Approved: May 22, 2009
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Thomas C. (Tim) Owens at 9:35 a.m. on March 12, 2009, in Room 545-N of the Capitol.

All members were present except:
Senator Derek Schmidt- 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
Jerry Donaldson, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Senator Faust-Goudeau
Elizabeth Bossell
Pete Bodyk, Manager, Traffic Safety Section, Kansas Department of Transportation
Helen Pedigo, Kansas Sentencing Commission
Tom Stanton, Kansas County & District Attorneys Association
Will Larson, Associated General Contractors of Kansas
Dean Ferrel, Ferrell Construction
Bennie Crossland, President, Crossland Construction Company
Woody Moses, Kansas Ready Mixed Concrete Association
Clint Patty, Frieden & Forbes Law Firm
Steve Glass, LRM Industries, Inc.

Others attending:
See attached list.

Senator Schordorf moved, Senator Lynn seconded, to approve the Committee minutes of January 22 and January 23. Motion carried.

The Chairman opened the hearing on **SB 279 - Mandatory minimum sentence for involuntary manslaughter while driving under the influence of alcohol drugs.**

Senator Faust-Goudeau testified in support as sponsor of the bill. The Senator related the circumstances of a recent case where the offender received little over seven years imprisonment for the death of two people and the serious injury to two other people. The offender was then allowed to be free on bail while the case was appealed. It is unconscionable to allow drunk drivers so much leniency and it is time for stricter penalties regarding drunk drivers to enacted. (Attachment 1)

Elizabeth Bossell spoke in support as the mother of a victim. Ms. Boswell related the anguish and grief her family has suffered due to the many court dates and legal proceedings due to delays, continuances, and appeals. The changes contained in this bill will eliminate other families from enduring the same pain. (Attachment 2)

Written testimony in support of **SB 279** was submitted by:
Avis E. Cosby (Attachment 3)

There being no further conferees, the hearing on **SB 279** was closed.

The Chairman opened the hearing on **SB 280 - Suspension and restriction of driving privileges for test refusal, test failure or alcohol or drug-related conviction for persons under 21.**

Pete Bodyk testified in opposition relating enactment of the bill as written would cause Kansas to be non-compliant with a federal requirement on minimum penalties for repeat DUI offenders. The penalty for this non-compliance is a transfer of three percent of the state's core construction funds ($7.9 million) to safety

programs. The transfer of funds would continue as long as the State remains non-compliant. This action would have a significant impact on the Department of Transportation's budget and recommends this bill not be enacted. (Attachment 4)

There being no further conferees, the hearing on **SB 280** was closed.

The Chairman opened the hearing on **SB 281 - Sentencing for severity level 4 drug crimes; probation or assignment to community correctional services up to 18 months.**

Helen Pedigo appeared in support stating enactment of **SB 281** will mirror what is often current practice reflecting sentencing based on the 2003 SB 123 substance abuse treatment program. This will allow the probation term to run the full term for treatment. Ms. Pedigo also requested the effective date be changed to publication in the Kansas Register. (Attachment 5)

Tom Stanton spoke in favor indicating the bill is intended to correct an inconsistency in the sentencing statutes and urged enactment of the bills (Attachment 6)

There being no further conferees, the hearing on **SB 281** was closed.

The Chairman opened the hearing on **SB 292 - Civil procedure, liens; requiring notice of commencement and notice of furnishings to be filed prior to filing certain commercial property liens.**

Will Larson testified in support stating **SB 292** offers a method for remote claimants (second-tier subcontractors and suppliers) to notify the general contractor of their intent to provides good and services on a construction project. This will help ensure that all parties are paid for goods and services and protect all parties of a construction contract. (Attachment 7)

Dean Ferrell spoke in favor indicating that over the years much efforts has been exerted to assure that laws are in place to protect vendors and subcontractors are paid in a timely manner. These laws generally work well but there is a gap that occurs when general contractors pay subcontractors for services rendered without the knowledge that the subcontractor has failed to pay their subcontractors or vendors leaving the general contractor at risk. This bill will allow contractors to better monitor the payment histories of its subcontractors. (Attachment 8)

Bennie Crossland appeared as a proponent stating general contractors are required to give owners a completed project free of liens. When remote claimants do not get paid, they file liens which in turn can require the general contractor pay twice for the same work. This bill will reduce liens being filed and ensure remote claimants are paid. (Attachment 9)

Woody Moses spoke in opposition stating Kansas has a good lien law structure that spreads the risk in a balanced manner. Lien laws exist for a good reason and **SB 292** unfairly tips the scale against suppliers and subcontractors by decreasing the time to life a lien fro 90 days to 21 days. This bill will increase construction costs, create unnecessary paperwork, and lacks a compelling reason for passage. (Attachment 10)

The Chairman indicated the Committee was out of time and would continue the hearing at the next Committee meeting.

The next meeting is scheduled for March 13, 2009.

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

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: MARCH 12, 2009

NAME	REPRESENTING
Ed Klumpp	KACP & KPOA
Joe Mosimann	Hein Law
Pete Bodyk	KDOT
Marcus Barfield	SRS
Helen Pedigo	KSC
Brenda Harmon	KSC
KAREN WITTMAN	KS-AG / KDOT
Spencer Duncan	Capitol Connection KS
TOM STANTON	KCDAA
Richard Samaniego	Kennedy & Assoc.
Elizabeth Bossell	Sen Faust-Goudeau HB279
SEAN MILLER	CAPITAL STRATEGIES
JEREMY S BARCLAY	KDOC

STATE OF KANSAS

OLETHA FAUST-GOUDEAU
SENATOR, 29TH DISTRICT
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TOPEKA
SENATE CHAMBER

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER: FEDERAL AND STATE AFFAIRS
ETHICS AND ELECTIONS
MEMBER: COMMERCE
LOCAL GOVERNMENT
JOINT COMMITTEE ON ARTS AND CULTURAL RESOURCES

email: Oletha.Faust-Goudeau@senate.ks.gov

Testimony

SB 279

Senate Judiciary Committee
March 12, 2009

Chairman Owens, esteemed colleagues,

A couple of years ago, I was approached by two heartbroken mothers who were suffering as much from a sense of injustice as they were grieving for the death of their sons. Dominique Green and Adrian Crosby were killed by a drunk driver in April 2006. Two other people in their car were seriously injured. The drunk driver's blood-alcohol level was more than twice the legal limit.

