;
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March 9, 2009

Testimony to the Senate Judiciary Committee
In Support of HB 2059
Proceeds Derived from Violation of the Uniform Controlled Substance Act

Senator Owens and committee members,

The Kansas Association of Chiefs of Police and the Kansas Peace Officers Association supports the proposed amendments to K.S.A. 65-4142 as presented in HB 2059. This statute is one of several tools we have to address drug manufacturing and distribution in our communities. We are aware of at least one Kansas district court decision where a charge of this statute was dismissed because the proceeds were derived in another state and therefore not from a violation of the "uniform controlled substances act" which the courts have ruled refers to the Kansas act and not to similar laws of other states.

This bill will clarify that the illegal conduct described in K.S.A. 65-4142 will also be illegal in furtherance of or resulting from illegal drug activities regardless of the jurisdiction where the illegal activity occurs. The proposed amendments clearly do no harm, and do not expand the base conduct this statute was designed to address. The passage of this bill will firmly clarify the point of law at question. The provisions of this bill will remedy what we believe is an unintended loophole in this statute. It will allow prosecution of those financially benefitting from illegal drug manufacturing and distributing, and those supporting or directing illegal drug manufacturing and distributing regardless of where the actual act of illegal drug manufacturing or distribution is taking place.

We respectfully, but strongly, urge you to pass this bill favorably.

Ed Klumpp

Ed Klumpp
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Legislative Committee Chair-Kansas Police Officers Association
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HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIR: TAXATION
MEMBER: TRANSPORTATION
JUDICIARY

Testimony in Support of the HB 2060

Representative Jeff King

March 9, 2009

Chair Owens & Members of the Senate Judiciary Committee;

Thank you for this opportunity to testify before you today in favor of HB 2060. This bill would end the presumption that a criminal receives only probation for battery against a law enforcement officer that causes bodily harm. By amending the state Sentencing Guidelines, HB 2060 would alter this presumption and recommend imprisonment for battery convictions that result in bodily harm to a law enforcement officer.

Under current Kansas law, it is a level VII felony to commit battery causing bodily harm against an on-duty law enforcement officer. Because the Sentencing Guidelines specifically provide for presumptive probation, however, almost no criminals convicted of this level VII felony serve jail time. HB 2060 changes this result. It provides a statutory presumption that these offenders will serve time in prison for their crime.

HB 2060 is narrowly tailored. It applies only to battery convictions that result in bodily harm to an officer. Situations that do not result in bodily harm will not receive presumptive imprisonment. Also, judges retain the discretion under HB 2060 to sentence an offender to probation if extenuating circumstances exist.

HB 2060 would amend Kansas law to more closely mirror statutes in our neighboring states. HB 2060 establishes a system for punishing battery crimes against law enforcement officers similar to that currently used in Nebraska, which mandates imprisonment for these offenders. If adopted, HB 2060 would still provide penalties that are **less** stringent than those in many states, including Missouri, Texas, Arkansas, and Oklahoma. For your reference, I have attached to this testimony a sheet detailing the current statutes addressing battery against a law enforcement officer in our neighboring states.

Police officers put their lives on the line every day to protect Kansans. Although battery against a law enforcement officer is a felony, only a small number of convicted offenders, if any, spend time in prison. This is an injustice that merits change. HB 2060 would ensure that criminals who cause our officers bodily harm spend time in prison for their

crime. To support the safety and the fine work of our law enforcement officers, I urge this committee to adopt HB 2060.

ARKANSAS

5-13-202. Battery in the second degree.

"(a) A person commits battery in the second degree if . . . .

(4) The person knowingly, without legal justification, causes physical injury to a person he or she knows to be:

(A) (i) A law enforcement officer, firefighter, or employee of a correctional facility while the law enforcement officer, firefighter, or employee of a correctional facility is acting in the line of duty.

(ii) As used in this subdivision (a)(4)(A), "employee of a correctional facility" includes a person working under a professional services contract with the Department of Correction, the Department of Community Correction, or the Division of Youth Services of the Department of Human Services . . . .

(b) Battery in the second degree is a Class D felony."

5-4-401. Sentence.

"(a) A defendant convicted of a felony shall receive a determinate sentence according to the following limitations:

(5) For a Class D felony, the sentence shall not exceed six (6) years; and

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MISSOURI

565.082. Assault of a law enforcement officer, emergency personnel, or probation and parole officer in the second degree, definition, penalty.

