Approved: February 23, 2010
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:30 a.m. on February 2, 2010, in Room 548-S of the Capitol.

All members were present.

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

Conferees appearing before the Committee:
Senator Mike Petersen
Ed Klumpp, Kansas Association of Chiefs of Police
Jordan Austin, Kansas Rifle Association of America
Randall Hodgkinson, Kansas Criminal Defense Lawyers
Helen Pedigo, Executive Director, Kansas Sentencing Commission
Mark Gleeson, Director of Trial Court Programs, Office of Judicial Administration
Roger Werholtz, Secretary, Kansas Department of Corrections
Richard Powell, Chief Deputy, Sedgwick County Sheriff's Office

Others attending:
See attached list.

The Chairman opened the hearing on **SB 381 - Criminal law; justified threat or use of force**. Jason Thompson, staff revisor, reviewed the bill.

Senator Derek Schmidt `testified as a sponsor of the bill stating last fall the Kansas Supreme Court interpreted Kansas self-defense statutes in a manner that was not intended as a result of changes to the statutes made in 2006. The Court concluded the word "use" rather that "threat or use" requires the actual use of force for the legal protections of self-defense to apply. **SB 381** clarifies the intent of the Legislature and encourages enactment of the bill. (Attachment 1)

Senator Mike Petersen appeared as a sponsor of the bill stating clarification is needed as a result of a Supreme Court ruling. The Court stated "The Legislature rather than this court, is charged with study, consideration and adoption of any statutory change the might make [the Statute] more workable." (Attachment 2)

Ed Klumpp appeared in support, stating this bill is necessary to remedy a gap left in the law. Prior to the introduction of **SB 381** the Kansas Association of Chiefs of Police developed a proposed bill draft which would add a statute to Article 32 to define the terms "use of deadly force". The Association encourages passage of legislation to address the problem. (Attachment 3)

Jordan Austin spoke in favor and recommended an amendment that would provide a more comprehensive solution to the ruling handed down by the Kansas Supreme Court. Among the changes in the proposed amendment are:

- defines the terms "force" and "deadly force";
- adds "place of work" as a place where self defense is justified;
- provides a presumption that the use of force is justified under certain conditions; and
- addressed the use of force when used against law enforcement;

The NRA believes the proposed amendment is a necessary fix based on the Supreme Court ruling. (Attachment 4)

Randall Hodgkinson testified in support, stating **SB 381** will protect the rights of Kansans to defend themselves, their families, and third persons. The statutory codification of these rights must allow not only the use of force, but the threat of force, for self defense and defense of another. Mr. Hodgkinson recommended the bill be amended to clearly indicated that it applies retroactively. (Attachment 5)

Minutes of the Senate Judiciary Committee at 9:30 a.m. on February 2, 2010, in Room 548-S of the Capitol.

Written testimony in support of **SB 381** was submitted by:
Brandon Flint (Attachment 6)
Thomas Stanton, Deputy Reno County District Attorney (Attachment 7)
John P. Wheeler, Jr., Finney County (Attachment 8)

There being no further conferees, the hearing on **SB 381** was closed.

The Chairman opened the hearing on **SB 345 - Increasing the probation services fee and community correctional services fee for persons convicted of felonies or misdemeanors**. Jason Thompson, staff revisor, reviewed the bill.

Helen Pedigo appeared in support, stating the reason for the fee increase is to provide for the implementation of and training for the use of a risk management assessment tool. Ms. Pedigo requested **HB 2581** as a substitute bill which would specifically direct the funds collected to implementation of and training for use of the risk needs assessment tool. (Attachment 9)

Mark Gleeson spoke in favor stating that while the Level of Service Inventory - Revised (LSI-R) has proven to be a successful program in jurisdictions where used, repeated attempts at acquiring funding have failed. Increasing the fee appears to be the only way the Judicial Branch will acquire the funding to pay for the program. (Attachment 10)

There being no further conferees, the hearing on **SB 345** was closed.

The Chairman opened the hearing on **SB 346 - No transfer of offenders with 10 or less days remaining on sentence to department of corrections custody**. Jason Thompson, staff revisor, reviewed the bill.

Tim Madden appeared in support stating the transfer of an inmate entails a number of issues and costs. These include the physical transportation to the Reception and Diagnostic Unit; segregation, medical and custodial evaluations; release of the offender into the community; and jail and prison capacity. Enactment of **SB 346** addresses the resources and public safety issues pertaining to inmates with 10 or less days imprisonment. Mr. Madden proposed a balloon amendment to provide that the Department's procession of journal entries submitted to the Department prior to the transfer ob a offender be changed from 3 to 5 business days. (Attachment 11)

Richard Powell spoke in opposition stating **SB 346** will have an immediate adverse impact on over-populated jails within Kansas. Enactment of this bill will add additional financial burden to the citizens of the county and does nothing to remedy the issue of inmate overpopulation. Mr. Powell suggested exempting county jails that were at 100% capacity and empower the Secretary of Corrections the authority to allow for early release of selected inmates falling into the defined 10 days or less category.
(Attachment 12)

There being no further conferees, the hearing on **SB 346** was closed.

Written testimony in support of **SB 346** was submitted by:
Melissa Wangemann, Legislative Services Director, Kansas Association of Counties (Attachment 13)

The next meeting is scheduled for February 3, 2010.

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

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.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb. 2, 2010

NAME	REPRESENTING
Mark Gleeson	Judicial Branch
Bob Keller	JCSO
Randall Hodgkinson	KACDL
Tim Dortch	Westar
JERAY PILLA	WESTAR
SEAN MILLER	CAPITOL STRATEGIES
Joe Molina	KS BAR ASSN
Richard Samaniego	Kennard & Assoc.
RICHARD POWELL	SEDGWICK CO SHERIFFS OFFICE
Ed Klumpp	KACP/KSA/KPOA
Bernd Koops	Hein Law Firm

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Interstate Cooperation
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Testimony in Support of Senate Bill 381
Presented to the Senate Judiciary Committee
by Senator Derek Schmidt

February 2, 2010

Mr. Chairman, members of the committee, thank you for the opportunity to testify today in support of Senate Bill 381.

Last fall, the Kansas Supreme Court in State v. Hendrix interpreted our self-defense statutes in a manner that was never intended. A copy of that opinion is attached to my testimony. The Court concluded that because the statute in question referred only to "use" of force, rather than "threat or use" of force, the actual use of force is required in order for the legal protections of self-defense from the 2006 changes to the statutes to apply.

That interpretation is peculiar at best and is bad public policy at worst. As the Chief Justice wrote in his dissenting opinion, "The practical result of the majority's interpretation of 'use of force' in K.S.A. 21-3211 ... is to interpret the ambiguity in favor of physical violence. Instead of using words to deter harmful conduct, persons would be encouraged to escalate a situation by committing some kind of physical act that would justify acting in self-defense under the law."

The bill before us today clarifies what the intent always was -- that the protections for self-defense under the 2006 legislation apply to both the actual use of force and the threat of use of force.

I encourage favorable consideration of this important clarification in the law, and I would stand for questions.

Senate Judiciary
2-2-10
Attachment 1

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 97,323

STATE OF KANSAS,
Appellee,

v.

RODNEY MAURICE HENDRIX,
Appellant.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Jury Instructions—Defendant Entitled to Instructions on Law Applicable to Theory of Defense—Sufficiency of Evidence to Support Instruction.* A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory.

2. STATUTES—*Interpretation —Legislative Intent—Court's Duty When Interpreting Unambiguous Statute.* In interpreting a statute, the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. The intent of the legislature is to be derived in the first place from the words used. In determining whether a statute is open to construction or in construing a statute, ordinary words are to be given their ordinary meaning and courts are not justified in disregarding the unambiguous language.

3. SAME—*Interpretation —Unambiguous Statute—Appellate Review.* When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there.

1-2

4. SAME—*Presumption Legislature Does not Intend to enact Meaningless Legislation.* There is a presumption that the legislature does not intend to enact useless or meaningless legislation.

5. LEGISLATURE—*Declaration of Public Policy.* Declaration of public policy is normally the function of the legislative branch of government.

6. CRIMINAL LAW—*Self-defense—Jury Instruction—Instruction Not Warranted unless Defendant Use Physical Force.* Under the plain language of K.S.A. 21-3211 (Furse 1995), a jury instruction on self-defense is not warranted unless the defendant has used actual physical force.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 19, 2008 Appeal from Johnson district court; JACQUELYN E. ROKUSEK, judge pro tem. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed. Opinion filed October 23, 2009.

Matthew J. Edge, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Steven J. Obermeier, assistant district attorney, argued the cause, and *Elizabeth J. Dorsey*, legal intern, *Phill Kline*, district attorney, and *Steve Six*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

NUSS, J.: The issue presented is whether a defendant must use actual force to justify a jury instruction on self-defense. We answer this question "yes." Accordingly, the judgment of the Court of Appeals is affirmed.

FACTS

The facts necessary to our determination are straightforward. While visiting their mother in her hospital room, Rodney Maurice Hendrix and his sister, Charlotte Brown, had a heated

confrontation. According to Brown, her brother entered the room and angrily approached her. Hendrix "shoved" a piece of paper in her face so severely that when he pulled the paper away it showed traces of her makeup. Brown testified that Hendrix backed away, then again came toward her and pulled a knife. He then threatened to kill Brown if she returned to their mother's home where Hendrix lived and where Brown had been staying during her visit. According to Brown, Hendrix then left.

Hendrix's story was considerably different. According to him, he entered the hospital room and knelt by his mother while holding a piece of paper that he wanted to show her. He testified that Brown approached him and stuck her hand in his face while loudly cussing him. Hendrix claimed he was afraid that Brown would slap him. He testified that to get her to back away, he told her he would "break her neck." One fact the siblings do agree upon is the complete absence of physical force by either one.