This devastated the families. As so often happens in these tragedies, the man driving the car received only minor injuries, which further increased their sense of the injustice. The outrage that brought them to me, however, was the feeling that the driver had not been punished with a sentence proportionate to the loss of two lives. Charged with two counts of involuntary manslaughter, DUI, and two counts of aggravated battery with grievous bodily harm, he was sentenced to only a little over seven years. In addition to that, the driver's lawyer filed an appeal, and the driver was out for 18 months, on bail of only $1,000, while the appeal process advanced.

I will let their mothers tell you about Dominique and Adrian, and will just point out that these were two fine young men, home on leave from the Navy, ready to start college when their service ended, with a future that had no limits, however, their lives were tragically cut short. That the man who caused their deaths will be eligible for parole in less than six years is a travesty of justice.

It is unconscionable that we allow drunk drivers so much leniency. We all know individuals with multiple DUIs who still drive. We must find a way to make these penalties stiffer, and we must find a way to make sure that repeat drunk drivers are kept off our streets, not so much as punishment as to secure the safety of our families. SB 279 is a further step in re-designing the laws concerning DUIs. We need to seriously address this problem with an overhaul of the sentencing guidelines. Let's start that process by supporting SB 279 favorable for passage.

Thank you for your time and your consideration of this heart-rending situation.

Sincerely,

Oletha Faust-Goudeau
Senator, 29th District

Senate Judiciary
3-12-09
Attachment 1

Testimony

Elizabeth Bossell
March 12, 2009
Senate Bill 279

Chairman Owens, esteemed Senators,

It happened to me. It is a parent's worst nightmare. I hear it on the radio, see it on TV, hear stories of it happening to other families, but this particular day in 2006, it happened to me. I was handed the greatest loss that a parent can face, the death of a child. I feel a tremendous loss, pain and sadness that is hard to explain. It left a hole inside of me that cannot be repaired. I think about him daily. I spend time visiting his resting place. A precious life was taken from me. Not only was the actual death untimely and tragic, but I had to endure funeral arrangements, the actual funeral, court dates, sentencing, and the perpetrator's release from prison. It has been almost three years and the drunk driver has just begun his sentence.

My story begins with my one and only child named Dominique Green, born July 31, 1984. Dominique, 21 years old, was a typical young man, who was not perfect, but on a good path. He was attending Wichita State University, wrapping up his last year of college. He would have graduated with his Bachelor's degree in Criminal Justice in May 2007. He decided to accompany a visiting relative, Adrian Crosby, out for a night on the town to celebrate Adrian's birthday in Hutchinson, Kansas. Adrian was visiting home in Wichita for a week on military leave where he was serving in the United States Navy. Adrian's birthday was the next day. He would have turned 22. Dominique, Adrian and two of their friends were heading back to Wichita from Hutchinson. Leaving Hutchinson is where the tragedy happened. The car that my son was riding in was hit head on by a drunk driver. This drunk driver, Robert Silhan, was driving on the highway in the wrong direction.

I woke up that Friday morning not realizing that it was Good Friday (the same day that Jesus Christ died on the cross). I climbed out of bed, then checked my cell phone that had been on vibrating mode. I had approximately 20 missed calls. I knew immediately that something had happened. My heart sank. My very first thought was that something had happened to my mother. I knew that she wasn't sick. Then, I spoke with my sister who was crying uncontrollably and I received the news that would rock any parent's world. My only son was KILLED in a car accident. The following week was unimaginable. I had to write my son's obituary, view his lifeless body and attend his funeral.

The months and years following the funeral have also been hard. It is a constant reminder of my son's death due to the many court dates and legal proceedings. What I thought was the last court appearance, was the sentencing process, but to my surprise that was not the last court appearance. I have been in and out of court for the past three years. It has been delay after delay, continuance after continuance, appeals, Supreme Court, motions, and more appeals. How much should a grieving family have to endure?

This tragedy has given me a new purpose. I must help in the fight to toughen the penalties on DUI offenders. First offenders (no prior record) that drink, drive and kill in the state of Kansas have a maximum penalty of 3.5 years. That penalty seems quite relaxed for someone to KILL another human being. Those minimal sentences are received for robberies, dog fighting, and drug charges. We have to place more value on a human life. SB 279 addresses the length of that sentence by extending it to 10 years. Other changes that I propose for the future are: changing the severity level from level four to level three, and making a change so that judges do not have discretion to give non- prison sanctions. This will make it mandatory for those who drink, drive and kill to serve out their prison sentence.

Statistics show that on average, someone is killed every 40 minutes by a drunk driver, someone is injured every 60 seconds, and that a drunk driver on average drives drunk 87 times before being caught.

Those who drink, drive, and kill should have stiffer, mandatory penalties. These changes will eliminate others from going through many of the lengthy court proceedings, send a clear message to drivers, and minimize the demand for court-appointed attorneys.

Thank you for your time and your consideration,

Elizabeth Bossell

To: The Honorable Tim Owens, Chairperson, & Committee Members
Senate Committee on Judiciary
Statehouse, Room 536-N
Topeka, KS 66612

Subject: Senate Bill No. 279

Date: March 12, 2009

Hello. My name is Avis E. Crosby, and I want to speak to you about the importance of Senate Bill No. 279.

On April 14, 2006, my son, Adrian O. Crosby, and his cousin, Dominique Green, were killed in a head-on collision on K-96 near South Hutchinson. Their girlfriends, Tiffany Whitehurst and Shanez Majeed, were seriously injured. Robert Silhan, the driver of the vehicle that struck them was driving under the influence of alcohol.

In February, 2007, Robert Silhan pleaded guilty to two counts of vehicular manslaughter and two counts of aggravated battery. In April, 2007, he was sentenced to seven years in prison, which is currently the maximum sentence allowable under the law. In August, 2007, he was released from jail after posting a $10,000 appeal bond. In December 2008, the Kansas Supreme Court denied Mr. Silhan's appeal and he was ordered to turn himself in at the Reno County jail, which he did January 14, 2009. Currently, Mr. Silhan is serving his sentence, but is continuing the appeals process. As you can imagine, this has been a long and difficult process. The lives of many people were shattered on that fateful day, especially the families of the young men who lost their lives. While we can't go back in time and change the events leading up to the accident, we do have an opportunity and an obligetion to make sure the laws in place sufficiently protect the innocent and, at the same time, effectively penalize the offenders.

SB 279 is a very important piece of legislation. It would require offenders who are convicted of involuntary manslaughter while driving under the influence of alcohol or drugs to serve a mandatory minimum sentence of 120 months imprisonment as a condition of probation. I would also like the Committee to consider the following items when drafting this piece of legislation, because a seven-year prison sentence is not sufficient for the loss of two lives.