"1. A person commits the crime of assault of a law enforcement officer, emergency personnel, or probation and parole officer in the second degree if such person:

(2) Knowingly causes or attempts to cause physical injury to a law enforcement officer, emergency personnel, or probation and parole officer by means other than a deadly weapon or dangerous instrument;

3. Assault of a law enforcement officer, emergency personnel, or probation and parole officer in the second degree is a class B felony unless committed pursuant to subdivision (2), (5), (6), or (7) of subsection 1 of this section in which case it is a class C felony."

558.011. Sentence of imprisonment, terms--conditional release.

"1. The authorized terms of imprisonment, including both prison and conditional release terms, are:

(2) For a class B felony, a term of years not less than five years and not to exceed fifteen years;

(3) For a class C felony, a term of years not to exceed seven years;

OKLAHOMA

§21-649. Assault, battery or assault and battery upon police officer or other peace officer - Penalties.

B. Every person who, without justifiable or excusable cause knowingly commits battery or assault and battery upon the person of a police officer, sheriff, deputy sheriff, highway patrolman, corrections personnel, or other state peace officer employed or duly appointed by any state governmental agency to enforce state laws while said officer is in the performance of his duties, upon conviction, shall be guilty of a felony punishable by imprisonment of not more than five (5) years in a state correctional institution or county jail for a period not to exceed one (1) year, or by a fine not exceeding Five Hundred Dollars ($500.00), or by both such fine and imprisonment.

C. As used in this section and in Section 650 of this title, "corrections personnel" means any person, employed or duly appointed by the state or by a political subdivision, who has direct contact with inmates of a jail or state correctional facility, and includes but is not limited to, Department of Corrections personnel in job classifications requiring direct contact with inmates, persons providing vocational technical training to inmates, education personnel who have direct contact with inmates because of education programs for inmates, and persons employed or duly appointed by county or municipal jails to supervise inmates or to provide medical treatment or meals to inmates of jails."

IOWA

708.3A. Assaults on Persons Engaged in Certain Occupations.

"1. A person who commits an assault, as defined in section 708.1, against a peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, or fire fighter, whether paid or volunteer, with the knowledge that the person against whom the assault is committed is a peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, or fire fighter and with the intent to inflict a serious injury upon the peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, or fire fighter, is guilty of a class "D" felony.

3. A person who commits an assault, as defined in section 708.1, against a peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, or fire fighter, whether paid or volunteer, who knows that the person against whom the assault is committed is a peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, or fire fighter, and who causes bodily injury or mental illness, is guilty of an aggravated misdemeanor.

4. Any other assault, as defined in section 708.1, committed against a peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, or fire fighter, whether paid or volunteer, by a person who knows that the person against whom the assault is committed is a peace officer, jailer, correctional staff, member or employee of the board of parole, health care provider, employee of the department of human services, employee of the department of revenue, or fire fighter, is a serious misdemeanor…"

708.1. Assault Defined.

"An assault as defined in this section is a general intent crime. A person commits an assault when, without justification, the person does any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

903.1 Maximum Sentence for Misdemeanants.

2. When a person is convicted of an aggravated misdemeanor, and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years. There shall be a fine of at least six hundred twenty-five dollars but not to exceed six thousand two hundred fifty dollars. When a judgment of conviction of an aggravated misdemeanor is entered against any person and the court imposes a sentence of confinement for a period of more than one year the term shall be an indeterminate term.

Texas

§ 22.01. Assault.

"(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

(1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant;

(4) a person the actor knows is a security officer while the officer is performing a duty as a security officer…"

§ 12.34. Third Degree Felony Punishment.

SUBCHAPTER C. ORDINARY FELONY PUNISHMENTS

"(a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the institutional division for any term of not more than 10 years or less than 2 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000."

NEBRASKA

28-931 Assault on an officer in the third degree; penalty.

"*(1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer, a probation officer, or an employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.*

(2) Assault on an officer in the third degree shall be a Class IIIA felony."

28-105 Felonies; classification of penalties; sentences; where served; eligibility for probation.

"(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into nine classes which are distinguished from one another by the following penalties which are authorized upon conviction:

"*...Class IIIA felony Maximum - five years imprisonment, or ten thousand dollars fine, or both*

Minimum – none"

COLORADO

18-3-203. Assault in the second degree.

