Approved: 12-18-2010
Date

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Pat Colloton at 1:30 p.m. on February 2, 2010, in Room 144-S of the Capitol.

All members were present except:
Representative Bob Bethell- excused
Representative Tom Moxley- excused

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

Conferees appearing before the Committee:
Ed Klump, KS Assoc. Of Chief's of Police,, KS Sheriff's Assoc., KS Peace Officers Assoc.
Kari Ann Rinker, Kansas National Organization for Women,
Sandy Barnett, Kansas Coalition Against Sexual and Domestic Abuse
Claudine Dombrowski, Private Citizen
Michelle Blasdel, Private Citizen
Mark Gleeson, Director of Trial Court Programs, Office of Judicial Administration
Sarah Hammond, Esq., Program Director, Criminal Justice, NCSL

Others attending:
See attached list.

Ed Klump, KS Assoc. Of Chief's of Police,, KS Sheriff's Assoc., KS Peace Officers Assoc.
Kari Ann Rinker, Kansas National Organization for Women,
Sandy Barnett, Kansas Coalition Against Sexual and Domestic Abuse
Claudine Dombrowski, Private Citizen
Michelle Blasdel, Private Citizen
Mark Gleeson, Director of Trial Court Programs, Office of Judicial Administration
Sarah Hammond, Esq., Program Director, Criminal Justice, NCSL

HB 2517 -- Domestic violence offenses; special sentencing provision.
HB 2469 - Use of prior convictions in determining criminal history.

Chairperson Colloton called the meeting to order and opened the continued hearing on **HB 2517.** She introduced Kari Ann Rinker, Kansas National Organization fort Women, to give her testimony as a proponent of the bill. Ms. Rinker presented written copy of her testimony. (Attachment 1) Ms. Rinker stated the bill will serve as a valuable tool for the criminal justice system to be aware or have access to facts that a person has a previous conviction of domestic violence. In closing, she urged all parties involved to make any necessary concessions and the committee to consider this legislation carefully, ultimately work the bill and let the House consider it as a whole.

Chairperson Colloton introduced Sandy Barnett, Kansas Coalition Against Sexual and Domestic Violence, to give her testimony as a proponent of **HB 2517.** Ms. Barnett presented written copy of her testimony. (Attachment 2) She stated the Kansas Coalition Against Sexual and Domestic Violence is in support of the bill only with the amendments they are offering. She explained her amendments to the Committee. In closing, she urged the Committee to include provisions that will prevent or reduce the number of victims who are also arrested and tagged.

A question and answer session followed.

Chairperson Colloton introduced Ed Klump, Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriff's Association, to give his testimony as a proponent of **HB 2517.** Mr. Klump presented written copy of his testimony. (Attachment 3) Mr. Klump offered an amendment for the bill and

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

stated they support the law enforcement related provisions as they exist with the amendment they offered.

Chairperson Colloton moved the Committee to the "written only" proponent testimony from:
Claudine Dombrowski, Private Citizen (Attachment 4)
Michelle Blasdel, Private Citizen (Attachment 5)
Tom Drees, Ellis County Attorney (Attachment 6)

Chairperson Colloton introduced Mark Gleeson, Director of Trial Court Programs, Kansas Office of Judicial Administration, to give his testimony as an opponent of **HB 2517.** Mr. Gleeson presented written copy of his testimony. (Attachment 7) He stated the difficulty with the bill lies in how the judge's findings get from the bench to the clerk or court services officer and into the FullCourt system. Creating a statewide misdemeanor journal entry of judgement would seem to be one solution, and we would request that the Sentencing Commission's expertise in developing a journal entry form be utilized if this bill is enacted into law. He went on to list the things in the bill that should be corrected.

Chairperson Colloton called for any others wishing to testify on the bill. Being none, she closed the hearing on **HB 2517.**

Chairperson Colloton introduced Sarah Hammond, Esq., Program Director, Criminal Justice, NCSL, to present a power point presentation on "Trends and Promising Approaches in Juvenile Justice". She highlighted on the following:

History of the system and juvenile justice today
Trends in the last 20 years
Treating juveniles like adults and movement to reconsider
Promising models and reforms in the states, including community based alternative to incarceration
Risk assessment and cost savings

A short questions and answers followed.