- Sentencing guidelines should be harsher when multiple lives are lost.
- First-time offenders should be subject to the maximum penalty allowable by law. I think this would reduce the number of repeat offenders.

Currently, Kansas laws are more lenient than other states. Adopting Senate Bill 279 would ensure that Kansas citizen are better protected from Drunk Drivers. When considering adoption of Senate Bill 279, please remember Adrian O. Crosby and Dominique N.T. Green.

Cordially,
Avis E. Crosby
316-519-2847

Senate Judiciary
3-12-09
Attachment 3

KANSAS
DEPARTMENT OF TRANSPORTATION

Kathleen Sebelius, Governor
Deb Miller, Secretary

http://www.ksdot.org

TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE

REGARDING SENATE BILL 280
RELATED TO UNDER 21 DUI CONVICTIONS, PENALTIES

March 12, 2009

Mr. Chairman and Committee Members:

I am Pete Bodyk, Manager of the Kansas Department of Transportation's Traffic Safety Section. On behalf of the Kansas Department of Transportation (KDOT), I am here to provide testimony in opposition of Senate Bill 280, regarding DUI convictions and penalties.

There is one amendment in this bill that will cause Kansas to be non-compliant with a federal requirement on minimum penalties for repeat DUI offenders. A requirement in 23 USC 164 of the federal code states that *"an individual convicted of a second or subsequent offense for driving under the influence shall be subject to the impoundment or immobilization of each of the individual's motor vehicles or the installation of an ignition interlock system on each of the motor vehicles."* On page 2, line 34 the word "first" is being stricken, and the word 'second" is being added. This means that for a second conviction, the individual's vehicles will not be impounded, immobilized, or have an ignition interlock installed.

The penalty for non-compliance is a transfer of three percent of the state's core highway construction funds to safety programs, which may address either alcohol-impaired driving or hazard elimination projects. The penalty would amount to a transfer of approximately $7.9 million in 2009, based on currently authorized federal funding levels. The transfer would continue as long as the state remains non-compliant.

We are waiting for an official determination from the National Highway Traffic Safety Administration (NHTSA) concerning this bill, but based on past discussions with NHTSA on 23 USC 164, we believe the referenced amendment will cause Kansas to be non-compliant.

Thank you for your time, I will gladly stand for questions.

BUREAU OF TRANSPORTATION SAFETY & TECHNOLOGY
Chief Michael D. Floberg, P.E.
Dwight D. Eisenhower State Office Building
700 S.W. Harrison Street; Topeka, KS 66603-3745 • (785) 296-5555 • Fax: (785) 291-5555
TTY (Hearing Impaired): 711 • e-mail: publicinfo@ksdot.org • Public Access at North Entrance of Build

KANSAS

KANSAS SENTENCING COMMISSION
Honorable Ernest L. Johnson, Chairman
Helen Pedigo, Executive Director

KATHLEEN SEBELIUS, GOVERNOR

SENATE JUDICIARY COMMITTEE
The Honorable Tim Owens, Chair

SENATE BILL 281
Severity Level 4 Drug Felony Extension of Standard Probation Term

TESTIMONY AND REQUEST FOR AMENDMENT
By Helen Pedigo, Executive Director
Kansas Sentencing Commission
March 12, 2009

Chairman Owens and committee members, thank you for the opportunity to testify in support of SB 281. The Kansas Sentencing Commission believes that extending the standard probation term from 12 to 18 months for this group mirrors the intent of the Legislature when the SB 123 program was initiated in 2003. This alternative sentencing substance abuse treatment program provides for up to 18 months of treatment, and it stands to reason that the probation supervision term should cover the same amount of time. While it is currently possible to extend probation for good cause, this bill would allow that probation term at sentencing, allowing the full term for treatment.

While most offenders finish substance abuse treatment in 8 to 12 months, treatment specialists recognize that substance abuse relapse is possible, if not probable. The longer probation term is warranted, so that officers can continue jurisdiction to maintain public safety, and have the flexibility to quickly move offenders into the level of treatment or relapse prevention necessary to encourage recovery. Offenders may be discharged from probation supervision earlier, if warranted and as determined by the court.

We do, however, request one amendment to **change the effective date to publication in the Kansas Register**. Practitioners had been sentencing offenders to 18 months as a part of SB 123. However, State v. Holt, 186 P.3d 803 (Kan. 2007)(Published June 10, 2008), indicated that standard probation for this group remains 12 months in length. As this is a practice that was common prior to the publication of the case, the Kansas Sentencing Commission anticipates that this amendment would be welcomed by justice system stakeholders.

Thank you for your time, and I would be happy to answer any questions.

700 SW Jackson Street, Suite 501, Topeka, KS 66603-3714

Voice 785-296-0923 Fax 785-296-0927 http://www.kansas.gov/ksc

Senate Judiciary
3-12-09
Attachment 5

No. 95,278[1]

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

Appellee,

v.

COURTNEY D. HOLT,

Appellant.

SYLLABUS BY THE COURT

1. The interpretation of a statute is a question of law over which an appellate court has unlimited review. An appellate court is not bound by the district court's interpretation of a statute.

2. An appeal will not be dismissed for mootness unless it is clearly and convincingly shown that the actual controversy has ended and the only judgment that could be entered would be ineffectual for any purpose and an idle act insofar as rights involved in the case are concerned.

3. For crimes committed on or after July 1, 1993, the duration of probation in felony cases is set forth in K.S.A. 21-4611(c). However, for certain felony convictions, the district court may impose a longer period of probation if it finds and sets forth with particularity that public safety will be jeopardized or that the welfare of the inmate will not be served by imposing a shorter term.

4. K.S.A. 21-4729(c) only addresses the duration of a defendant's term of drug treatment, whereas K.S.A. 21-4611(c) addresses the duration of a defendant's term of probation.

5. The sentencing court does not violate the defendant's constitutional rights by sentencing the defendant based on a criminal history which is not proved to a jury beyond a reasonable doubt.

Appeal from Johnson District Court, PETER V. RUDDICK, judge. Opinion filed July 13, 2007. Remanded with directions.

Jay Witt, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant district attorney, *Paul J. Morrison*, district attorney, and *Phill Kline,* attorney general, for appellee.

Before MALONE, P.J., GREEN and MARQUARDT, JJ.