Hendrix was charged with the crimes of criminal threat and aggravated assault. The trial court denied his request for a self-defense jury instruction on the basis of insufficient evidence. Specifically, it ruled that Hendrix did not have a reasonable belief that his conduct was necessary to defend himself against the use of imminent force by his sister. The jury then convicted Hendrix of making a criminal threat under K.S.A. 21-3419(a) ("any threat to . . . [1] [c]ommit violence communicated with intent to terrorize another, or . . . in reckless disregard of the risk of causing such terror") and misdemeanor assault under K.S.A. 21-3408 ("intentionally placing another person in reasonable apprehension of immediate bodily harm").

The Court of Appeals held that Hendrix was not entitled to a self-defense instruction as a matter of law because no physical force was actually used. *State v. Hendrix*, No. 97,323, unpublished opinion filed September 19, 2008. The panel cited the statute and the standard jury instruction on self-defense: K.S.A. 21-3211 (Furse 1995) and PIK Crim. 3d 54.17. Accordingly, its rationale eliminated the need to consider the trial court's determination of insufficient evidence of Hendrix's reasonable belief that his conduct was necessary to defend himself against the threat of imminent force.

We granted Hendrix's petition for review under K.S.A. 22-3602(e).

ANALYSIS

We recently set forth our standard of review for determining when a defendant is entitled to a jury instruction on his or her theory of defense in *State v. Anderson*, 287 Kan. 325, 334, 197 P.3d 409 (2008):

> "'A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory.'"

The statute concerning Hendrix's theory of self-defense, K.S.A. 21-3211 (Furse 1995), in turn provided as follows:

> "A person is justified in the *use of force* against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's use of unlawful force." (Emphasis added.)

We begin by acknowledging that the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. *Steffes v. City of Lawrence*, 284 Kan. 380, Syl. ¶ 2, 160 P.3d 843 (2007). The intent of the legislature is to be derived in the first place from the words used. *Griffin v. Suzuki Motor Corp.*, 280 Kan. 447, 460, 124 P.3d 57 (2005). In determining whether a statute is open to construction or in construing a statute, ordinary words are to be given their ordinary meaning and courts are not justified in disregarding the unambiguous language. *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, Syl. ¶ 8, 132 P.3d 1279 (2006); see *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 822, 104 P.3d 378 (2005).

"When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there." *Steffes*, 284 Kan. 380, Syl. ¶ 2.

We agree with the State and the Court of Appeals panel that the phrase "use of force" contained in K.S.A. 21-3211 (Furse 1995) should be given its ordinary meaning—and that means actual force. "Use of force" does not mean "threat of force" or "display of force" or "presentation of force" or any interpretations which similarly dilute the actual use of force, *i.e.*, physical contact.

Even if the statutory language were somehow ambiguous and we looked to canons of construction to assist in determining the meaning of "use of force," we note that the legislature has been clear in other contexts to distinguish between the actual use of force and diluted variations. For example, the legislature has explicitly defined robbery as the taking of property from the person or presence of another either "by *force* or by *threat* of bodily harm" to any person. (Emphasis added.) K.S.A. 21-3426. The legislature has made the same type of explicit distinctions in the crime of kidnapping. It defines kidnapping as a taking or confining of another person "accomplished by *force, threat* or deception." (Emphasis added.) K.S.A. 21-3420.

Finally the legislative distinction is again clearly made in K.S.A. 21-3213 which concerns defense of property other than a dwelling. It provides:

> "A person who is lawfully in possession of property other than a dwelling is justified *in the threat or use of force* against another for the purpose of preventing or terminating an unlawful interference with such property. Only such degree of *force or threat* thereof as a reasonable man would deem necessary to prevent or terminate the interference may intentionally be used." (Emphasis added.)

Hendrix's take on the statutes would make the language of clear distinction superfluous. In short, there would be no need for the legislature to discern, on the one hand, "threats" or implied force from actual "force" and "use of force" on the other. See *Hawley v. Kansas Department of Agriculture*, 281 Kan. 603, Syl. ¶ 9, 132 P.3d 870 (2006) (there is a presumption that the legislature does not intend to enact useless or meaningless legislation).

Hendrix relies upon language contained in another unpublished Court of Appeals decision, *State v. Kincade*, No. 94,657, filed August 4, 2006. There the panel stated:

> "In the present case, the defendant offered no evidence which, if believed, would have supported a reasonable belief the defendant or another person was in imminent danger of the use of unlawful force. The use of force *or the threat of force* to protect another person is a defense only when such force is necessary to protect the third party from an aggressor's imminent use of force. K.S.A. 21-3211. The evidence in this case provides no basis from which to conclude that any person, other than the victim, was placed in imminent danger of the use of unlawful force justifying the defendant's protective use of force in response. The record simply fails to support an instruction on self-defense or defense of another." (Emphasis added.) Slip Op. at 4.

The italicized words upon which Hendrix relies are contrary to the plain language of the statute. More specifically, the *Kincade* panel inappropriately read into the statute words not found there. *Steffes*, 284 Kan. 380, Syl. ¶ 2. To the extent that *Kincade* is inconsistent with the holding of the instant case, it is overruled.

Hendrix primarily argues policy considerations. Among other things, he points out the alleged absurdity in *denying* self-defense to a defendant (purportedly like himself) who can defuse a violent situation with the mere threat of force, but then in *granting* the defense to one who instead chooses to actually apply force. He argues the statute—or at least our interpretation of it—promotes violence because defendants wanting to ensure their entitlement to the defense will use actual force instead of words.

We agree with the worthy goal of promoting de-escalation, *e.g.*, defusing a violent episode with some well chosen words. However, policy making is the province of the legislature. See *Bland v. Scott*, 279 Kan. 962, 966, 112 P.3d 941 (2005) ("'declaration of public policy is normally the function of the legislative branch of government'"); see also *State v. Prine*, 287 Kan. 713, 737, 200 P.3d 1 (2009) ("Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make [the statute] more workable."). It alone must decide whether to pursue this goal in the self-

defense statute. Consequently, it alone must decide to make the explicit distinctions there as it has in the other statutory enactments mentioned earlier.

Such an approach would also be consistent with the ones chosen by a number of other states in their self-defense statutes. See, *e.g.*, Ga. Code Ann. § 16-3-24.2 (2007) ("A person who uses threats or force . . . shall be immune from criminal prosecution therefor . . . ."); Tex. Penal Code Ann. § 9.04 (West 2003) ("The threat of force is justified when the use of force is justified by this chapter."); Wisc. Stat. § 939.48(1) (2005) ("A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person.").

For all of these reasons, the judgment of the Court of Appeals is affirmed.

* * *

DAVIS, C.J., dissenting: Under Kansas law, "[a] person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such force is necessary to defend himself or another against such aggressor's imminent use of unlawful force." K.S.A. 21-3211(a) (Furse 1995); accord *State v. Shortey*, 256 Kan. 166, 173, 884 P.2d 426 (1994). The majority determines that the plain language "use of force" means only the exertion of physical force. Because I find the language of K.S.A. 21-3211 (Furse 1995) to be ambiguous and because I conclude that the legislature reasonably intended to incorporate both physical and constructive force within the self-defense statute, I cannot join in the majority opinion and must dissent.

Consider the following example. One evening, a large man approaches a woman in a menacing manner and threatens, "I'm going to hurt you!" Worried for her life, the woman takes a gun from her purse, points it at her assailant, and says, "Stay where you are!" The assailant turns and runs.

Assume for the sake of the example that the woman is subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by the legislature in its enactment of K.S.A. 21-3211 (Furse 1995).

Although the majority recognizes the incongruity in this outcome from a policy perspective, it finds that its interpretation of K.S.A. 21-3211 (Furse 1995) is demanded by the plain language of that statute. I disagree that the plain language dictates such a result.

K.S.A. 21-3211(a) (Furse 1995) provides that, in certain instances, the "use of force" is justified when defending oneself or others. The statute does not define the terms "use" or "force." In my opinion, the failure to define these terms creates an ambiguity in the statute that must be resolved through statutory construction.

Notably, the majority assumes that the term "force" includes only "physical force." See slip op. at 5-6 (indicating that the "ordinary meaning" of "force" is "actual [or physical] force"). This interpretation is not based on the plain language of the statute, as K.S.A. 21-3211 (Furse 1995) is silent as to the types of force it encompasses. The generic term "force" may include both "actual force"—that is, physical force—and "constructive force"—that is, the threat of actual force. See Black's Law Dictionary 717 (9th ed. 2009) (distinguishing *actual force* ["(f)orce consisting in a physical act"] from *constructive force* ["(t)hreats and intimidation to gain control or prevent resistance"]).

Likewise, the majority opinion interprets the term "use" in K.S.A. 21-3211 (Furse 1995) to mean only *the exertion of physical force*. The majority reaches the blanket conclusion that "'[u]se of force' does not mean 'threat of force' or 'display of force' or 'presentation of force' or any interpretations which similarly dilute the actual use of force, *i.e.*, physical contact." Slip op. at 6. But contrary to the majority's interpretation, "use" is a general term that may include all of those other actions (threat, display, presentation, etc.). See Black's Law Dictionary 1681 (9th ed.

2009) (defining "use" in general terms as "[t]he application or employment of something" and listing 34 examples where "use" carries different meanings in the legal context).

It is a cardinal principle of statutory interpretation that a statute should not be read to add language that is not found in its text. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). Absent a definition of the terms "use" and "force" in K.S.A. 21-3211 (Furse 1995), we are left with the task of ascertaining the intent of the legislature in its including those undefined terms in the statute. In order to reach the majority's conclusion that it may resolve the question before us under the statute's plain language, one must first *assume* that the legislature intended to exclude constructive force to limit "force" to "physical force" only. The same is true if one limits "use" to describe only the "exertion of physical force." Contrary to the majority's conclusion, the language used in K.S.A. 21-3211 (Furse 1995) is not necessarily clear and, without some assumptions on the part of the reader, does not exclude constructive force from the ambit of self-defense.