"PART 2 ASSAULTS

(1) A person commits the crime of assault in the second degree if:

(c) With intent to prevent one whom he or she knows, or should know, to be a peace officer or firefighter from performing a lawful duty, he or she intentionally causes bodily injury to any person...

(c) If a defendant is convicted of assault in the second degree pursuant to paragraph (b), (c), (d), or (g) of subsection (1) of this section or paragraph (b.5) of this subsection (2), except with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406. A defendant convicted of assault in the second degree pursuant to paragraph (b.5) of this subsection (2) with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, shall be sentenced in accordance with section 18-1.3-401 (8) (e) or (8) (e.5). "

18-1.3-401. Felonies classified - presumptive penalties.

"PART 4 SENTENCES TO IMPRISONMENT

"*(IV) If a person is convicted of assault in the first degree pursuant to section 18-3-202 or assault in the second degree pursuant to section 18-3-203 and the victim is a peace officer or firefighter engaged in the*

*performance of his or her duties, as defined in section 18-1.3-501 (1.5) (b), notwithstanding the provisions of subparagraph (III) of paragraph (a) of this subsection (1) and subparagraph (II) of this paragraph (b), the court **shall** sentence the person to the department of corrections. In addition to a term of imprisonment, the court may impose a fine on such person pursuant to subparagraph (III) of paragraph (a) of this subsection (1)....*"

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UNDERSHERIFF

Date: March 09, 2009

Chairperson Owens, Vice Chair Schmidt, and distinguished members of the Senate Judiciary Committee,

My name is Bob Keller and I am the Commander of the Investigations Division for the Johnson County Sheriff's Office. Thank you for allowing me the opportunity to testify today in support of HB 2060.

According to the U.S. Department of Justice, assaults on law enforcement officers in the Midwest are on the rise. 8087 law enforcement officers were assaulted in the line of duty in 2007, an increase of 697 over the previous year. Additionally, there was a 14% increase in the number of Midwest law enforcement officers assaulted in the line of duty in the last decade. This unfortunate trend is dangerous for two reasons. First, it calls into question the effectiveness of the current sentencing guidelines that mandate presumptive probation for offenders. Second, the financial cost associated with in-the-line-of-duty injuries places a burden on Kansas taxpayers.

There is a moral imperative to deal effectively with those that would attack law enforcement officers. The knowledge that imprisonment is the presumptive sentence for battering a law enforcement officer will dissuade would-be attackers. Additionally, a convicted offender would be less prone to recidivate having experienced a sentence of presumed imprisonment as opposed to a sentence that presumed probation. The reduction in attacks on law enforcement officers would result in safer and more secure Kansas communities

In addition to providing a greater deterrent against attacks on law enforcement officers, HB 2060 is fiscally responsible. In-the-line-of-duty injuries are inherently associated to worker's compensation claims. According to the Kansas Division of Worker's Compensation, the mean total cost of a worker's compensation claim in 2007 was $21,686.76. Analysts agree that there is a strong correlation between crime rates and the economy. In slow economic times, it is essential that our efforts are focused on providing services in a fiscally responsible manner. HB 2060 meets these objectives very efficiently with minimal bed space impact at the state level.

In closing, I urge the committee to vote favorably on HB 2060. I'm happy to stand for any questions you may have.

Respectfully,

Captain Bob Keller
Johnson County Sheriff's Office

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Kansas Association of Chiefs of Police
PO Box 780603, Wichita, KS 67278 (316)733-7301

Kansas Peace Officers Association
PO Box 2592, Wichita, KS 67201 (316)722-8433

March 9, 2009

Testimony to the Senate Judiciary Committee
In Support of HB 2060
Presumptive Imprisonment for Battery to a Law Enforcement Officer

Senator Owens and committee members,

The Kansas Association of Chiefs of Police and the Kansas Peace Officers Association support the provisions of SB 2060. The bill is relatively simple in nature. It does not create a new crime and it does not increase the severity level of the crime. It does simply add a special rule which will make the sentence for this offense presumptive imprisonment.

THE PROBLEM: Since this crime is a SL7 person crime, an offender is sentenced as presumptive probation for the first and second offenses unless they have prior person felony convictions. But for a lesser misdemeanor battery to a law enforcement officer, a judge could sentence the offender to some local jail time if they found that appropriate. But the more serious felony battery offense at SL7 a judge must find aggravating factors to do so.