Chairperson Colloton called on Commissioner Jennings Kansas Juvenile Justice Authority, he stated the presentation was excellent and is virtually doable with the statutory framework we have today . In fact, many of the things we are doing now.

Chairperson Colloton thanked Ms. Hammond and Commissioner Jennings. She then moved the Committee's attention to **HB 2469** and opened the floor for consideration.

HB 2469 - Use of prior convictions in determining criminal history

Chairperson Colloton called on Helen Pedigo, Executive Director, Kansas Sentencing Commission to give a quick explanation of the bill.

A discussion followed.

Representative Roth moved to pass HB 2469 out favorably for passage. Representative Patton seconded. Motion carried.

Representative Roth moved to move the bill out to the consent calendar. Representative Brookens seconded. Motion carried.

Chairperson Colloton announced they would work the veterans bill tomorrow and adjourned the meeting at 3:15 p.m. with the next meeting scheduled for February 3, 2010.

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CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 2-2-10

NAME	REPRESENTING
Juliene Maske	Gov office - FRB
Mark Gleeson	Judicial Administration
Liza Webb	" "
Brian K. Dempsey	SRS
Belinda Seale	Kelley Juvenile Justice Resources
Dorothy Stucky Halley	AG Office
Michelle McCormick	AG Office
Mariah Neeley	KCSL
Jennie Marsh	KDOC
Sandy Barnett	KCSDV
Joyce Grover	KCSDV
[illegible]	Rep. McCray-Miller's intern
Ed Klumpp	KACP/KPOA/KSA

Kansas National Organization for Women
PO Box 1860
Wichita, KS 67201-1860
(620) 245 4904

HB 2517: Proponent

Prepared for: House Corrections & Juvenile Justice
Prepared by: Kari Ann Rinker
Kansas NOW- State Coordinator & Lobbyist

February 1, 2010

While I have not been at the negotiating table with many of the other supporters providing testimony here today, I have had many conversations about the bill with Curt and Christie Brungardt. The information they have provided me with, as well as the information available regarding domestic violence is compelling enough and for me to put the support of Kansas NOW behind this bill.

In 2009, 34 adults and 14 children were murdered in domestic violence related-homicides in the state of Kansas. This is one of the highest numbers in years. In the "Report on Domestic Violence and Rape Statistics in Kansas", the KBI reports that one domestic violence killing occurred every 19.2 days in 2008, so that number…once statistics are fully compiled, will be even higher in Kansas for 2009.

Is it a situation that simply cannot be altered or influenced? Is our society in a position where we have no choice, but to turn our heads the other way because there will always be violent men and the women who refuse to leave them? In fact, the violence most often occurs when they do leave or attempt to leave. A victim's chances of being killed or seriously injured increases by 75% when leaving a violent relationship. These women are immobilized physically, psychologically and economically.

Many stay out of respect for the traditional family unit and for the sake of the children. Many women believe that if they stick it out, they will be able to change the relationship for the better. Many batterers threaten suicide to place guilt on the woman. The economic situation of the victim cannot be ignored. It costs approximately $1500 to set up household in the first month

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without housing assistance. Public housing lists are long, sometimes over six months and many do not qualify. Domestic violence is the number one cause of loss of employment to women in the United States.

Batterers ring up a tab of over $5.8 billion per year nationally in their victim's health care costs and lost productivity. The $5.8 billion total does not include the costs incurred by law enforcement agencies as they respond to and investigate domestic violence calls, nor does it factor in the amount of time and money spent in other branches of the civil and criminal court system.

Will HB 2517 eliminate domestic violence homicides in Kansas? No, but it will serve as a valuable tool for the criminal justice system to be aware or have access to facts that a person has a previous conviction of domestic violence. Judges will be able to see a pattern of abusive behavior even in a conviction that may not immediately appear to be related to domestic violence and allow the courts to direct an abuser into assessment and treatment programs to reduce the likelihood of additional offenses.