When the language of a statute leaves the reader generally uncertain as to which of two or more reasonable interpretations is proper—as is the case here—courts must resort to maxims of construction. See *Weber v. Tillman*, 259 Kan. 457, 476, 913 P.2d 84 (1996). Most importantly, when ascertaining legislative intent, courts must interpret statutes in a reasonable manner as long as such an interpretation is consistent with a statute's language. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

The practical result of the majority's interpretation of "use of force" in K.S.A. 21-3211 (Furse 1995)—that a self-defense instruction is only warranted when actual physical force has been exerted—is to interpret the ambiguity in favor of physical violence. Instead of using words to deter harmful conduct, persons would be encouraged to escalate a situation by committing some kind of physical act that would justify acting in self-defense under the law. In the example described above, the woman would be encouraged to shoot her assailant instead of merely threatening him. As Hendrix argues in his petition for review, this result is truly "absurd."

The majority attempts to bolster its interpretation by turning to other examples in our statutes where the legislature has apparently differentiated between "threat" and "force." I do not find these distinctions persuasive in light of its unreasonable interpretation in favor of escalating already violent situations. Instead, I would resolve the ambiguity in favor of nonviolence and de-escalation.

I find the self-defense definition included in the Model Penal Code to be a particularly helpful example of a resolution of the question before us. Model Penal Code § 3.04(1) (1995) provides that "the *use of force upon or toward another person* is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." (Emphasis added.) Several states have adopted the exact language of the model code in their definition of self-defense. See Del. Code Ann. tit. 11, § 464 (2007); Guam Code Ann. tit. 9, § 7.84 (2008); Hawaii Rev. Stat. § 703-304 (2007); Neb. Rev. Stat. § 28-1409 (2003); N.J. Stat. Ann. § 2C:3-4 (West 2005); 18 Pa. Cons. Stat. Ann. § 505 (Purdon 1998).

Two important aspects of the model code are worth noting. First, the model code employs the same phrase—"use of force"—that is used in K.S.A. 21-3211 (Furse 1995). It does not distinguish between threats and physical force, nor does it specifically define "force" in that context. Second, the model code indicates that one may use force "upon or toward" another. In other words, the "use of force" does not necessarily require some physical force exerted on another; rather, it can involve force directed toward another to de-escalate a violent situation. Put simply, the Model Penal Code envisions self-defense to include constructive force.

The cases decided by the states employing the Model Penal Code definition are consistent with this interpretation. For example, in *Com. v. Rittle,* 285 Pa. Super. 522, 428 A.2d 168 (1981), the Pennsylvania Superior Court reversed and remanded an assault conviction for a new trial because the trial court failed to provide a self-defense instruction. In *Rittle,* the victim, who was much larger then the allegedly sickly defendant, approached the defendant's car and threatened to beat up the defendant. The defendant reached into his back seat, produced a gun, and pointed it at the victim; the victim walked away. No shots were fired. The trial court

refused to charge the jury on self-defense and the defendant was found guilty of simple assault. On appeal, however, the court held that the jury could have concluded that the victim was the initial aggressor who attempted to place the defendant in fear of imminent serious bodily injury and such could amount to simple assault. Therefore, the defendant was entitled to an instruction on the use of self-defense. 285 Pa. Super. at 525-26.

It is true that K.S.A. 21-3211 (Furse 1995) is not identical to the Model Penal Code's self-defense definition. Instead of stating that "the use of force *upon or toward* another person is justifiable" in limited circumstances (as Model Penal Code § 3.04[1] [1995] provides), K.S.A. 21-3211(a) (Furse 1995) states that "[a] person is justified in the use of force *against* an aggressor" when the other conditions of the statute are met. (Emphasis added.) I do not find this difference to be significant, however. The term "against" encompasses the same behavior that may be directed "upon or toward" another. Thus, it is consistent with the model code and likewise does not exclude from its ambit the use of constructive force in self-defense.

Statutes should be interpreted in a reasonable manner as long as such an interpretation is consistent with a statute's plain language. *Winnebago Tribe of Nebraska*, 283 Kan. at 77. Because it would be entirely consistent with the language of K.S.A. 21-3211 to interpret "use of force" to include both constructive and actual force, I would conclude that the legislature intended to include constructive force within its definition of self-defense. Thus, in the hypothetical example described above between the man and the woman, I would conclude that the woman's use of force to repel her assailant by pointing the gun fits the legislature's definition of self-defense.

LUCKERT, J., joins in the foregoing dissent.

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SENATOR MIKE PETERSEN

COMMITTEES
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MEMBER: LOCAL GOVERNMENT
TRANSPORTATION
JOINT COMMITTEE ON
INFORMATION TECHNOLOGY

SB 381

February, 2nd 2010

Chairman Owens, Members of the Committee. The purpose of SB 381 is to clarify a statute which the Supreme Court in October ruled that the meeting of the term "Use of Force" means actual force i.e. physical contact. The majority opinion also stated that "The Legislature rather than this court, is the body charged with study, consideration and adoption of any statutory change that might make [The Statute] more workable."

The absurdity of denying self defense to a defendant who can defuse a violent situation with the threat of force, then granting it to a person who actually uses physical force goes against any discussion of self defense I have heard in the Legislature. I have attached a copy of Chief Justice Davis's dissenting opinion that contains a clear example of the practical result of the Courts decision.

Thank you for your consideration,

Mike Peterson

Senator Mike Petersen

Senate Judiciary
2-2-10
Attachment 2

defense statute. Consequently, it alone must decide to make the explicit distinctions there as it has in the other statutory enactments mentioned earlier.

Such an approach would also be consistent with the ones chosen by a number of other states in their self-defense statutes. See, *e.g.*, Ga. Code Ann. § 16-3-24.2 (2007) ("A person who uses threats or force . . . shall be immune from criminal prosecution therefor . . . ."); Tex. Penal Code Ann. § 9.04 (West 2003) ("The threat of force is justified when the use of force is justified by this chapter."); Wisc. Stat. § 939.48(1) (2005) ("A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person.").

For all of these reasons, the judgment of the Court of Appeals is affirmed.

* * *

DAVIS, C.J., dissenting: Under Kansas law, "[a] person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such force is necessary to defend himself or another against such aggressor's imminent use of unlawful force." K.S.A. 21-3211(a) (Furse 1995); accord *State v. Shortey*, 256 Kan. 166, 173, 884 P.2d 426 (1994). The majority determines that the plain language "use of force" means only the exertion of physical force. Because I find the language of K.S.A. 21-3211 (Furse 1995) to be ambiguous and because I conclude that the legislature reasonably intended to incorporate both physical and constructive force within the self-defense statute, I cannot join in the majority opinion and must dissent.

Consider the following example. One evening, a large man approaches a woman in a menacing manner and threatens, "I'm going to hurt you!" Worried for her life, the woman takes a gun from her purse, points it at her assailant, and says, "Stay where you are!" The assailant turns and runs.

2-2

Assume for the sake of the example that the woman is subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by the legislature in its enactment of K.S.A. 21-3211 (Furse 1995).

Although the majority recognizes the incongruity in this outcome from a policy perspective, it finds that its interpretation of K.S.A. 21-3211 (Furse 1995) is demanded by the plain language of that statute. I disagree that the plain language dictates such a result.

K.S.A. 21-3211(a) (Furse 1995) provides that, in certain instances, the "use of force" is justified when defending oneself or others. The statute does not define the terms "use" or "force." In my opinion, the failure to define these terms creates an ambiguity in the statute that must be resolved through statutory construction.

Notably, the majority assumes that the term "force" includes only "physical force." See slip op. at 5-6 (indicating that the "ordinary meaning" of "force" is "actual [or physical] force"). This interpretation is not based on the plain language of the statute, as K.S.A. 21-3211 (Furse 1995) is silent as to the types of force it encompasses. The generic term "force" may include both "actual force"—that is, physical force—and "constructive force"—that is, the threat of actual force. See Black's Law Dictionary 717 (9th ed. 2009) (distinguishing *actual force* ["(f)orce consisting in a physical act"] from *constructive force* ["(t)hreats and intimidation to gain control or prevent resistance"]).

Likewise, the majority opinion interprets the term "use" in K.S.A. 21-3211 (Furse 1995) to mean only *the exertion of physical force*. The majority reaches the blanket conclusion that "'[u]se of force' does not mean 'threat of force' or 'display of force' or 'presentation of force' or any interpretations which similarly dilute the actual use of force, *i.e.*, physical contact." Slip op. at 6. But contrary to the majority's interpretation, "use" is a general term that may include all of those other actions (threat, display, presentation, etc.). See Black's Law Dictionary 1681 (9th ed.

2009) (defining "use" in general terms as "[t]he application or employment of something" and listing 34 examples where "use" carries different meanings in the legal context).

It is a cardinal principle of statutory interpretation that a statute should not be read to add language that is not found in its text. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). Absent a definition of the terms "use" and "force" in K.S.A. 21-3211 (Furse 1995), we are left with the task of ascertaining the intent of the legislature in its including those undefined terms in the statute. In order to reach the majority's conclusion that it may resolve the question before us under the statute's plain language, one must first *assume* that the legislature intended to exclude constructive force to limit "force" to "physical force" only. The same is true if one limits "use" to describe only the "exertion of physical force." Contrary to the majority's conclusion, the language used in K.S.A. 21-3211 (Furse 1995) is not necessarily clear and, without some assumptions on the part of the reader, does not exclude constructive force from the ambit of self-defense.