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MALONE, J.: Courtney D. Holt appeals the district court's imposition of an 18-month probation term following his conviction of one count of attempted possession of marijuana. Holt claims his presumptive probation term under the Kansas Sentencing Guidelines Act (KSGA) was limited to 12 months, and the district court failed to make the required findings to extend the probation term to 18 months.

Holt pled guilty to one count of attempted possession of marijuana in violation of K.S.A. 65-4162, a drug severity level 4 felony. Holt's criminal history score was H. On June 22, 2005, the district court imposed a sentence of 7 months, plus 12 months' postrelease supervision, and placed Holt on 18 months' probation. The district court ordered Holt to attend mandatory drug treatment for up to 18 months pursuant to Senate Bill 123 (K.S.A. 21-4729). The district court also ordered Holt's sentence to run consecutive to his sentence in case No. 04CR1259. Holt timely appeals.

Holt claims the district court erred in imposing a probation term of 18 months. Holt claims his presumptive probation term under the KSGA was limited to 12 months and the district court failed to make the required findings under K.S.A. 21-4611(c)(5) to extend the probation term to 18 months. Holt's argument requires statutory interpretation. "The interpretation of a statute is a question of law over which this court has unlimited review. An appellate court is not bound by the trial court's interpretation. [Citation omitted.]" *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006).

As a preliminary matter, the State argues Holt's appeal is moot because Holt's probation has been subsequently revoked. An appeal will not be dismissed for mootness unless it is clearly and convincingly shown that the actual controversy has ended and the only judgment that could be entered would be ineffectual for any purpose and an idle act insofar as rights involved in the case are concerned. *State v. McIntyre*, 30 Kan. App. 2d 705, 706, 46 P.3d 1212 (2002).

In September 2005, the State filed a motion to revoke Holt's probation. Holt stipulated to the probation violations, and the district court revoked and then reinstated his probation in November 2005. In August 2006, the State filed another motion to revoke Holt's probation. Holt stipulated to failing to complete outpatient treatment, failing to report to his probation officer, and failing to pay his court fees. On November 17, 2006, the district court revoked Holt's probation and ordered him to serve his underlying sentence. Because Holt's probation was revoked due to technical violations, he was released from his postrelease supervision term. See K.S.A. 22-3716(e).

The State argues the issue concerning Holt's probation term is moot because the district court has revoked Holt's probation and ordered him to serve his underlying sentence. However, because the State's final motion to revoke probation was filed more than 12 months after the probationary period began, the issue raised by Holt is not moot for this reason. If the district court had only ordered 12 months of probation, as Holt argues it should have, then the State's motion to revoke probation would have been untimely.

The State also argues the appeal is moot because Holt has now completely served his sentence. In November 2006, the district court revoked Holt's probation and ordered him to serve his underlying 7 months' sentence. Holt had already earned significant jail credit at that time, but the record is unclear exactly how much jail credit Holt had earned. The journal entry from the November 2005 revocation hearing indicated Holt had earned 118 days of jail credit, but the journal entry from the November 2006 revocation hearing indicated he had only earned 62 days of jail credit. In either event, it appears that Holt has now served his underlying sentence in this case.

However, we note the district court ordered Holt's sentence to run consecutive with his sentence in case No. 04CR1259. We do not know Holt's current incarceration status, and we are unable to determine

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from the record to what extent Holt's sentence in this case may have affected his term of incarceration or the potential release date in the other case. Because the record does not conclusively establish that our opinion is only advisory, we decline to dismiss Holt's appeal as moot.

Turning to the merits of the appeal, Holt claims the district court erred in imposing a probation term of 18 months. Holt contends that under K.S.A. 21-4611, the maximum probation term the district court could have imposed was 12 months. The State, however, contends the district court was authorized to impose a probation term of 18 months pursuant to K.S.A. 21-4729.

For crimes committed on or after July 1, 1993, the duration of probation in felony cases is set forth in K.S.A. 21-4611(c). Holt committed a drug severity level 4 felony. As such, Holt's presumptive term of probation should have been limited to 12 months pursuant to K.S.A. 21-4611(c)(3). However, the district court may impose a longer period of probation if it finds and sets forth with particularity that public safety will be jeopardized or that the welfare of the inmate will not be served by imposing a shorter term. K.S.A. 21-4611(c)(5). Here, the district court did not make the necessary findings to impose a longer period of probation.

The district court imposed an 18 months' probation term on Holt, relying on K.S.A. 21-4729. This statute provides a nonprison certified drug abuse treatment program for certain offenders. The district court found that Holt fell under the statute because he attempted to violate K.S.A. 65-4162, and he fell in the drug grid block 4-H. K.S.A. 21-4729(a)(1). According to K.S.A. 21-4729(c), "The sentencing court shall commit the offender to treatment in a drug abuse treatment program until determined suitable for discharge by the court but *the term of treatment shall not exceed 18 months*." (Emphasis added.)

By its plain language, K.S.A. 21-4611 sets forth the maximum duration of probation that a district court can impose in felony cases. K.S.A. 21-4729, however, does not address the duration of probation. Instead it merely sets forth the maximum term for which a court can commit a defendant to a drug abuse treatment program. Simply put, K.S.A. 21-4729 only addresses the duration of a defendant's *term of drug treatment*, whereas K.S.A. 21-4611 addresses the duration of a defendant's *term of probation*.

Because K.S.A. 21-4611, rather than K.S.A. 21-4729, sets forth the maximum probation term a district court can impose, Holt's presumptive term of probation was limited to 12 months. See K.S.A. 21-4611 (c)(3). The district court could have imposed a longer probation term of 18 months if it had made the necessary findings under K.S.A. 21-4611(c)(5). However, it failed to do so. Without making these requisite findings, the district court's extension of Holt's probation was an abuse of discretion, resulting in an illegal sentence. See *McIntyre*, 30 Kan. App. 2d at 708-09; *State v. Jones*, 30 Kan. App. 2d 210, 213-14, 41 P.3d 293 (2001).

Finally, Holt claims his Sixth and Fourteenth Amendment rights under the United States Constitution were violated when the district court enhanced his sentence based on his prior criminal history. Holt contends that under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the district court should have required his criminal history to be proved to a jury beyond a reasonable doubt. Holt acknowledges the Kansas Supreme Court has previously rejected this argument in *State v. Ivory*, 273 Kan. 44, Syl., 41 P.3d 781 (2002) (*Apprendi* does not apply where sentence was based on defendant's criminal history score). We have no indication the Kansas Supreme Court would depart from its holding in *Ivory*, and this court is duty bound to follow precedent. *State v. Beck*, 32 Kan. App. 2d 784, 788, 88 P.3d 1233, *rev. denied* 278 Kan. 847 (2004).