Domestic violence is a crime that is difficult to prosecute due to lack of corroborating evidence. And, although some suggest that this bill may unduly target innocent persons convicted of domestic violence, the statistics do not bear this out. The rate of false convictions is no higher than any other crime. Domestic violence is a national epidemic. It has become our responsibility to support efforts like HB 2517 that helps promote the basic human right of all of us to live free from harassment, intimidation and violence. To do less than that is to perpetuate conditions which condone it.

I implore all parties involved to make any necessary concessions and the committee to consider this legislation carefully, ultimately work the bill and let the House consider it as a whole.

Kansas Coalition Against Sexual and Domestic Violence

KCSDV
UNITED AGAINST VIOLENCE

634 SW Harrison Topeka, Kansas 66603
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org • www.kcsdv.org

House Corrections and Juvenile Justice Committee
February 1, 2010

Position on HB 2517: Proponent ONLY with amendments

Madam Chair and Members of the Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) works on behalf of the 30 domestic violence and sexual assault advocacy programs and victims across the state of Kansas.

The important goal of HB 2517 is to create a way for the criminal justice system to be able to readily identify behavior that, over time, indicates a pattern of conduct. Identifying this pattern of conduct is important so that penalties can be crafted with increasing accountability and appropriate intervention services. Currently, there are large gaps in information that is readily available for this purpose; those gaps are especially perplexing between municipal and district courts. KCSDV supports that goal.

HB 2517 requires the trier of fact to determine if a domestic violence offense has occurred and, if evidence exists, the trier of fact shall place a domestic violence designation on the criminal case. The definition of "domestic violence" being added into K.S.A 21-3110 therefore becomes critical. KCSDV believes this definition will include the myriad of crimes that occur in the context of domestic violence, including those committed against a third party but directed at the intimate partner (a new husband or a family member, for example). With this designation, county, district, and municipal prosecutors will be able to quickly identify those who have a domestic violence offense designation. However, it is our experience that victims are sometimes arrested and caught in this system. KCSDV receives calls every week from victims who have been arrested or from advocates and attorneys who are working with them. HB 2517 will also likely result in those victims being tagged as a domestic violence offender.

The proper identification of domestic violence offenders is critical to the effective implementation of this bill. A single incident of violence that may lead to a plea, a diversion, or a low level misdemeanor conviction – may not seem like a big deal given the bigger picture of trying to get our hands on the real offenders. But, this unintended consequence for victims may affect as many as 25% of those arrested and may be accompanied by penalties imposed by other systems – such a designation may make someone ineligible to become a licensed daycare provider, move into public housing, become a certified law enforcement officer, or even get certain licenses in the health care profession.

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KCSDV recognizes that there are often unintended consequences of most, if not all, public policy initiatives. In the case of HB 2517 those unintended consequences may be, at least partially, resolved by amending the definition of domestic violence to include the full context of that violence.

I. The definition of domestic violence needs context:

Domestic violence is a serious and complex issue involving a pattern of many tactics used to control, coerce, punish, and intimidate the victim.

KCSDV requests the following amendment: Replace the definition of domestic violence on page 2, lines 24 – 31 with:

"Domestic violence" means any crime committed against a person or against property, or any municipal ordinance violation against a person or against property when used to coerce, control, punish, intimidate, or to take revenge against a person with whom the offender is involved or has been involved in an intimate relationship. For the purposes of this definition, the offender shall be 18 years of age or older.

Similar definitions that recognize this context are accepted across the nation by

- Advocates
- The National Council of Juvenile and Family Court Judges
- American Bar Association Commission on Domestic Violence
- American Prosecutors Research Institute, and others

This definition is perhaps best portrayed in the Power and Control wheel (attached).

Much like stalking – domestic violence is a pattern of conduct. A single incident can still be illegal conduct; but when this single incident is part of a bigger pattern of conduct, it may be meant to intimidate, control, coerce, and punish. Much like stalking, domestic violence is defined by a course of conduct. HB 2517 identifies offenders only by the existence of certain relationships – that is not an adequate definition.