When the language of a statute leaves the reader generally uncertain as to which of two or more reasonable interpretations is proper—as is the case here—courts must resort to maxims of construction. See *Weber v. Tillman*, 259 Kan. 457, 476, 913 P.2d 84 (1996). Most importantly, when ascertaining legislative intent, courts must interpret statutes in a reasonable manner as long as such an interpretation is consistent with a statute's language. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

The practical result of the majority's interpretation of "use of force" in K.S.A. 21-3211 (Furse 1995)—that a self-defense instruction is only warranted when actual physical force has been exerted—is to interpret the ambiguity in favor of physical violence. Instead of using words to deter harmful conduct, persons would be encouraged to escalate a situation by committing some kind of physical act that would justify acting in self-defense under the law. In the example described above, the woman would be encouraged to shoot her assailant instead of merely threatening him. As Hendrix argues in his petition for review, this result is truly "absurd."

The majority attempts to bolster its interpretation by turning to other examples in our statutes where the legislature has apparently differentiated between "threat" and "force." I do not find these distinctions persuasive in light of its unreasonable interpretation in favor of escalating already violent situations. Instead, I would resolve the ambiguity in favor of nonviolence and de-escalation.

I find the self-defense definition included in the Model Penal Code to be a particularly helpful example of a resolution of the question before us. Model Penal Code § 3.04(1) (1995) provides that "the *use of force upon or toward another person* is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." (Emphasis added.) Several states have adopted the exact language of the model code in their definition of self-defense. See Del. Code Ann. tit. 11, § 464 (2007); Guam Code Ann. tit. 9, § 7.84 (2008); Hawaii Rev. Stat. § 703-304 (2007); Neb. Rev. Stat. § 28-1409 (2003); N.J. Stat. Ann. § 2C:3-4 (West 2005); 18 Pa. Cons. Stat. Ann. § 505 (Purdon 1998).

Two important aspects of the model code are worth noting. First, the model code employs the same phrase—"use of force"—that is used in K.S.A. 21-3211 (Furse 1995). It does not distinguish between threats and physical force, nor does it specifically define "force" in that context. Second, the model code indicates that one may use force "upon or toward" another. In other words, the "use of force" does not necessarily require some physical force exerted on another; rather, it can involve force directed toward another to de-escalate a violent situation. Put simply, the Model Penal Code envisions self-defense to include constructive force.

The cases decided by the states employing the Model Penal Code definition are consistent with this interpretation. For example, in *Com. v. Rittle,* 285 Pa. Super. 522, 428 A.2d 168 (1981), the Pennsylvania Superior Court reversed and remanded an assault conviction for a new trial because the trial court failed to provide a self-defense instruction. In *Rittle,* the victim, who was much larger then the allegedly sickly defendant, approached the defendant's car and threatened to beat up the defendant. The defendant reached into his back seat, produced a gun, and pointed it at the victim; the victim walked away. No shots were fired. The trial court

refused to charge the jury on self-defense and the defendant was found guilty of simple assault. On appeal, however, the court held that the jury could have concluded that the victim was the initial aggressor who attempted to place the defendant in fear of imminent serious bodily injury and such could amount to simple assault. Therefore, the defendant was entitled to an instruction on the use of self-defense. 285 Pa. Super. at 525-26.

It is true that K.S.A. 21-3211 (Furse 1995) is not identical to the Model Penal Code's self-defense definition. Instead of stating that "the use of force *upon or toward* another person is justifiable" in limited circumstances (as Model Penal Code § 3.04[1] [1995] provides), K.S.A. 21-3211(a) (Furse 1995) states that "[a] person is justified in the use of force *against* an aggressor" when the other conditions of the statute are met. (Emphasis added.) I do not find this difference to be significant, however. The term "against" encompasses the same behavior that may be directed "upon or toward" another. Thus, it is consistent with the model code and likewise does not exclude from its ambit the use of constructive force in self-defense.

Statutes should be interpreted in a reasonable manner as long as such an interpretation is consistent with a statute's plain language. *Winnebago Tribe of Nebraska*, 283 Kan. at 77. Because it would be entirely consistent with the language of K.S.A. 21-3211 to interpret "use of force" to include both constructive and actual force, I would conclude that the legislature intended to include constructive force within its definition of self-defense. Thus, in the hypothetical example described above between the man and the woman, I would conclude that the woman's use of force to repel her assailant by pointing the gun fits the legislature's definition of self-defense.

LUCKERT, J., joins in the foregoing dissent.

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Marysville Police Dept.

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Testimony to the Senate Judiciary Committee
In Support of SB 381

February 2, 2010

Mr. Chairman and Committee Members,

The Kansas Association of Chiefs of Police supports SB381 which proposes amending the use of force statutes in K.S.A. Chapter 21, Article 32. This action is necessary to remedy a gap left in the law after the Kansas Supreme Court ruling in State vs. Hendrix, decided in October 2009.

After this ruling, the KACP worked with several other persons, including prosecutors and law enforcement legal advisors to develop a bill proposal to make this correction. However, SB481 was filed prior to our proposal and we elected not to introduce a separate bill. I have attached a copy of the bill draft for informational purposes. Our proposal would have simply added a statute to Article 32 and defined the terms "use of force" and "use of deadly force." Our reasons for this approach were:

1. We thought it would be better to stay away from making any changes in the core statute language and simply make the fix by defining the words creating difficulty for the court.
2. The case law includes a statement, "The statute does not define the terms "use" or "force." In my opinion, the failure to define these terms creates an ambiguity in the statute. . ." (Page 8, ¶3)
3. The case law also includes a statement, ""Use of force" does not mean "threat of force" or "display of force" or "presentation of force". . ." leaving the possibility the court sees each of these terms with a different meaning or application. (Page 5, ¶1)
4. The dissenting opinion in the Hendrix case also includes a statement, "The generic term "force" may include both "actual force"—that is, physical force—and "constructive force"—that is, the threat of actual force. See Black's Law Dictionary 717 (9th ed. 2009) (distinguishing *actual force* ["(f)orce consisting in a physical act"] from *constructive force* ["(t)hreats and intimidation to gain control or prevent resistance"])." (Page 8, ¶4)

The attached draft includes all of the above issues from the case law: constructive force; defining "use of force" and "use of deadly force"; and including in those definitions "display", "presentation", and "threat" of force, not just the threat of force.

We urge you to recommend this bill favorably for passage regardless of which approach is taken.

Ed Klumpp
Legislative Committee Chair
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Phone: (785) 235-5619
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Senate Judiciary
2-2-10
Attachment 3

2010 9rs1364

SENATE BILL NO. ____

By

AN ACT concerning crimes, punishment and criminal procedure; defining "use of force" and "use of "deadly force".

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

Section 1. As used in article 32 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto:

(a) "Use of force" means any actual or constructive force, including, but not limited to, threats, displays or presentations of force directed toward another person or the actual application of force upon another person.

(b) "Use of deadly force" means any actual or constructive force described in subsection (a) which is likely to cause imminent death or great bodily harm.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
11250 WAPLES MILL ROAD
FAIRFAX, VIRGINIA 22030-7400

Chairman Tim Owens
Senate Judiciary Committee
548-S
State Capitol
Topeka, KS 66612

Dear Chairman Owens,

February 2, 2010

My name is Jordan Austin and I am a registered lobbyist speaking on behalf of the National Rifle Association. I come before you today to express our support for SB 381. In 2006, the members of this legislature passed a bill known as the Castle Doctrine. This bill gave KS citizens the right to protect themselves in their homes, cars, and anywhere they have a legal right to be. This bill also made it clear that KS citizens have no "duty to retreat" when confronted by an attacker. Finally the bill provided protection from civil liability lawsuits from criminals or their families who are injured or killed.

SB 381 is attempting to address a court ruling handed down by the Kansas Supreme Court. In State v. Hendrix, the court determined that the threat of force is not covered under the Castle Doctrine law and therefore, simply threatening to use force does not entitle you to a self defense jury instruction. The courts ruling states that, "the "use of force" contained in K.S.A. 21-3211 should be given its ordinary meaning—and that means actual force. "Use of force" does not mean "threat of force" or "display of force" or "presentation of force" or any interpretations which similarly dilute the actual use of force."

So, according to the court, if you shoot someone in self defense in your home you are protected under the law and get a self defense jury instruction. If you threaten some one in your home and tell them to leave or you will shoot them, you could be charged with criminal threat and aggravated assault and if/when you go to court, the jury would not be given a self defense jury instruction.

It was originally determined that SB 381 would sufficiently cover the problems caused by the Hendrix ruling, but upon a more thorough analysis of the Kansas statute concerning self defense, it was determined that a more comprehensive solution was necessary and thusly a committee substitute is being proposed.

The NRA supports the proposed amendment to SB 381 and we strongly believe that the new language is a necessary fix based on the Hendrix ruling. This legislature overwhelmingly passed the original castle doctrine bill in 2006. This bill and the proposed amendment does very little to change the substance of what Kansas citizens can do in self defense, it simply makes is more clear. We again urge your support.

Sincerely,

Jordan A. Austin

Kansas State Lobbyist
NRA-ILA

Senate Judiciary
2-2-10
Attachment 4

Testimony on SB 381 (Proponent)
To the Senate Judiciary Committee

Testimony of Randall L. Hodgkinson
Kansas Association of Criminal Defense Lawyers

February 2, 2010

KACDL is a 300-member nonprofit organization dedicated to justice and due process for people accused of crimes. KACDL generally supports SB 381 to protect the rights of Kansans to defend themselves, their families, and third persons. The statutory right to use or threaten to use force in self-defense or defense of another is rooted in the Kansas and federal constitutions. In order to properly preserve these fundamental rights, the statutory codification of these rights must allow not only the use of force, but also the threat of force, for self-defense and defense of another.

SB 381 should be applied retroactively.