In summary, we acknowledge that resentencing Holt may now be moot. However, we are unable to conclusively determine this from the record. Thus, we are remanding this case to district court. If the

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district court determines that resentencing Holt is moot as to this case or any other case pending against Holt, then no further proceedings are necessary and the case may be journalized to so indicate. Otherwise, the district court must "turn back the clock" and resentence Holt for his conviction of attempted possession of marijuana. In resentencing Holt, the district court may impose an 18-month probation term, but only if the district court makes the necessary findings pursuant to K.S.A. 21-4611(c)(5).

Remanded for further proceedings consistent with this opinion.

[1]Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish pursuant to Rule 7.04 (2007 Kan. Ct. R. Annot. 51). The published version was filed with the Clerk of the Appellate Courts on June 10, 2008.

END

 Kansas Opinions | Finding Aids: Case Name » Supreme Court or Court of Appeals | Docket Number | Release Date |

Comments to: WebMaster, kscases@kscourts.org.
Updated: June 10, 2008.
URL: http://www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2007/20070713/95278.htm.

5-5

Kansas County & District Attorneys Association
1200 SW 10th Avenue
Topeka, KS 66604
(785) 232-5822 Fax: (785) 234-2433
www.kcdaa.org

TO: The Honorable Senators of the Judiciary Committee

FROM: Thomas R. Stanton
Deputy Reno County District Attorney
President, Kansas County and District Attorneys Association

DATE: March 12, 2009

RE: Senate Bill 281

Chairman Owens and Members of the Committee:

Thank you for allowing me to submit testimony regarding Senate Bill 281. The KCDAA supports passage of this legislation.

SB 281 is designed to correct an inconsistency in the sentencing statutes. K.S.A. 21-4611(c) currently sets the probation period for a level four drug felony at 12 months. This conflicts with the 18-month assignment for treatment under SB123 (K.S.A. 21-4729). Most jurisdictions have been placing defendants on community corrections for a period of 18 months pursuant to SB 123. The Kansas Court of Appeals recently ruled that an assignment to community corrections for 18 months without an upward departure was an illegal sentence. (See State v. Holt, 39 Kan.App.2d 741, 186 P.3d 803) Thus, K.S.A. 21-4611(c) requires a 12 month probation period, while K.S.A. 21-4729 requires an assignment to community corrections for up to 18 months. This legislation would resolve the conflict.

The 18 month assignment to community corrections is designed to give a person addicted to a controlled substances time to address the addiction. Twelve months is normally too short of a time period to allow for successful treatment of a drug addiction. The 18 month time period found in K.S.A. 21-4729 was established in recognition of this fact. The term of probation must reflect the public policy behind making drug possession felonies subject to presumptive probation sentences, that is treatment and rehabilitation of the offender. In my experience, it takes at least 12 months of abstinence before the addict regains sufficient cognitive ability to attempt to overcome the addiction. The ability to function as a productive member of society requires 24 months of abstinence. If we want to see persons treated successfully for drug addictions, we should require no less than 18 months of supervised treatment.

Senate Judiciary
3-12-09
Attachment 6

AGC of KANSAS

Building a Better Kansas Since 1934

200 SW 33rd St. Topeka, KS 66611 785-266-4015

TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE SENATE COMMITTEE ON JUDICIARY
SB 292

March 12, 2009

By Will Larson, Associated General Contractors of Kansas, Inc.

Mister Chairman and members of the committee, my name is Will Larson with Larson & Blumreich Law Firm. I serve as Legal Counsel for the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

The AGC of Kansas supports Senate Bill 292 and asks that you recommend it favorably for passage.

SB 292 offers a method for remote claimants to notify the general contractor of their intent to provide goods and services on a construction project. This is important legislation provides protection to the suppliers but also the general contractor who is ultimately responsible to ensure that all parties are paid.

SB 292 would require that remote claimants (second-tier subcontractors and suppliers) submit a Notice of Furnishing to the General Contractor within 21 days of providing goods or services on a project. Also, SB 292 would require the general contractor to file a Notice of Commencement with the County Register of Deeds and post the notice at the jobsite prior to the commencement of work.

After several conference calls this past fall, it became clear to AGC that a compromise was not imminent and moved forward with the introduction of SB 292. AGC listened to the concerns of interested parties and after researching policies in other states, AGC feels the changes made in SB 292 offer reasonable alternatives to the legislation introduced last year. AGC has found similar statutes regarding "notice of furnishing" or "preliminary notice" in 26 states.

To help suppliers obtain information required in their Notice of Furnishing, SB 292 now requires a Notice of Commencement be filed at the County Register of Deeds in the county of the project, as well as posting of the notice on the jobsite. This Notice of Commencement contains all of the information required in the Notice of Furnishing.

SB 292 states that if the general contractor does not submit the notice of commencement, that remote claimants are not obligated to file the notice of furnishing to the general contractor. Therefore, if it is important to the general contractor to know who remote claimants are, they will take the effort and initiative to submit their own notice before construction begins.

In closing, the ultimate goal of SB 292 is to protect ALL parties of a construction contract through increased transparency and accountability. **Again, the AGC of Kansas respectfully requests that you recommend SB 292 favorably for passage.** Thank you for your consideration.

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Session of 2009

SENATE BILL No. 292

By Committee on Ways and Means

2-26

AN ACT concerning civil procedure; relating to remote claim liens on commercial property; amending K.S.A. 60-1103, 60-1110 and 60-1111 and repealing the existing sections.

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

New Section 1. As used in sections 1 and 2, and amendments thereto:

(a) "Commercial property" means a new or pre-existing structure which is not constructed for use or used as a single or two family residence.

(b) "Original contractor" means any contractor who has a contract directly with the owner. "Original contractor" may include more than one contractor and be referred to as a general contractor.

(c) "Subcontractor" means any person who furnishes labor, equipment, materials or supplies pursuant to a contract directly with an original contractor.

(d) "Supplier" means any person who furnishes equipment, materials or supplies pursuant to a contract directly with an original contractor.

(e) "Remote claimant" means a subcontractor to a subcontractor, also referred to as a sub-subcontractor, as well as suppliers to subcontractors. Remote claimants have no contact directly with the original contractor.

(f) "Notice of furnishing" means a written notice from a remote claimant that is given prior to the recording of a mechanic's lien and which is required to be given pursuant to the provisions of section 2, and amendments thereto.