The relationship of the offender to the victim is only one part of this equation – it is perhaps the most easily defined piece, but is not sufficient in and of itself. A finding by the trier of fact based solely on whether a relationship exists will create negative consequences for those accused of using illegal violence who are not batterers.

We have been challenged to consider whether there is a greater good here--of being able to better address repeat offenders. I do not believe this is an either/or situation – we must find a way to do both; find a way to identify repeat offenders AND eliminate or reduce the likelihood of victims being pulled into the system and tagged as though they were the abuser.

This request on our part is also not an academic question, consider the following:

- Victims who have been arrested often claim they will not call law enforcement again, regardless of the danger they or their children are in. It is only the batterers' interests that are served when victims are too afraid to call for help.
- For a victim, being arrested and booked is a terrifying and retraumatizing event, without even considering what it must be like to spend the night, or longer, in jail.
- When victims are arrested they often have to leave children in the care of the batterer. In some cases, children are placed in the care of SRS.
- The co-occurrence of domestic violence and child abuse may be as high as 70 percent. Putting children in the care of batterers in these circumstances is dangerous.
- Adolescent girls are 6 times more likely to be sexually abused by a person who is battering their mother than a non-abuser. Putting these children in the care of batterers when the victim is inappropriately arrested is dangerous.

When victims are arrested and charged with a crime, the system becomes a tool for the abuser!

As an illustration of how easily this can happen: in relation to a project we are working on, when we contacted law enforcement about their domestic violence policies, a sheriff told us that he just arrests the women because then the abusers get a taste of having to baby sit when she goes to jail; he believes that is why they have few repeat calls – he apparently believes abusers are no longer abusive because they had to baby sit while mom was in jail. These abusers now have victims who is too scared to call for help.

We have also talked with a prosecutor who believes that arresting and charging a victim, even if she is not a batterer, gets her out of the abusive relationship and "helps" her.

II. The definition of dating violence in HB 2517 is different from any other definition in Kansas statute.

A second issue regarding definitions is that of "intimate relationship" and "dating relationship" on page 3, line 4 through 9. The definition of intimate relationship and dating relationship as stated in HB 2517 are different from any other definition used in Kansas statute. And, the dating relationship definition introduces an undefined term of "...expectation of affectional or sexual involvement."

For consistency, KCSDV recommends using the definition for "dating relationship" that has existed for a number of years (since 2001) in the protection from abuse act.

"Intimate relationship means spouses, former spouses, person's who have a child in common, or persons who are or have been in a dating relationship. Dating relationship means a social relationship of a romantic nature. In addition to any other factors the court deems relevant, the trier of fact may consider the following when making a determination of whether a relationship

existed: nature of the relationship, length of time the relationship existed, frequency of interaction between the parties, and time since termination of the relationship, if applicable."

III. HB 2517 as it is written clashes with the goals of safety, accountability and justice

KCSDV and its member programs work every day for safety, accountability, and justice – unfortunately these values and goals clash with each other in HB 2517 as it is written. We are aware of the criticisms of amending the definition of domestic violence in the ways we suggest: that it may make the language vague and unconstitutional, that it may introduce elements that have to be proven and will make it harder for prosecution to accomplish their goals. We are all working toward the same goal – we want batterers to be identified, to have penalties crafted to increase accountability, and to help the criminal justice system address this complex issue. If we cannot agree on the language that will prevent potential unintended consequences – it begs the question of whether there may be a different approach. In order to address the problem that has been identified, we first have to accurately define the problem.

One idea that comes to mind and that has been discussed is to require that all courts open case files with a DV designation number instead of a CR designation. This approach has been used in Johnson County for many years and allows prosecutors to immediately see repetitive history of these types of crimes, but also allows them to consider the context. It is our understanding that this has been done with no determination or "tag" being decided by the trier of fact.

KCSDV is deeply appreciative of the recognition that better tracking of abusers will lead to better criminal justice outcomes. However, KCSDV finds itself in a position to appose this approach to the goal unless provisions are included that will prevent or reduce the number of victims who are also arrested and tagged.