The statutory changes proposed in SB 381 should not be denied to those Kansans who use the threat of force in self-defense or defense of another before the changes in SB 381 go into effect. Because of the recent holding in State v. Hendrix, 289 Kan. 859 (2009), ordinary Kansans have become felons when their only crime was using *the threat* of force to defend themselves or their families (as opposed to actually using force). SB 381 should be applied retroactively so it applies to those persons who were in the unfortunate position of having to use a threat of force for protection before any amendment to the applicable statutes.

Brandon Flint testified before the House Judiciary Committee yesterday (in re HB 2432). Mr. Flint is an Iraq War veteran who had no "criminal history" until he used the threat of force to defend his fiancée one night in Emporia. After leaving a bar, Mr. Flint observed his fiancée in a scuffle with two men; she was on her back, on the ground, and under the two men. Mr. Flint got his handgun from his car and subsequently pointed the gun at the men so his fiancée could get to her feet and get away.

Mr. Flint was convicted of aggravated assault after the trial court refused to instruct the jury on the affirmative defense of "defense of another." The Kansas Court of Appeals recently ruled that Mr. Flint's conviction should be upheld because the court was required to follow the holding of Hendrix. Judge Richard Greene wrote separately to stress that Mr. Flint's case demonstrates the "urgent need for a legislative fix of K.S.A. 21-3211." The court's opinion in Mr. Flint's case is attached to this testimony.

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Attachment 5

Mr. Flint, and a handful of other persons similarly situated both on appeal and in district court, should be allowed to assert self-defense or defense of others under K.S.A. 21-3211. Under current law, Mr. Flint is a convicted felon because he used a threat of force to protect his fiancée instead of using actual force to defend his fiancée. In its current form, SB 381 will not apply to Mr. Flint's case because his offense was committed before the change in the applicable statutes. See State v. Sutherland, 248 Kan. 96, Syl. ¶ 4 (1991) ("[A] statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively.").

SB 381 should be amended so it clearly indicates that it applies retroactively. A retroactive change to K.S.A. 21-3211 to allow for the threat of force for self-defense or defense of another might guarantee that Mr. Flint gets his day in court to assert "defense of another" to a jury. By making SB 381 apply retroactively, the Legislature can also assure the rights of Kansans until the bill goes into effect. A simple additional section indicating that "This act shall apply retroactively" will suffice.

In its current form, SB 381 goes into effect upon its publication in the statute book. If this bill is passed during this legislative session, the bill would still not take effect for several months. KACDL is generally in favor of this bill, but asks this committee to amend the bill to apply the statutory changes retroactively so that ordinary Kansans are not made into felons simply because of the date of their need to use a threat of force for self-defense or defense of another.

Respectfully submitted,

Randall L. Hodgkinson
randall.hodgkinson@washburn.edu

NOT DESIGNATED FOR PUBLICATION

No. 101,583

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

Appellee,

v.

BRANDON FLINT,

Appellee.

MEMORANDUM DECISION

Appeal from Lyon District Court; JEFFRY J. LARSON, judge. Opinion filed January 29, 2010. Affirmed.

Carl Folsom, III, of Kansas Appellate Defender Office, for appellant.

Vernon E. Buck, first assistant county attorney, *Marc Goodman*, county attorney, and *Steve Six*, attorney general, for appellee.

5-3

Before HILL, P.J., ELLIOTT and GREENE, JJ.

Per Curiam: This is Brandon Flint's direct appeal of his aggravated assault conviction. This court issued a Show Cause Order on December 10, 2009, to both parties to decide the effect of the recent holding of our Supreme Court in *State v. Hendrix,* 289 Kan. 859 (2009), on the only issue raised in this appeal. After considering this matter, we hold that *Hendrix* controls this case.

Briefly repeated, the facts reveal that after leaving a bar in Emporia where Flint's fiancée and another man exchanged angry words, Flint walked to his car. Outside, Flint's fiancée and two men continued to talk in a heated fashion. Flint's fiancée fell to the ground during the scuffle. At this point, Flint got his gun, walked back across the street, and pointed the gun at the chest of one of the men; both men immediately backed away. Flint's fiancée got up, she and Flint walked back to Flint's car, and they drove away.

The State charged Flint with aggravated assault, and the jury convicted him. Flint requested an instruction for defense of another under K.S.A. 21-3211(a), but the district court denied his request, ruling Flint's use of force was greater than reasonably necessary to resist the attack. The court cited the ruling in *State v. Marks*, 226 Kan. 704, 602 P.2d 1344 (1979), as authority. Flint asks us to reverse based on this issue alone.

A majority of the Supreme Court held in *Hendrix* that K.S.A. 21-3211 created a defense of self or defense of another only when there is "use of force." The majority decided actual physical contact rather than a mere threat or display of force is necessary to raise this defense. See 289 Kan. 589, Syl. ¶ 6. Since Flint merely threatened the use of his gun and there was no actual force applied, he was not entitled to the defense of another.

This court is duty bound to follow Supreme Court precedent, without some suggestion the court is departing from its previous position. *State v. Merrills*, 37 Kan. App. 2d 81, 83, 149 P. 3d 869, *rev. denied* 284 Kan. 949 (2007). In addition, if a trial court reaches the right result, its decision will be upheld even though the trial court assigned erroneous reasons for its decision. *State v. Murray*, 285 Kan. 503, 533, 174 P. 3d 407 (2008). We are not persuaded by Flint's argument that *Hendrix* does not control here because *Hendrix* fails to consider Flint's right to bear arms as pronounced by the United States Supreme Court in *District of Columbia v. Heller*, ___ U.S. ___, 171 L.Ed. 2d 637, 128 S. Ct. 2783 (2008). Therefore, the trial court's decision is affirmed according to Supreme Court Rule 7.041 (2009 Kan. Ct. R. Annot. 56) based on the holding in *Hendrix*.

Affirmed.

GREENE, J, concurring: I agree that the outcome here is controlled by *State v. Hendrix*, 289 Kan. 859, 218 P.3d 40 (2009), but I write separately to note that the factual scenario in this case is very much like the hypothetical scenario depicted by Chief Justice Davis' dissent in *Hendrix*. The fact that Flint has been deprived of self-defense here demonstrates the wisdom of the Chief Justice Davis' dissent and the urgent need for a legislative fix of K.S.A. 21-3211.

Session of 2010

SENATE BILL No. 381

By Senators D. Schmidt and Petersen

1-15

AN ACT concerning crimes, punishment and criminal procedure; relating to justified threat or use of force; amending K.S.A. 21-3211, 21-3212, 21-3214, 21-3215, 21-3216, 21-3217, 21-3218 and 21-3219 and repealing the existing sections.

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

Section 1. K.S.A. 21-3211 is hereby amended to read as follows: 21-3211. (a) A person is justified in the *threat or* use of force against another when and to the extent it appears to such person and such person reasonably believes that such *threat or use of* force is necessary to defend such person or a third person against such other's imminent use of unlawful force.

(b) A person is justified in the *threat or* use of deadly force under circumstances described in subsection (a) if such person reasonably believes *that such threat or use of* deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

(c) Nothing in this section shall require a person to retreat if such person is *threatening or* using force to protect such person or a third person.

Sec. 2. K.S.A. 21-3212 is hereby amended to read as follows: 21-3212. (a) A person is justified in the *threat or* use of force against another when and to the extent that it appears to such person and such person reasonably believes that such *threat or use of* force is necessary to prevent or terminate such other's unlawful entry into or attack upon such person's dwelling or occupied vehicle.

(b) A person is justified in the *threat or* use of deadly force to prevent or terminate unlawful entry into or attack upon any dwelling or occupied vehicle if such person reasonably believes *that such threat or use of* deadly force is necessary to prevent imminent death or great bodily harm to such person or another.

(c) Nothing in this section shall require a person to retreat if such person is *threatening or* using force to protect such person's dwelling or occupied vehicle.

Sec. 3. K.S.A. 21-3214 is hereby amended to read as follows: 21-3214. The justification described in sections 21-3211, 21-3212, and 21-

KACDL - proposed amendment
(language on p. 4)

3213, *and amendments thereto,* is not available to a person who:

~~(1)~~ *(a)* Is attempting to commit, committing, or escaping from the commission of a forcible felony; or

~~(2)~~ *(b)* Initially provokes the use of force against ~~himself~~ *such person* or another, with intent to use such force as an excuse to inflict bodily harm upon the assailant; or

~~(3)~~ *(c)* Otherwise initially provokes the use of force against ~~himself~~ *such person* or another, unless:

~~(a) He~~ *(1)* *Such person* has reasonable ~~ground~~ *grounds* to believe that ~~he~~ *such person* is in imminent danger of death or great bodily harm, and ~~he~~ *such person* has exhausted every reasonable means to escape such danger other than the *threat or* use of force which is likely to cause death or great bodily harm to the assailant; or

~~(b)~~ *(2)* In good faith, ~~he~~ *such person* withdraws from physical contact with the assailant and indicates clearly to the assailant that ~~he~~ *such person* desires to withdraw and terminate the *threat or* use of force, but the assailant continues or resumes the use of force.

Sec. 4. K.S.A. 21-3215 is hereby amended to read as follows: 21-3215. ~~(1)~~ *(a)* A law enforcement officer, or any person whom such officer has summoned or directed to assist in making a lawful arrest, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Such officer is justified in the *threat or* use of any force which such officer reasonably believes to be necessary to effect the arrest and ~~of~~ *the threat or use of* any force which such officer reasonably believes to be necessary to defend the officer's self or another from bodily harm while making the arrest. However, such officer is justified in *threatening or* using force likely to cause death or great bodily harm only when such officer reasonably believes that such *threat or use of* force is necessary to prevent death or great bodily harm to such officer or another person, or when such officer reasonably believes that such *threat or use of* force is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit a felony involving great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that such person will endanger human life or inflict great bodily harm unless arrested without delay.