(g) "Notice of commencement" means a written notice, in the form of an affidavit, from the original contractor providing the information required to be given pursuant to the provisions of section 2, and amendments thereto.

New Sec. 2. (a) The original contractor shall record in the office of the register of deeds in each county in which the original contractor enters into a contract for the construction or improvement of commercial property a notice of commencement.

(b) The purpose of the notice of commencement is to notify other persons, including, but not limited to, remote claimants, who are working

on the project, that the project has started and to give information as to the name and address of the owner, original contractor and the description of the project.

(c) The notice of commencement shall be recorded before commencing work on the construction or improvement of the commercial property. The original contractor shall post the notice of commencement at the job site.

(d) The notice of commencement required under this section shall contain the following information:

(1) The legal description of the real property on which the construction or improvement is to be made.

(2) A brief description of the construction or improvement to be performed on the property.

(3) The name, address of the owner, part owner, or lessee of the real property contracting for the construction or improvement.

(4) The name and address of the owner's, part owner's, or lessee's designee, if any.

(5) The name and address of all original contractors.

(6) The date the owner, part owner, or lessee first executed a contract with an original contractor for the construction or improvement.

(7) The name and address of the person preparing the notice of commencement.

(8) The following statement:

To remote claimants: Take notice that labor or work is about to begin on or materials are about to be furnished for an improvement to the real property described in this notice. Any remote claimant may preserve such claimant's lien rights by providing a notice of furnishings to the original contractor or contractors and owner within 21 days of furnishing labor, equipment, materials or supplies to this project.

(e) Within ten business days of the date a remote claimant serves a written request for a copy of the notice of commencement on the original contractor or contractors, the original contractor shall provide a copy of the notice of commencement to the requesting remote claimant.

(f) If a notice of commencement is not recorded with the register of deeds in the county where the construction or improvement is to be performed, a remote claimant is not required to file a notice of furnishing.

(g) A lien for the furnishing of labor, equipment, materials or supplies by a remote claimant for the construction of or improvement to commercial property pursuant to K.S.A. 60-1103, and amendments thereto, may be claimed only if the remote claimant has filed a notice of furnishing within 21 days of the date of furnishing any such labor, equipment, materials or supplies to the project. If the remote claimant does not file within such time period, the remote claimant may file at a later date. In

such event, the remote claimant's lien rights will only be effective from the date of the filing of the notice of furnishings.

(h) The notice of furnishings shall be served on the original contractor and owner by certified mail, return receipt requested.

(i) The notice of furnishings required under this section shall contain the following information:

(1) The name and address of the original contractor.

(2) The name and address of all subcontractors with whom the remote claimant has contracted.

(3) The name, address, telephone number, fax number and e-mail address of the remote claimant.

(4) The approximate value of material, labor, equipment or supplies on the project.

(5) The legal description of the real property on which the construction or improvement is to be made.

(j) Nothing in this act shall expand or create any additional rights of a person to claim a lien pursuant to K.S.A. 60-1103 or K.S.A. 60-1110, and amendments thereto, or to file a claim under a bond furnished pursuant to K.S.A. 60-1111, and amendments thereto.

(k) The notice of commencement and notice of furnishings shall be deemed sufficient if in substantial compliance with the forms set forth by the judicial council.

Sec. 3. K.S.A. 60-1103 is hereby amended to read as follows: 60-1103. *(a) Procedure.* Any supplier, subcontractor or other person furnishing labor, equipment, material or supplies, used or consumed at the site of the property subject to the lien, under an agreement with the contractor, subcontractor or owner contractor may obtain a lien for the amount due in the same manner and to the same extent as the original contractor except that:

(1) The lien statement must state the name of the contractor and be filed within three months after the date supplies, material or equipment was last furnished or labor performed by the claimant;

(2) if a warning statement is required to be given pursuant to K.S.A. 60-1103a, and amendments thereto, there shall be attached to the lien statement the affidavit of the supplier or subcontractor that such warning statement was properly given; and

(3) a notice of intent to perform, if required pursuant to K.S.A. 60-1103b, and amendments thereto, must have been filed as provided by that section; *and*

(4) a notice of furnishings, if required pursuant to section 2, and amendments thereto, must have been filed as provided by that section.

(b) Owner contractor is defined as any person, firm or corporation who:

(1) Is the fee title owner of the real estate subject to the lien; and

(2) enters into contracts with more than one person, firm or corporation for labor, equipment, material or supplies used or consumed for the improvement of such real property.

(c) *Recording and notice.* When a lien is filed pursuant to this section, the clerk of the district court shall enter the filing in the general index. The claimant shall (1) cause a copy of the lien statement to be served personally upon any one owner, any holder of a recorded equitable interest and any party obligated to pay the lien in the manner provided by K.S.A. 60-304, and amendments thereto, for the service of summons within the state, or by K.S.A. 60-308, and amendments thereto, for service outside of the state, (2) mail a copy of the lien statement to any one owner of the property, any holder of a recorded equitable interest and to any party obligated to pay the same by restricted mail or (3) if the address of any one owner or such party is unknown and cannot be ascertained with reasonable diligence, post a copy of the lien statement in a conspicuous place on the premises. The provisions of this subsection requiring that the claimant serve a copy of the lien statement shall be deemed to have been complied with, if it is proven that the person to be served actually received a copy of the lien statement. No action to foreclose any lien may proceed or be entered against residential real property in this state unless the holder of a recorded equitable interest was served with notice in accordance with the provisions of this subsection.

(d) Rights and liability of owner. The owner of the real property shall not become liable for a greater amount than the owner has contracted to pay the original contractor, except for any payments to the contractor made:

(1) Prior to the expiration of the three-month period for filing lien claims, if no warning statement is required by K.S.A. 60-1103a, and amendments thereto; or

(2) subsequent to the date the owner received the warning statement, if a warning statement is required by K.S.A. 60-1103a, and amendments thereto.

The owner may discharge any lien filed under this section which the contractor fails to discharge and credit such payment against the amount due the contractor.