Respectfully submitted,

Sandy C. Barnett
Executive Director

PHYSICAL VIOLENCE SEXUAL

POWER AND CONTROL

USING COERCION AND THREATS
Making and/or carrying out threats to do something to hurt her • threatening to leave her, to commit suicide, to report her to welfare • making her drop charges • making her do illegal things

USING INTIMIDATION
Making her afraid by using looks, actions, gestures • smashing things • destroying her property • abusing pets • displaying weapons

USING EMOTIONAL ABUSE
Putting her down • calling her names • making her think she's crazy • playing mind games • humiliating her • making her feel bad about herself • making her feel guilty

USING ISOLATION
Controlling what she does, who she sees and talks to, what she reads, where she goes • limiting her outside involvement • using jealousy to justify actions

MINIMIZING, DENYING, AND BLAMING
Making light of the abuse and not taking her concerns about it seriously • saying the abuse didn't happen • shifting responsibility for abusive behavior • saying she caused it

USING CHILDREN
Making her feel guilty about the children • using the children to relay messages •using visitation to harass her • threatening to take the children away

USING MALE PRIVILEGE
Treating her like a servant • making all the big decisions • acting like the "master of the castle" • being the one to define men's and women's roles

USING ECONOMIC ABUSE
Preventing her from getting or keeping a job • making her ask for money • giving her an allowance • taking her money • not letting her know about or have access to family income

PHYSICAL VIOLENCE SEXUAL

Developed by Domestic Abuse Intervention Project, Duluth, MN

Provided by:

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Kansas Sheriffs Association
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(785)827-2222

Kansas Peace Officers Association
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TESTIMONY TO THE KANSAS HOUSE OF REPRESENTATIVES CORRECTIONS AND JUVENILE JUSTICE COMMITTEE REGARDING HB2517

DOMESTIC VIOLENCE AMENDMENTS

February 1, 2010

I believe the committee knows the Kansas Association of Chiefs of Police and the Kansas Peace Officers Association has been very active in assuring this bill provides clear direction to law enforcement. We have also been acutely aware of other prosecutorial and due process issues the original bill proposal presented. Those concerns of our associations have been addressed in the bill as presented.

However, there is a new concern that recently came to light in regards to liability with the new arrangement of the provisions in this bill. There is concern it negatively impacts law enforcement and their employers when the mandatory arrest language is moved to K.S.A. 21-4201 from the statute setting policy requirements. Several law enforcement legal advisors have told me having provisions proposed in section 6, subsection (b) in K.S.A. 21-4201 creates a duty of care which will disqualify the use of the immunity provisions in K.S.A. 22-2308. We recommend moving Section 6, subsection (b) to Section 5 of the bill. What is important is for the bill to retain the language of what is now Section 6, subsection (b) without amendment except for location and technical amendments necessary to accomplish that move.

We know there are other concerns with this bill not directly impacting law enforcement. We support the law enforcement related provisions as they exist with the above amendment, we may have to change that position if amendments made to the bill by the committee negatively impacting law enforcement or if the proposed amendment above is not adopted.

Ed Klumpp
Ks Association of Chiefs of Police - Legislative Committee Chair
Ks Peace Officers Association – Legislative Liaison
Ks Sheriffs Association – Legislative Liaison
eklumpp@cox.net
Phone: (785)640-1102

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Attachment # 3

Written Testimony For Domestic Violence Tag Law

February 1, 2010

Submitted by: Claudine Dombrowski

My name is Claudine Dombrowski, I am a survivor of Domestic Violence, and my story does not have a happy ending. I am still trying to just 'survive'. The 'private' matter of intimate violence.

I am the lead Plaintiff at the Inter American Commission Human Rights known as Dombrowski et el v US 2007 for the policy and practices of US Courts giving custody to batterers and pedophiles.

Kansas Law Enforcement and Kansas Coalition Against Domestic Violence & Sexual Assault is hard copy co-signors to the petition.

The entire suit can be read on the www.StopFamilyViolence.org web site.