~~(2)~~ *(b)* A law enforcement officer making an arrest pursuant to an invalid warrant is justified in the *threat or* use of any force which such officer would be justified in *threatening or* using if the warrant were valid, unless such officer knows that the warrant is invalid.

Sec. 5. K.S.A. 21-3216 is hereby amended to read as follows: 21-3216. ~~(1)~~ *(a)* A private person who makes, or assists another private person

in making a lawful arrest is justified in the *threat or* use of any force which ~~he~~ *such person* would be justified in *threatening or* using if ~~he~~ *such person* were summoned or directed by a law enforcement officer to make such arrest, except that ~~he~~ *such person* is justified in the *threat or* use of force likely to cause death or great bodily harm only when ~~he~~ *such person* reasonably believes that such *threat or use of* force is necessary to prevent death or great bodily harm to ~~himself~~ *such person* or another.

~~(2)~~ *(b)* A private person who is summoned or directed by a law enforcement officer to assist in making an arrest which is unlawful, is justified in the *threat or* use of any force which ~~he~~ *such person* would be justified in *threatening or* using if the arrest were lawful.

Sec. 6. K.S.A. 21-3217 is hereby amended to read as follows: 21-3217. A person is not authorized to *threaten or* use force to resist an arrest which ~~he~~ *such person* knows is being made either by a law enforcement officer or by a private person summoned and directed by a law enforcement officer to make the arrest, even if the person arrested believes that the arrest is unlawful.

Sec. 7. K.S.A. 21-3218 is hereby amended to read as follows: 21-3218. (a) A person who is not engaged in an unlawful activity and who is attacked in a place where such person has a right to be has no duty to retreat and has the right to stand such person's ground and meet force with *the threat or use of* force.

(b) This section shall be part of and supplemental to the Kansas criminal code.

Sec. 8. K.S.A. 21-3219 is hereby amended to read as follows: 21-3219. (a) A person who *threatens or* uses force which, subject to the provisions of K.S.A. 21-3214, and amendments thereto, is justified pursuant to K.S.A. 21-3211, 21-3212 or 21-3213, and amendments thereto, is immune from criminal prosecution and civil action for the *threat or* use of such force, unless the person against whom force was *threatened or* used is a law enforcement officer who was acting in the performance of such officer's official duties and the officer identified the officer's self in accordance with any applicable law or the person *threatening or* using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, "criminal prosecution" includes arrest, detention in custody and charging or prosecution of the defendant.

(b) A law enforcement agency may use standard procedures for investigating the *threat or* use of force as described in subsection (a), but the agency shall not arrest the person for *threatening or* using force unless it determines that there is probable cause for the arrest.

(c) A county or district attorney or other prosecutor may commence a criminal prosecution upon a determination of probable cause.

Sec. 9. This act shall apply retroactively.

10

Sec. ~~9.~~ K.S.A. 21-3211, 21-3212, 21-3214, 21-3215, 21-3216, 21-3217, 21-3218 and 21-3219 are hereby repealed.

Sec. ~~10.~~ 11. This act shall take effect and be in force from and after its publication in the statute book.

5-10

Testimony on SB 381 (Proponent)

Senate Judiciary Committee on February 2, 2010

Testimony of Brandon Flint

My name is Brandon Flint. I'm a mechanic, construction worker, college student, a father, a Veteran, and a felon.

One night, I took my fiancée to the bar to play some pool. We had some drinks, talked and socialized with other patrons. My alleged victim tried to start a fight with me and we left the bar. He and his friend followed us out.

There were words being exchanged, I saw a shoving match and then everyone separated. I turned around and started walking to my car. Mr. Mitchell got in his truck for a few seconds; I turned around to see him sprint at Nicole and tackle her to the ground. It was dark, the two guys were bigger than me and I was by my car, so I grabbed my Glock out of my glove box, ran over, pointed it as his chest and yelled "Get the F off of her." I told Nicole to get in the car. Mr. Mitchell complied and Nicole got up from underneath him. I saw Mr. Mitchell was not armed, Nicole got past me and I dropped the gun to my side. Mr. Mitchell got up and we got in our car and left.

I'm now a felon because I protected the mother of my child from Mr. Mitchell. I don't know what would have happened if I hadn't pulled a gun on Mr. Mitchell, but I know that Nicole made it away safely because I did.

About eight years ago, there was a football player, in Emporia, beat to death; three men were charged. If he had done the same thing I did, he would be alive, but would be a felon like me. He would have to register every four months as an offender, his driver's license would say "Registered Offender", the same words that appear on the licenses of registered pedophiles and rapists. He would also have to attend community classes, have psychological evaluations done and attend a variety of meetings.

At my trial, my entire defense was built around "defense of another." However, the judge threw out the instructions to the jury and I was convicted, because I "stuck by my guns," so to speak, and stated that I believed I had done the right thing.

I served two separate tours in Iraq with the United States Army. I hauled jet fuel and was shot at with everything from AK-47's to RPG's and rockets. Roadside bombs hit our convoys constantly. I went through all of that to help keep our great nation safe, only to find that the same great nation I protected does not allow me to protect myself or my loved ones.

On Friday, the Court of Appeals affirmed my conviction. I was told by Mr. Folsom that these proceedings today have a direct bearing on my case. I hope that a favorable decision will be made and will allow my case to be grandfathered, as it applies here into the laws you are about to change. Thank you for your time.

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

TO: Senator Tim Owens, Chair
The Honorable Senators of the Senate Judiciary Committee

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

RE: Written Testimony in Support of Senate Bill 381

DATE: February 2, 2010

Thank you for the opportunity to submit written testimony regarding Senate Bill 381. This legislation is in direct response to the Kansas Supreme Court decision in *State v. Hendrix*, ____ Kan. ____, 218 P.3d 40 (2009). In that Case, Justice Nuss, writing for a majority of the Court, ruled that, "Under the plain language of K.S.A. 21-3211 (Furse 1995), a jury instruction on self-defense is not warranted unless the defendant has used actual physical force." *Id.* at Syl ¶ 6. Justices Davis and Luckert dissented.

K.S.A. 21-3211 currently states as follows:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
> (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.
> (c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person."

The statute references only the actual use of force as a defense to a perceived threat as being

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protected conduct. Although it appears that the Kansas Legislature appears to have made no distinction between the use of force and the threat of the use of force, such a distinction has been read into the law. Senate Bill 381 clarifies the law to reflect what we believe to have been the original intent of the law.

Hendrix would require that a person use actual force before the self-defense provisions of K.S.A. 21-3211 could apply. Such a result would lead to a situation in which the party defending himself or herself would be required to use the weapon being used in self-defense before the provisions of the statute could be applied. A person who lawfully carried a concealed firearm, and who pulled the firearm in defense of himself or another would be required to actually fire the weapon to be protected by K.S.A. 21-3211. Thus, the decision has the effect of promoting violence, even if such effect was not the intention of the Court. As Justice Davis stated in his dissenting opinion:

> "Consider the following example. One evening, a large man approaches a woman in a menacing manner and threatens, 'I'm going to hurt you!' Worried for her life, the woman takes a gun from her purse, points it at her assailant, and says, 'Stay where you are!' The assailant turns and runs.
> "Assume for the sake of the example that the woman is subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by the legislature in its enactment of K.S.A. 21-3211 (Furse 1995)."

We agree with Justice Davis that such a bizarre result was not the intention of this body when K.S.A. 21-3211 was originally enacted. The KCDAA therefore supports this legislation, and requests that the bill be favorably considered by this Committee.

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TO: Senate Judiciary Committee

From: John P. Wheeler, Jr., Finney County Attorney

Re: Senate Bill No. 381

Date: February 2, 2010

I thank the Chair for allowing me to supplement the record on Senate Bill No. 381 with this written testimony. I present this testimony on behalf of the Kansas County and District Attorneys Association as a proponent of this bill.

Senate Bill No. 381 is submitted in response to the Kansas Supreme Court's decision of State v. Hendrix, 218 P. 3d 40 (2009). Although the facts in Hendrix are conflicted, the essence of the case is that the defendant was charged with Aggravated Assault for pulling a knife on his sister while in their mother's hospital room. The defendant claimed that he was only exercising lawful self-defense, pursuant to K.S.A. 21-3211 (Use of force in defense of a person; no duty to retreat) in protecting himself from what he perceived to be the immediate physical aggression from his sister. The sister, of course, claimed that it was her brother who was the aggressor.

In resolving the case, the Supreme Court found that the only salient fact that was undisputed . was that the defendant did not use force. He only *threatened* the use of force. The Supreme Court further found that K.S.A. 21-3211, by its own clear and concise language, only applies to the actual *use* of force and not the *threat* of force and, therefore, the defendant could not avail himself to the use

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of self-defense under K.S.A. 21-3211. In furtherance of its position, the Supreme Court noted the language set forth in K.S.A. 21-3213 (Use of force in defense of property other than a dwelling) which states, "A person who is lawfully in possession of property other than a dwelling is justified in the *threat* or use of force against another...." [Emphasis added].

It should be noted that in Hendrix the defendant did argue the public policy considerations, pointing out "...the alleged absurdity in *denying* self-defense to a defendant...who can defuse a violent situation with the mere threat of force, but then in *granting* the defense to one who instead chooses to actually apply force." The Supreme Court dispensed with that argument stating that the public policy of this state is to be set by the Legislature and not by the Court.

So, consider the following scenario: A woman is leaving the grocery store and headed toward her car. As she begins to open the door, as man approaches her and attempts to take her purse. She resists, pulls her lawfully concealed pistol from the pocket of her coat and points it at the perpetrator and screams. The perpetrator runs away. The police are called and apprehend the suspect several blocks away. He says he wasn't trying to take her purse. He was just passing through vehicles in the parking lot on the way to the store when "that woman" threatened him with a gun! The woman is arrested and charged with Aggravated Assault. As the law now exists post Hendrix, the woman cannot claim self-defense because she did not shoot the fellow. She only threatened him.