THE SOLUTION: As with most problems there are multiple solutions, but the most acceptable solution appears to be the one proposed in this bill. It also retains the sentencing level recommendation for this crime proposed by the Kansas Sentencing Commission Proportionality Subcommittee and the Kansas Recodification Commission.

RATIONALE: Two times of receiving presumptive probation for injuring a law enforcement officer by assault is not right and does nothing to deter the offender from committing the crime. Nor does it provide appropriate punishment for an offense against the representative of the people in a law and order role. This bill will assure a just result for the perpetrators of this crime. The estimated 7-11 prison beds required is not prohibitive.

We respectfully encourage you to recommend this bill favorably for passage.

Ed Klumpp
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TESTIMONY BY JAMES M. CONCANNON
DISTINGUISHED PROFESSOR OF LAW
WASHBURN UNIVERSITY SCHOOL OF LAW
HB 2250 - MARCH 9, 2009

I am interested in HB 2250 because I have taught Evidence at Washburn Law School since 1973 and have written extensively on both the Kansas and Federal rules of evidence.

Current K.S.A. 60-455 embodies a fundamental principle of American law: when a person is charged with a crime, evidence that the person has committed other criminal acts is inadmissible when it is relevant only to show that the person has a propensity to commit crimes of that type, so likely committed this one. Prior crimes are excluded not because they are wholly irrelevant - what we know about recidivism tells us that those who commit crimes have a somewhat increased probability of doing so again - but because we fear that juries will misuse the evidence to convict defendants because they are bad people even without sufficient evidence they committed the act charged.

However, current law does allow evidence of prior crimes when it is relevant in a way that does not rely upon the propensity inference. The reference in the Supplemental Note to HB 2250 to the recent decision in *State v. Prine*, 287 Kan. ___, 200 P.3d 1 (2009), could be misunderstood. In prosecutions for child molestation today, evidence that defendant molested other children will be admitted to prove, for example, identity if defendant claims someone else molested the child, or common plan if defendant claims the child fabricated the accusation, if the other acts of molestation occurred in a strikingly similar way to the crime charged, amounting to a signature. If defendant admits the act but claims it was done with innocent intent, other offenses are admissible on a lesser showing of similarity to prove intent or absence of mistake.

In *Prine*, however, Justice Beier found it "disturbing" that "the modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person sexually abusing a child. In short, sexual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness." She suggested, "it may be time for the legislature to examine the advisability" of amending 60-455 "or some other appropriate adjustment of the statutory scheme."

The problem with HB 2250 is that it goes far beyond the problem of pedophilia that disturbed Justice Beier. It makes a sweeping change applicable in every sex crime prosecution. Even in a child sexual abuse prosecution, if defendant is charged with fondling his six-year old niece on the couch at his home, this bill provides that evidence "is admissible " of defendant's prior rape of someone's grandmother he abducted to the woods. It would be, as subsection (b) describes "evidence of the defendant's commission of another act or offense of sexual misconduct" and it would be relevant to show a propensity for sexual deviance. It is not a prerequisite to admission that there have been a conviction for the prior act or even proof of it by a preponderance of the evidence, let alone beyond a reasonable doubt. One has to be concerned that indiscriminate admission of this kind of inflammatory evidence could increase the number of wrongful convictions.

Thus, I am not persuaded there is a compelling need for far-reaching change beyond

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Justice Beier's prior pedophilia example, and I urge that any amendment be limited to those cases. One should not use a sledgehammer when a scalpel will do. Even with that limitation, I worry there will be more wrongful convictions when a minor makes false allegations - and they do sometimes for a variety of reasons - against a person who long ago molested a minor in circumstances in which there were not striking similarities or a signature that would allow the incident to be admitted under current law. See Lempert, Gross, and Liebman, *A Modern Approach to Evidence*, 457, at 460 (3d ed. 2000) (suggesting a preferable approach would be to extend statutes like K.S.A. 60-449 "to admit evidence of demonstrably obsessive or compulsive misbehavior along with (and analogous to) evidence of habit or routine practice.")