In April 2007, I was enrolled in the Address Confidentiality Program Safe at Home. Finally at least my address can remain safe- it to is a constant challenge to remain confidential.

With the Domestic Violence tag in place- it makes it more a 'Public Policy' versus a 'personal family matter' which is an overwhelming obstacle for the plight of a battered mother to ever overcome.

Sixteen years after the fact I am forced to live like a refugee-I have lost my daughter and live mostly in a 'homeless' state.

Hopefully as in my case as it would have been applied the past Domestic Violence tag history as well as the many other Domestic Violence convictions would have taken the 'Personal' out for this survivor myself and placed a 'Public Policy' and perhaps Battered women will be less likely to lose their lives their homes and their children to the Batterers when they do dare try to leave- an abusive relationship.

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Thank you for the opportunity to testify on House Bill 2517.

My Name is Michelle Blasdel,
I am A survivor of Domestic Violence. I know all to well what Domestic Violence is, having experienced different incidents, since the age of 10. Most recent though has been by a coworker that I worked with for a year who was charged with sexual assault and rape behind the work place (Carlson Auto Auction, Topeka, Ks).(case still pending) We found through Police Reports and news papers that he has been offending women, children and his own family members since he was 16. He attacked me when he was 56.

I was warned by Jefferson Law Enforcement that he is a very violent man. He intimidates all of his victims. He would even attack his victims at his car lot. Some of his customers whom were only 17.

Domestic Violence is a serious and complex issue involving pattern of control, coercion, punishment and intimidation. It disrupts the family life of the victim, as I am single with three children. Recovering from Domestic Violence takes years.

With the Domestic Violence Tag in Place it would let others know of history of offender.

"written only"

Thomas J. Drees
Ellis County Attorney

January 29, 2010

Representative Pat Colloton, Chair,
Kansas House Corrections and Juvenile Justice Committee

RE: House Bill 2517 (domestic violence offenses)

Dear Representative Colloton,

The following are some of the concerns regarding the Domestic Violence Offense Bill, HB 2517. Sect. 1, requires the trier of fact shall determine if the defendant committed a domestic violence offense. The Court shall place a domestic violence designation on the criminal case. The defendant shall be subject to subsection (p) of K.S.A. 21-4603d (sentencing statue).

Sect. 3, K.S.A. 21-3110(8) defines "domestic violence offense" as a crime committed whereby the underlying factual basis includes an act of domestic violence.

K.S.A. 21-3310(7) defines "domestic violence" as violence between persons involved or who have been involved in a "intimate relationship". (13) defines "intimate relationship" as spouses, former spouses, people who share parentage of a child, people who are or were involved in a "dating relationship". "Dating relationship" is defined as frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement.

Sect 4, K.S.A. 21-4603(d)(p) when sentencing a "domestic violence designation", the Court shall require the defendant to undergo a domestic violence offender assessment and complete all recommendations. The Court may order the assessment prior to sentencing. The defendant shall be required to pay for the assessment.

Sect 5, K.S.A. 21-3207 requires officers to adopt written policies that (b)(1) officers shall make an arrest in accordance with K.S.A. 22-2401.

Sect. 6, K.S.A. 22-2401 the Kansas arrest statute, which states that a law enforcement officer may arrest a person would be modified to include new subsection (b)(1) probable cause that a crime involving domestic violence has been committed, the officer shall, without undue delay, arrest the person for which the officer has probable cause to believe the person committed the crime or offense.

New subsection (b)(2) goes through a convoluted explanation of arrest concerning domestic violence. I believe this subsection to be confusing and unnecessary.