Now, after the Hendrix decision, the people of the State of Kansas should properly be counseled that, if they lawfully threaten the use of force in defense of their person, in defense of another, in defense of their dwelling or occupied vehicle, they should actually shoot, bludgeon or stab to protect themselves. A law enforcement officer in making a lawful arrest or protecting himself or herself from attack should not threaten to use force to make the arrest or to protect himself or herself. He or she should just shoot and get it over with.

As we can all see, the effect of Hendrix has left the people of this state in a clearly uncivil position. Passing Senate Bill No. 381 which inserts the term "threat" in all relevant statutes that apply to use of force will clearly state the legislative policy that has always likely been intended by the Legislature.

I appreciate the opportunity to address the Committee on this important issue through my written testimony. I appreciate your attention to both my views and the views of my organization, the Kansas County & District Attorneys Association.

John P. Wheeler, Jr.
Finney County Attorney
409 N. 9th Street
Garden City, KS 67846
Telephone: (620) 272-3568
Email: jwheeler@finneycounty.org

KANSAS

KANSAS SENTENCING COMMISSION

MARK PARKINSON, GOVERNOR

Honorable Ernest L. Johnson, Chair
Honorable Richard M. Smith, Vice Chair
Helen Pedigo, Executive Director

SENATE JUDICIARY COMMITTEE
Senator Tim Owens, Chair
TESTIMONY AND SUBSTITUTE REQUEST
SB 345 Probation Supervision Fee Increase
Helen Pedigo, Executive Director
February 2, 2010

Mr. Chair and committee members, thank you for the opportunity to testify before you today on behalf of the Kansas Sentencing Commission, a 17-member board comprised of criminal justice professionals, including local and state partners, members of all branches of State government, and the public.

This bill raises misdemeanor probation fees from $25 to $50 and felony probation supervision fees from $50 to $100. This statute was adopted in 1984. In the intervening 24 years, these fees have not been increased. The reason for the fee increase is to provide implementation of and training for use of a risk needs assessment tool, the Level of Services Inventory – Revised (LSI-R).

At the request of the Kansas Sentencing Commission, Johnson County initiated a pilot program in 2003 to assign supervision levels and specific probation conditions based on the risk assessment. This program provided a mechanism to allocate limited resources wisely and to supervise offenders at appropriate levels. Offenders in the pilot program are assigned to either court services or community corrections supervision, based upon their risk to reoffend and their supervision needs. Outcomes from this program are attached and demonstrate a reduction in revocations and an increase in successful completions. This initiative is one that the Kansas Sentencing Commission has advocated for many years, working smarter with the resources available, and thereby keeping the public safer.

I would like to request a substitute to this bill. After SB 345 was drafted, it was identified that the increase in funds was not specifically directed to implementation of and training for use of the risk needs assessment tool. The attached bill, HB 2581, would direct the increase in funding to this purpose. Once training and implementation of this initiative is complete, the funding would continue to be directed to support offender supervision by court services and other court personnel in evidence based offender supervision programs. The fee is increased slightly to achieve the needed estimate of $350,000 in training funds within the next two years.

Thank you for your time, and I'd be happy to answer questions.

700 SW Jackson Street, Suite 501, Topeka, KS 66603-3757
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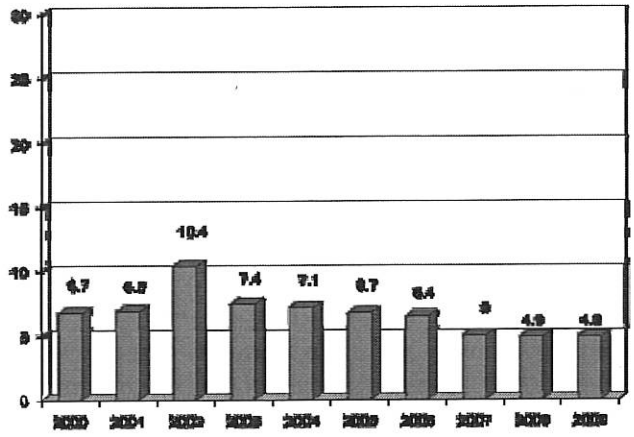
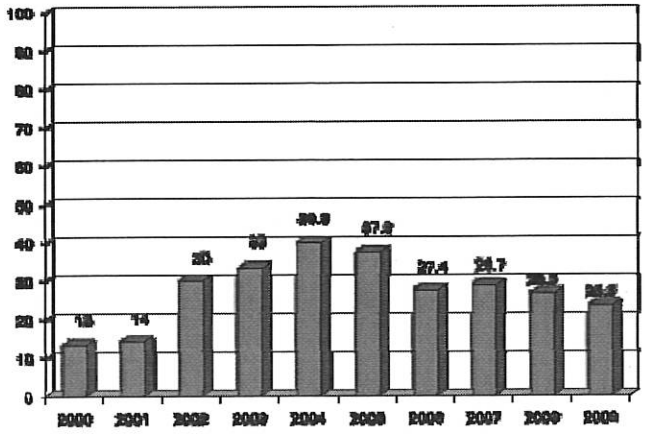
Percent Revoke + Incarceration Rates* by Year: Court Services



Percent Revoke + Incarceration Rates* by Year: Community Corrections



Session of 2010

HOUSE BILL No. 2581

By Committee on Corrections and Juvenile Justice

1-29

AN ACT concerning criminal procedure; relating to the correctional supervision fee; amending K.S.A. 21-4610a and repealing the existing section.

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

Section 1. K.S.A. 21-4610a is hereby amended to read as follows: 21-4610a. (a) Each person placed under the probation supervision of a court services officer or other officer or employee of the judicial branch by a judge of the district court under K.S.A. 21-4610, and amendments thereto, and each person assigned to a community correctional services program shall pay a ~~probation or community correctional services~~ *correctional supervision* fee. If the person was convicted of a misdemeanor, the amount of the ~~probation services~~ *correctional supervision* fee is ~~$25~~ *$60* and if the person was convicted of a felony, the amount of the ~~probation or community correctional services~~ *correctional supervision* fee is ~~$50~~ *$120*, except that in any case the amount of the ~~probation or community correctional services~~ *correctional supervision* fee specified by this section may be reduced or waived by the judge if the person is unable to pay that amount.

(b) The ~~probation or community correctional services~~ *correctional supervision* fee imposed by this section shall be charged and collected by the district court. The clerk of the district court shall remit all revenues received under this section from ~~probation or community correctional services~~ *correctional supervision* fees to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state general fund, *a sum equal to 41.67% of such remittance, and to the correctional supervision fund, a sum equal to 58.33% of such remittance.*

(c) There is hereby established in the state treasury the correctional supervision fund. All moneys credited to the correctional supervision fund shall be used for the implementation of and training for use of a statewide, mandatory, standardized risk assessment tool or instrument as specified by the Kansas sentencing commission, pursuant to K.S.A. 75-5291, and amendments thereto, and for evidence based offender supervision pro-

grams by judicial branch personnel. If all expenditures for the program have been paid and moneys remain in the correctional supervision fund for a fiscal year, remaining moneys may be expended from the correctional supervision fund to support offender supervision by court services officers. All expenditures from the correctional supervision fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the chief justice of the Kansas supreme court or by a person or persons designated by the chief justice.

~~(c)~~ *(d) This section shall apply to persons placed on felony or misdemeanor probation or released on misdemeanor parole to reside in Kansas and supervised by Kansas court services officers under the interstate compact for offender supervision.*

(e) This section shall not apply to persons placed on probation or released on parole to reside in Kansas under the uniform act for out-of-state parolee supervision.

Sec. 2. K.S.A. 21-4610a is hereby repealed.

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

State of Kansas
Office of Judicial Administration
Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507 (785) 296-2256

Testimony in support of Senate Bill No. 345
With Amendments
Mark Gleeson
Director of Trial Court Programs
Office of Judicial Administration

Thank you for the opportunity to testify in support of Senate Bill 345. Although we have amendments, increasing the probation fee is essential to our ability to train court services officers to administer the Level of Service Inventory – Revised, as required by K.S.A. 75-5291. Among states that charge a probation supervision fee, Kansas has the lowest probation fee in the country. The fee of $50 for persons placed on probation following conviction for a felony and $25 for persons placed on probation following conviction of a misdemeanor was established in 1984 and has remained unchanged since that time. Over the past three years, the probation fee for adult offenders generated $425,098 in FY 2007, $403,700 in FY 2008, and $393,902 in FY 2009.

The Level of Service Inventory – Revised (LSI-R) is a quantitative survey of offender attributes and their situations relevant to supervision decisions. The results guide supervision officers in determining the appropriate level of supervision and treatment needs. The offenders are assessed on ten domains: criminal history, education/employment, financial, family/marital, accommodation, use of leisure time, companions, alcohol/drug problems, emotional/personal, and attitudes/orientation. The LSI-R assists the supervision officer in making effective use of limited resources by targeting specific needs of offenders. In jurisdictions where the LSI-R is used to determine levels of supervision, successful discharges have increased and revocations have decreased.

This is our sixth attempt at acquiring funding for court services officers to administer the LSI-R. In 2005, we submitted our first Byrne grant requesting funding for the project. Two additional Byrne grants and two State General Fund requests later, we are making our sixth request to meet a legislative requirement to bring probation supervision practices on par with community corrections, parole, and inmate classification in Kansas prisons. Funding for this project is essential. We estimate it will require at least $350,000 to purchase the software licenses and train the 275 court services officers who will administer these assessments by January 1, 2011.