(e) Notwithstanding subsection (a)(1), a lien for the furnishing of labor, equipment, materials or supplies on property other than residential property may be claimed pursuant to this section, and amendments thereto, within five months only if the claimant has filed a notice of extension within three months since last furnishing labor, equipment, materials or supplies to the job site. Such notice shall be filed in the office of the clerk of the district court of the county where such property is

located and shall be mailed by certified and regular mail to the general contractor or construction manager and a copy to the owner by regular mail, if known. The notice of extension shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

Sec. 4. K.S.A. 60-1110 is hereby amended to read as follows: 60-1110. The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of such claim in the amount thereof. Any such bond shall have good and sufficient sureties, be approved by a judge of the district court and filed with the clerk of the district court. When bond is approved and filed, no lien for the labor, equipment, material or supplies under contract, or claim described or referred to in the bond shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on such bond *by any* person interested but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor contractually liable for the payment of the claim. *No remote claimant may file a claim under a payment bond obtained and executed pursuant to this section, unless such remote claimant has served a notice of furnishing as required in section 1, and amendments thereto, on the original contractor and owner.*

Sec. 5. K.S.A. 60-1111 is hereby amended to read as follows: 60-1111. *(a) Bond by contractor.* Except as provided in this section, whenever any public official, under the laws of the state, enters into contract in any sum exceeding $100,000 with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take, from the party contracted with, a bond to the state of Kansas with good and sufficient sureties in a sum not less than the sum total in the contract, conditioned that such contractor or the subcontractor of such contractor shall pay all indebtedness incurred for labor furnished, materials, equipment or supplies, used or consumed in connection with or in or about the construction of such public building or in making such public improvements.

A contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer. A public official entering into a contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer.

(b) Filing and limitations. The bond required under subsection (a)

shall be filed with the clerk of the district court of the county in which such public improvement is to be made. When such bond is filed, no lien shall attach under this article. Any liens which have been filed prior to the filing of such bond shall be discharged. Any person to whom there is due any sum for labor or material furnished, as stated in subsection (a), or such person's assigns, may bring an action on such bond for the recovery of such indebtedness but no action shall be brought on such bond after six months from the completion of such public improvements or public buildings.

(c) In any case of a contract for construction, repairs or improvements for the state or a state agency under K.S.A. 75-3739 or 75-3741, and amendments thereto, a certificate of deposit payable to the state may be accepted in accordance with and subject to K.S.A. 60-1112, and amendments thereto. When such certificate of deposit is so accepted, no lien shall attach under this article. Any liens which have been filed prior to the acceptance of such certificate of deposit shall be discharged. Any person to whom there is due any sum for labor furnished, materials, equipment or supplies used or consumed in connection with or for such contract for construction, repairs or improvements shall make a claim therefor with the director of purchases under K.S.A. 60-1112, and amendments thereto.

(d) No remote claimant may file a claim under a public works bond obtained and executed pursuant to this section, unless such remote claimant has served a notice of furnishing as required in section 1, and amendments thereto, on the original contractor ~~and owner~~ required to obtain a bond pursuant to this section.

Delete

Sec. 6. K.S.A. 60-1103, 60-1110 and 60-1111 are hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.

FERRELL
CONSTRUCTION
OF TOPEKA, INC.

TESTIMONY PRESENTED TO THE SENATE COMMITTEE

ON JUDICIARY

RE: SB 292

MARCH 10, 2009

BY

DEAN F. FERRELL

Mr. Chairman and Members of the Committee

My name is Dean Ferrell, President and Owner of Ferrell Construction of Topeka, Inc., and I am a past president of the AGC of Kansas. My company specializes in commercial building construction and, through the years, we have completed several State of Kansas projects in the northeast area of the state.

I am writing to express my support of SB 292, regarding lien notification requirements for second tier subcontractors and suppliers. Through the years, much effort has been exterted to assure that laws are in place to protect vendors and subcontractors, even general contractors, when the entity they are doing business with fails to pay them, or is slow in making payments.

These laws have served us well, but there has always been an inherent gap that, in some cases, leaves the general contractor ("original" contractor, as defined by SB 292) at risk. That gap occurs when a general contractor has paid his subcontractor for services rendered without the knowledge that the subcontractor is failing to pay its subcontractors or suppliers (referred, to as remote, or second tier, claimants). Since the remote claimants can take up to three months to file a lien, the offending first tier subcontractor may have already been paid in full by the time the lien is filed. In order to keep a project "lien free", more often that not, the original contractor is left "holding the bag". By this, I mean paying for the same work twice, without a sound means to recoup the loss.

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This problem can be eliminated, or at least improved, if the original contractor could just know who all the "potential" remote claimants are. There is no way to police who is not being paid unless the subcontractor informs us who all its vendors are. Unfortunately, as you can imagine, "financially strapped" subcontractors will never provide us with a complete list.

It would also help if the second tier vendors would keep us informed that one of our subcontractors is struggling to pay them, or not paying them at all. If we only knew, we could work out "joint check" arrangements, or something similar. Some do alert us to potential problems, but quite honestly, most don't. Most will wait until the end of their statutory time period is nearing to contact us, or they just simply file the lien – at the last moment – without advance notice to us. In some cases, it may be too late for us to take action to protect our interests. We may have already paid the subcontractor too much.

I understand the dilemma that a second tier subcontractor or supplier faces. They are very hesitant to "make waves" for their customer (our subcontractor). Many subcontractors take great offense if their supplier makes direct contact with the general contractor about slow payments. They are hesitant to do anything to jeopardize their relationship with the struggling subcontractor, and there is always hope that it is only a temporary problem. And, I'm sure that it is always in the backs of their minds that the lien laws will protect them. I'm sure that many don't realize that in some cases, the general contractor is the one that ends up being penalized.

For the reasons stated above, SB 292 makes sense. Since the "up front" notification by remote claimants would be required by law, there would be no pressure by the subcontractors (their customers) to keep them from making this notification. Most importantly, this would allow the general contractor to better monitor the payment histories of its subcontractors. If that doesn't happen, shame on the general contractor.

In closing, I feel this is a fair bill to all involved parties. I urge you to support passage of SB 292.

Thank you.

CROSSLAND
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Testimony of Bennie Crossland
Senate Judiciary Committee
March 12, 2009
Senate Bill 292

Mister Chairman and Members of the Committee,

My name is Bennie Crossland, President of Crossland Construction Company of Columbus, Kansas. We are a family owned and operated business with offices in Columbus, KS, Rogers, AR, Tulsa, OK, Prosper, TX and Wichita, KS. Crossland currently employs over 900 people. I have been in the General Contracting business for 30 years and am a past President of AGC of Kansas. I am currently a National Director of AGC of America, and a Board Member of AGC of Kansas.

I come to you today with a problem which exists in our industry. This problem greatly affects the risk General Contractors take in building a project. This problem points out an inequity in the law which puts unnecessary risk on General Contractors.