Statutes involving law enforcement arrest, prosecution, conviction and sentencing, are best served when they use the discretionary term "may" instead of "shall". When the term "shall" is used, the officer, the prosecutor, nor the Court have any discretion in the matter. This could remove police officers, prosecutors and judges from the Kansas Tort Claim Act immunity statute of K.S.A. 75-6104, which grants immunity for:

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(c) enforcement or failure to enforce a law, ...
(d) adoption or enforcement of, or failure to adopt or enforce, any written personnel policy which protects persons health or safety unless a duty of care independent of such policy, is owed to the specific individual injured, except that the finder of fact may consider the failure to comply with any written personnel policy in determining the question of negligence;
(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved;
(n) failure to provide, or the method of providing police or fire protections;
The enumeration of the exceptions to liability in this section shall not be construed to be exclusive nor as legislation intent to waive immunity from liability in the performance or failure to perform any other act or function of an discretionary nature.

As long as the discretionary word "may" is used, officer, prosecutors and judges are protected under the Kansas Tort Claim Act. When the term "shall" is used, it removes discretion on the part of the officer, prosecutor, Judge and could be argued that the word "shall" thereby requires a specific duty to protect the individual who is the victim. Once a special duty to protect the victim is created, failure to protect that victim could result in liability. As long as the discretionary terms "may" are used, all persons maintain immunity under the Kansas Tort Claim Act. That is why the arrest statute under K.S.A. 22-2401 uses the term "may arrest" even as it pertains to Court issued warrants and felony arrests, and why the sentencing statute K.S.A. 21-4603d(a) states that a Court "may adjudge any of the following:" before listing the potential sentences and actions of the Court.

The discretionary function of arrest law as an immunity under the Kansas Tort Claim Act has recently been upheld in Soto v. City of Bonner Springs, 38 K.A.2d 382 (2007). In that opinion, authored by Judge Marquardt, specifically found that the Kansas arrest law is discretionary. Because it is discretionary, subsection (e) of the Tort Claim Act immunities as it applies "whether or not the discretion is abused and regardless of the level of discretion involved". In that case, the plaintiff was arrested and held for three days in Wyandotte County before Johnson County picked him up on his warrant. As soon as Johnson County picked him up on his warrant, it was determined that his middle initial was different, his date of birth was different by one day and the Johnson County warrant, which had a photo attached, did not appear to be the same person as Soto. Soto sued for false arrest. The case was dismissed on summary judgment due to the immunity of the discretionary act of arrest. The term "may" should be used instead of "shall" so as to maintain immunity under the Kansas Tort Claim Act.

By having the "trier of fact" make the determination of domestic violence, the matter will have to be adjudicated as an element of every offense. This may result in prosecutors bargaining away the "domestic violence" tag to obtain the conviction for the underlying crime. That happens quite frequently under the only current "domestic" criminal statue K.S.A. 21-3412a domestic battery, which is commonly pled to battery instead. Conviction of a "domestic" battery prohibits possession or carrying a firearm under federal law, including hunting weapons. Adding the additional element to prove "domestic violence" may hinder your efforts in addressing domestic violence, rather than enhance them.

The definitions of "dating relationship" and "intimate relationship" require a finding that the persons involved had a "frequent intimate association primarily characterized by the expectation of affectional or sexual involvement." These terms may be hard to prove and will be subject to judicial interpretation as to what an expectation of affectional or sexual involvements means. The domestic battery statute originally included similar language of having "an intimate relationship", but it became problematic and it was redefined to "a family or household member" who are "spouses, former spouses, parents or step-parents and children or step-children, persons who presently reside together or who have resided together in the past and persons who have a child in common regardless of whether they have been married or have lived together at any time, or if a women is pregnant and the man is the alleged father." The prior definition included "intimate relations" which resulted in law enforcement having to question victims and defendants as to whether or not they were sexually intimate with each other, which officers did not care to do. Officers believed it was unnecessarily intrusive to question victims about their sexual contact with the suspect. Also, in my experience, a lot of the "domestic violence" incidents occur because one person in the relationship is emotionally involved or attached and the other is not. If the victim was not emotionally attached or expecting affectional or sexual involvement, but the defendant did, does this preclude the domestic violence tag? Do both parties have to be emotionally involved with an expectation of affectional or sexual involvement?