HB 2250 originally tracked nearly verbatim Federal Rule of Evidence 413, which Congress enacted, effective in 1995. Congress bypassed the normal rules amendment process through the U.S. Judicial Conference. See James Joseph Duane, *The New Federal Rules of Eviudence on Prior Acts of Accused Sex Offienders: A Poorly Drafted Version of a Very Bad Idea,* 157 F.R.D. 95 (1994) (noting Rule 413 was added to Violent Crime Control and Law Enforcement Act without hearings before either Judiciary Committees to secure favorable vote of single House member). Less than a handful of states have adopted Rule 413 verbatim. Rule 413 was widely criticized by evidence scholars on policy grounds, including that studies suggest that for a number of categories of sex offenses, rates of recidivism actually are lower than for other crimes. See the extensive discussion in Lempert, Gross, and Liebman, *supra*, 457-465. The rule also was criticized for poor drafting and uncertainties - e.g., the "is admissible" language was feared to eliminate the trial court's ordinary discretion to exclude evidence when probative value is substantially outweighed by the risk of prejudice, as it might be in my example involving the grandmother. Almost all courts, including several leading cases in the Tenth Circuit, have held that there would be due process concerns if the court did not retain discretion to exclude for prejudice, but the matter is made litigable by the language used. The House Judiciary Committee attempted to deal with this issue by adding the reference to K.S.A. 60-445, but there are difficulties with that fix too. Even if discretion is retained, neither Rule 413 nor K.S.A. 60-445 give judges guidance for its exercise.

While the U.S. Judicial Conference opposed Rules 413-415, believing the issue was adequately addressed by Rule 404(b), it subsequently, in the alternative, submitted a better drafted proposal "to correct ambiguities and possible constitutional infirmities." Congress adhered to its version. If there is to be a change that goes beyond Justice Beier's prior pedophilia example, a broader change I don't support, I believe the Judicial Conference version is better. It would have amended Federal Rule 404(a) to expand the admissibility of propensity evidence. That is the rule that ordinarily excludes character evidence to prove conduct in accord with character [the Kansas equivalent is K.S.A. 60-447]. It then would have amended the prior crimes section, Rule 404(b) [corresponding to K.S.A. 60-455] to make it subject to the amendment in Rule 404(a). My printed testimony quotes the core of the Judicial Conference proposal, showing the greater guidance it provides:

"(4) **Character in sexual misconduct cases.** Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.

(A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:

(i) proximity in time to the charged or predicate misconduct;
(ii) similarity to the charged or predicate misconduct;
(iii) frequency of the other acts;
(iv) surrounding circumstances;
(v) relevant intervening events; and
(vi) other relevant similarities or differences.

(B) [similar to section (c) of HB 2250]

(C) [definition section similar to section (e) of HB 2250]"

To the extent the reference in subsection (b) to K.S.A. 60-445 is meant to preserve trial court discretion, it does so imperfectly. K.S.A. 60-445 differs from Federal Rule 403 because it expressly authorizes exclusion of relevant evidence only with its "probative value is substantially outweighed by the risk" of unfair or harmful surprise. For reasons that are unknown, we struck authority in Uniform Rule 45, upon which 60-445 was based, to exclude when probative value was substantially outweighed by the risk of "undue prejudice," "confusing the issues," "misleading the jury," or "undue consumption of time." Of course, the Kansas Supreme Court in *State v. Davis,* 213 Kan. 54, 59, 515 P.2d 802 (1973), appropriately held that courts have to have authority to exclude evidence when probative value is substantially outweighed by the risk of unfair prejudice, and for the other listed reasons.

Nevertheless, omission from 60-445 of these grounds for exclusion has been harmful. While many cases apply the statutory standard when balancing for unfair prejudice, the failure of the statute to mention prejudice has led our Court, in some cases, to say loosely that evidence of prior crimes can be excluded when probative value is merely "outweighed" by the risk of prejudice or even that they are admissible only if probative value "outweighs" prejudice. See, e.g., *State v. Tompkins*, 271 Kan. 324, 329, 21 P.3d 997 (2001) (when evidence is relevant to prove an issue specified in K.S.A. 60-455, the court must find that "the probative value of the evidence outweighs its potential prejudice."). Both alternate standards tilt the balance more against admissibility than did Uniform Rule 45, K..S.A. 60-445, or Federal Rule 403.

In general, but particularly if HB 2250 goes forward in its current form tracking Federal Rule 413, I recommend amending K.S.A. 60-445 to more closely track Federal Rule 403:

60-445. Discretion of Judge to Exclude Admissible Evidence. Except as in this article otherwise provided, the judge may in ~~his or her~~ the judge's discretion exclude evidence if ~~he or she~~ the judge finds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, or by the risk that its admission will unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.