When a General Contractor takes a job, he issues subcontracts and purchase orders to subcontractors and suppliers for portions of the work he needs help in supplying. In turn, the subcontractors and suppliers hire subcontractors (sub of a subcontractor) and suppliers to help them perform the portion of the work they have contracted with the General Contractor to perform.

The General Contractor pays the subcontractors and suppliers with whom he has a direct contract and in turn, they pay their subs and suppliers. We call these remote claimants (People who do NOT have a direct relationship with the General Contractor). The problem arises when the subcontractor and suppliers (the ones who DO have a direct contract with the General Contractor) fail to pay their downstream subs and suppliers (remote claimants). The General Contractor has no idea these people exist.

The General Contractor is required to give the owner a project free of liens. When remote claimants do not get paid, they file liens or claims on payment bonds. In order for the General Contractor to deliver to the owner a clean project lien free, he is

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forced to pay the remote claimants for work he has already paid his subcontractor or supplier for previously. In essence the General Contractor pays twice for the same work. Under current law, the remote claimants have little risk. They know if the job has a payment bond or if the General Contractor is reputable, they will get paid. In fact, the other day our C.E.O. asked a supplier to a subcontractor, "Did you check out his credit?" to which he replied "I didn't have to, you have a payment bond in place". This is the case in many instances.

Some of you are asking what happened to the subcontractor. In most instances he has disappeared or gone bankrupt, leaving the General Contractor with a big mess.

General Contractors today try all different kinds of methods to prevent this from happening. We ask for a list of subcontractors' subs and suppliers up front. We check with these remote claimants before each payment to our subs to ensure they are getting paid. The problem is when you have a bad sub or supplier, they will shift purchasing places often without informing the General Contractor. The first time he knows there is a problem is when the new supplier shows up demanding payment from the General Contractor, or he files a lien or bond claim.

The good news is that the legislation before you today brings a fair and equitable solution to this problem. This legislation before you requires two simple notifications. The first is required of the General Contractor. It is called a Notice of Commencement. This simple Notice states who the Owner is, who the General Contractor is, contact information for the Owner and General Contractor, a legal description of the property and the date of the Contract. The Notice also lets all remote claimants know work is about to begin on this site and if they do not have a direct relationship with the General Contractor they must file a one-time Notice of Furnishing within 21 days of supplying material, labor, equipment or supplies to this job in order to preserve their lien rights.

The General Contractor records this Notice prior to work starting with the Register of Deeds and post the Notice on the jobsite. The remote claimants (people who have no direct contract with the General Contractor) are then required to file a Notice of Furnishing.

The purpose of the Notice of Furnishing is to let the General Contractor know this person or company is supplying goods and services to his job. It helps the General Contractor know who these people are and to contact them so he can pay them.

- The Notice of Furnishing contains the name, address and contact information of the remote claimant, the date(s) he supplied materials on the job, to who he supplied the goods (subcontractor or supplier) and approximate value of the goods and services he will be supplying.

- The Notice of Furnishing forces the General Contractor to take protective measures to make sure the remote claimant is paid.

- The Notice of Furnishing is to be served only if the General Contractor has filed a Notice of Commencement.

- The Notice of Furnishing must be filed within 21 days of supplying material, labor, equipment or supplies to a jobsite or the remote claimant will lose his lien or payment bond rights.

- The Notice of Furnishing is sent to the General Contractor. Only remote claimants (those with no direct contract with the General Contractor) are required to file a Notice of Furnishing. Subcontractors and suppliers with direct contracts with the General Contractor are not.

- The Notice of Furnishing is a one-time notice. If the remote claimant misses the 21 days period required by the Notice of Furnishing, he may submit a Notice of Furnishing later but loses his lien rights up to the date of the late filing.

These simple Notices level the playing field for a General Contractor and remote claimants. It will reduce liens being filed and ensure subs of subcontractor and suppliers of subcontractors get paid.

Many states such as South Carolina, Ohio, Arizona, California, Georgia, Florida, Michigan and Oregon have Notice of Furnishing or Pre-lien Notices required. I ask you to join the ranks of these states in making lien laws fair by supporting this legislation.

Again, I respectfully request that the committee to support Senate Bill 292 and report it favorably for passage.

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KRMCA
Kansas Ready Mixed
Concrete Association

KAPA
Kansas Aggregate
Producers' Association

TESTIMONY

Date: March 12, 2009

By: Woody Moses, Managing Director
Kansas Aggregate Producers' Association
Kansas Ready Mixed Concrete Association

Regarding: Senate Bill 292, An act concerning liens; relating to supplier's liens

Before: The Senate Committee on Judiciary

Good morning Mr. Chairman and Members of the Committee:

My name is Woody Moses, Managing Director of the Kansas Aggregate Producers' Association and the Kansas Ready Mixed Concrete Association. The Kansas Aggregate Producer's Association (KAPA) and the Kansas Ready Mixed Concrete Association (KRMCA) is a state wide trade association comprised of over 170 members located or conducting operations in all 165 legislative districts in this state, providing basic building materials to all Kansans. I appreciate the opportunity to appear before you today to express our reluctant opposition regarding SB 292.

While we have considered why this bill is relevant and has been introduced, our thoughts go to the old saying, "If it is not broke, do not fix it". Over the course of many years we, as a state, have crafted a good lien law structure and it seems as though it works just as it was intended by spreading risk in a balanced manner. Now, SB 292 seeks to upset the carefully crafted balance by shifting the risk from one group (general contractors) to another (subcontractors and suppliers). Ironic, as general contractors profess to make a living out of accepting risk, which justifies their existence. It is even more ironic, as the contractor already enjoys automatic lien protection, pursuant to K.S.A. 60-1101. Yet they seek to limit those of others.

Lien laws exist in all 50 states for a good reason, by fairly assigning the risks and providing a means whereby the fruits of one's labor may be recovered. SB 292 unfairly tips the scale against suppliers and subcontractors, as it essentially changes the time to file a lien from 90 days to 21 days.

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Our industry is aware of the problems general contractors have in identifying all the subcontractors and suppliers which may be furnishing materials or labor to a project. Consequently we have been working with the AGC of Kansas and others to come up with a workable solution envisioning some type of voluntary notification system. However, we are strongly opposed to any system which would require changes in current law.

In short, we urge this committee to reject SB 292 as its passage would:

- Drive construction costs higher as suppliers are forced to add more dollars to their estimates to cover the increased risk.
- Creates unnecessary paperwork and the labor involved.
- Creates even more uncertainty in an already uncertain marketplace, and
- Lacks a compelling reason for passage.

Thank you for your time and attention, I would be happy to respond to any questions at the appropriate time.