The requirement at sentencing that the Judge require the defendant to undergo the "domestic violence offender assessment" appears to use that as a term of art. In speaking with some professionals in the field, they're unaware of a "domestic violence offender assessment". I believe the correct term of art is that the person should undergo a "domestic violence batterer's intervention assessment" to determine if intervention is necessary, and at what level. By requiring the defendant pay this, does the Court have to wait for the defendant to be able to pay to receive the evaluation? More importantly, the domestic violence batterer's intervention assessment may be a tool that prosecutors would like to request before deciding what plea offer to make the defendant.

The true value of a domestic violence "tag" is to allow law enforcement and prosecutors to be aware of a domestic violence prior history. I think the proper methodology would be to allow law enforcement to designate any crime as "DV" on the Kansas Standard Offense Report and/or on the Triple I criminal history index. This would allow prosecutors and law enforcement to know at the time of the crime that the person they are dealing with has a prior history of domestic violence. This option should be explored through the KBI to determine how the DV "tag" can be added to both the Kansas Standard Offense Report and to the Triple I criminal history index.

If you have any questions, please contact me.

Sincerely,

Thomas J. Drees
Ellis County Attorney

State of Kansas

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Corrections and Juvenile Justice Oversight Committee

Monday, February 1, 2010

Testimony in Opposition to House Bill 2517

Mark Gleeson, Director of Trial Court Programs

Thank you for the opportunity to testify on House Bill 2517. Although identified as an opponent, my testimony is centered on the court's ability to implement the requirement in Section 1 that a "domestic violence designation be placed on the criminal case" and the potential for increased risk to victims by implementing the domestic violence assessment provisions of Section 4.

Let me begin by pointing out that, although the bill includes ordinance violations filed in municipal courts, my testimony applies only to those cases filed in the district courts.

New Section 1 would require that, in all criminal cases where the court determines there is evidence the defendant committed a domestic violence offense, the court is required to place a domestic violence designation on the criminal case. In felony cases, this could be accomplished by modifying the Sentencing Commission Felony Journal Entry of Judgment form to include a check-box indicating the domestic violence designation. However, there is no misdemeanor Journal Entry of Judgment form. The domestic violence designation itself is not a problem because FullCourt, the Judicial Branch accounting and case management system, includes the ability to generate a domestic violence designation. The difficulty lies in how the judge's finding gets from the bench to the clerk or the court services officer and into the FullCourt system. Creating a statewide misdemeanor journal entry of judgment would seem to be one solution, and we would request that the Sentencing Commission's expertise in developing a journal entry form be utilized if this bill is enacted into law.

The definitions of "intimate relationship" and "dating relationship" in Section 3 are different than the definitions of "intimate partners or household members" and "dating relationship" found in K.S.A. 60-3102. The committee may want consider using the same definition.

Corrections and Juvenile Justice
Date: 2-2-10
Attachment # 7

My most significant concern is with Section 4, which amends K.S.A. 2009 Supp. 21-4603d by adding new section (p) obligating "the court to require the defendant to undergo a domestic violence assessment, complete all recommendations, and pay for the assessment and the completion of all recommendations." At best, this language is vague, very difficult to implement, and sets up an expectation that offenders will pay the cost of the program. I also believe Section 4 establishes procedures which create potentially dangerous conditions for victims.

In addition to standard court costs, fines, fees, and restitution, House Bill 2517 requires offenders to pay the costs of the assessment and the costs required to complete all of the recommendations. It is unlikely that offenders will be able to produce sufficient revenue to support the demands created by this bill. Consider the state's experience with SB 123. Offenders sentenced under SB 123 are required to participate in treatment through providers certified by and accountable to the Department of Corrections. Offenders are typically ordered to pay $350 toward that treatment. The state provided $7.6 million in funding during FY 2009 to pay for SB 123 treatment programs. During that same year, offenders reimbursed the state at total of $74,463.90, less than 1% of the state's share of the treatment program. I believe that assessment, treatment, and sanctions for offenders designated as having committed a domestic violence offense will have a similar track record of paying for their costs. Bottom line: Resources envisioned under the term "recommendations" do not currently exist. Unless the state provides funding for the assessment and "completion of all recommendations," those resources will not exist.

Please let me know if you have questions.