Increasing the fee appears to be the only way the Judicial Branch will acquire the funding to pay for training and support for court services officers to administer the LSI-R and to adopt evidence based practices in the supervision of offenders. I believe that adopting these practices will save money by reducing probation violations and recidivism. Without this fund, it will be impossible for us to meet the requirement of K.S.A. 75-5291.

Please let me know if you have questions.

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KANSAS
DEPARTMENT OF CORRECTIONS

Mark Parkinson, Governor
Roger Werholtz, Secretary

www.doc.ks.gov

Testimony on SB 346
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
February 2, 2010

The Department supports SB 346. SB 346 amends K.S.A. 75-5220 to provide that if an offender sentenced to the custody of the Department of Corrections has 10 days or less remaining to be served on the balance of his or her prison sentence, that offender is to remain in the custody of the sheriff for the balance of the prison portion of the sentence.

The Department would ask that consideration be given to a balloon amendment to SB 346 to provide that the Department's processing of the journal entries submitted to the Department prior to the transfer of the offender be changed from 3 business days to five business days. A balloon amendment for this proposal is attached.

The transfer of convicted offenders from sheriffs to the Department of Corrections entails a number of issues and costs. The physical transportation of the inmate to the Reception and Diagnostic Unit; the segregation, medical and custody evaluation of newly admitted offenders; the release of the offender into the community; and of course jail and prison capacity. The Department believes that SB 346 addresses the resources and public safety issues pertaining to the confinement of inmates with a term of imprisonment of 10 days or less remaining to be served in a manner that constitutes a savings to taxpayers.

The Department and sheriffs have worked together to achieve cost savings in the transportation of offenders sentenced to the Department's custody. The Department's inmate bus transport system which travels between KDOC facilities works with sheriffs to pick up offenders at nearby KDOC facilities or at points along the system's route, thus saving sheriffs from having to transport offenders to the Reception and Diagnostic Units at the Topeka Correctional or El Dorado Correctional Facilities.

Additionally, the Department's Sentence Computation Unit receives journal entries of sentencing by fax and email, or in the case of Johnson and Shawnee Counties, which have provided to the Department free access to online court records, so the Department can compute the balance of the sentence remaining to be served or advise the court of any sentencing concern which may require resentencing before the inmate is removed from the county jail.

These measures and the cooperation between sheriffs and the Department has resulted in 142 offenders remaining in a county jail for the short balance of time remaining to be

served in FY 2008; 194 offenders serving the balance of their sentence in county jails for FY 2009; and 127 inmates for the first half of FY 2010.

In addition to the cost savings incurred by counties in not having to transport the inmate to the Department of Corrections, savings are gained by not using the specialized resources required for the new admission of a prisoner into a different correctional system. The admission of a new offender into a correctional system requires the searching of the offender and his or her property complete with an inventory, the segregation of the inmate until that inmate's medical, mental health and custody status is evaluated, and an assessment of the inmate's programming risks and needs. These resources are expended due to the fact the offender is entering a different correctional system and in the Department's opinion are wasted if the offender is going to be returned back to the community shortly after his or her arrival at the Reception and Diagnostic Unit.

Finally, the Department's parole officers contact the offender and begin the release planning for these short term offenders while they are still in the county jail. Parole Officers are able to pick up the offender's release supervision immediately upon release from jail rather than having to issue reporting instructions that are dependant upon the time of day the offender is released from a correctional facility and bus schedules back to the community where they will be supervised.

Despite the savings and good public policy evidenced by the number of offenders who are allowed to stay in the county jail until the prison portion of their sentence expires (194 offenders in FY 2009 and 127 inmates for the first half of FY 2010), 106 offenders in FY 2009 were admitted into a KDOC facility with 10 or less days remaining to be served. SB 346 would extend the savings and benefits derived from the voluntary retention of short term offenders experienced today to those offenders who have ten or fewer days to be served.

The Department request that SB 346 be amended at page 1 line 16 to allow the Department five business days to review the journal entries forwarded to the Department prior to admission. The additional two business days in which to review the sentencing documents would allow the Department's Reception and Diagnostic Units to better manage the flow of inmates received at the Reception and Diagnostic Units over the course of a week and provide more time for communication between the Department, sheriffs and the sentencing courts regarding any anomaly that the Department finds in the sentencing documents. For example, the Department reviews the postrelease supervision provisions of sentencing orders and if it believes that an erroneous order has been issued, the court is contacted. That review and contact enables the court to issue a corrected order prior to the offender being moved out of the county and negates having the offender having to be brought back to the county for resentencing. Finally, the additional two days for processing the journal entry prior to admission would aid parole officers in establishing the release and supervision plan while the offender is still in the county of conviction.

Session of 2010

SENATE BILL No. 346

By Joint Committee on Corrections and Juvenile Justice Oversight

1-8

AN ACT concerning the department of corrections; relating to the transfer of certain offenders; amending K.S.A. 2009 Supp. 75-5220 and repealing the existing section.

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

Section 1. K.S.A. 2009 Supp. 75-5220 is hereby amended to read as follows: 75-5220. (a) Except as provided in ~~subsection (d)~~ *subsections (d), (e) and (f)*, within ~~three~~ five business days of receipt of the notice provided for in K.S.A. 75-5218, and amendments thereto, the secretary of corrections shall notify the sheriff having such offender in custody to convey such offender immediately to the department of corrections reception and diagnostic unit or if space is not available at such facility, then to some other state correctional institution until space at the facility is available, except that, in the case of first offenders who are conveyed to a state correctional institution other than the reception and diagnostic unit, such offenders shall be segregated from the inmates of such correctional institution who are not being held in custody at such institution pending transfer to the reception and diagnostic unit when space is available therein. The expenses of any such conveyance shall be charged against and paid out of the general fund of the county whose sheriff conveys the offender to the institution as provided in this subsection.

(b) Any female offender sentenced according to the provisions of K.S.A. 75-5229, and amendments thereto, shall be conveyed by the sheriff having such offender in custody directly to a correctional institution designated by the secretary of corrections, subject to the provisions of K.S.A. 75-52,134, and amendments thereto. The expenses of such conveyance to the designated institution shall be charged against and paid out of the general fund of the county whose sheriff conveys such female offender to such institution.

(c) Each offender conveyed to a state correctional institution pursuant to this section shall be accompanied by the record of the offender's trial and conviction as prepared by the clerk of the district court in accordance with K.S.A. 75-5218, and amendments thereto.

(d) If the offender in the custody of the secretary is a juvenile, as described in K.S.A. 2009 Supp. 38-2366, and amendments thereto, such

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juvenile shall not be transferred to the state reception and diagnostic center until such time as such juvenile is to be transferred from a juvenile correctional facility to a department of corrections institution or facility.

(e) Any offender sentenced to a facility designated by the secretary of corrections to participate in an intensive substance abuse treatment program shall not be transferred to the state reception and diagnostic center but directly to such facility, unless otherwise directed by the secretary. The secretary may transfer the housing and confinement of any offender sentenced to a facility to participate in an intensive substance abuse treatment program to any institution or facility pursuant to K.S.A. 75-5206, and amendments thereto.

(f) If the offender has 10 or less days remaining to be served on the prison portion of the sentence at the time the notice provided for in K.S.A. 75-5218, and amendments thereto, is received by the secretary of corrections, the offender shall remain in the custody of the sheriff until the completion of the prison portion of the sentence. The secretary shall inform the sheriff of the date of the expiration of the prison portion of the offender's sentence if 10 or less days remain to be served.

Sec. 2. K.S.A. 2009 Supp. 75-5220 is hereby repealed.

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

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SEDGWICK COUNTY, KANSAS

SHERIFF'S OFFICE
ROBERT HINSHAW
Sheriff

141 WEST ELM * WICHITA, KANSAS 67203 * TELEPHONE: (316) 660-3900 * FAX: (316) 660-3248

Testimony SB 346
Before the Senate Judiciary Committee
February 2, 2010

Honorable Chairman Tim Owens and members of the committee, I appreciate the opportunity to testify in opposition of SB 346. My name is Richard Powell. I am the Chief Deputy with the Sedgwick County Sheriff's Office. I am responsible for the annual budget and financial needs of the agency. I am appearing on behalf of Sheriff Robert Hinshaw, the Sheriff of Sedgwick County in opposition of this legislation, as proposed.
SB 346 amends KSA 2009 Supp. 75-5220 relating to the transfer of certain offenders. The amended Section (f) allows for an offender with 10 or less days remaining on their prison sentences and who are residing in county jails awaiting transfer to state correctional facilities, to complete their sentences in the county jails.

As proposed, SB 346 will have an immediate impact on those over populated county jails within Kansas. Our current jail was built to house 1158 inmates. As of yesterday, we had 1589 inmates in custody of which 351 were being housed in 19 other Kansas counties. Mandating this proposed amendment will only add additional burden to the citizens of Sedgwick County and does nothing to remedy the issue of inmate over population

In a letter from Duane Goossen, Kansas Director of Budget dated January 29, 2010 it was written that this action would only cost county jails somewhere between $400 to $640 per inmate, excluding medical treatment. In actuality, the cost to Sedgwick County would be approximately$650 plus medical expenses per inmate. It was also mentioned in the same letter that this measure would save Kansas counties approximately $100 in transportation cost by not having to move these inmates to a correctional facility. In Sedgwick County, due to inmate over population, this would add an additional cost of $757 since these inmates would be transported to another county for housing purposes.

The issue of concern is one that may affect many counties to a greater or lesser degree. These are the factors of inmate population and the cost of inmate housing. This proposed amendment, holds the promise of overwhelming a local jail's ability to house inmates in a safe and efficient manner.

For the above reasons, the Sedgwick County Sheriff's Office opposes SB 346.

We would respectfully suggest other alternatives to the proposed amendments

- Exempting those Kansas county jails that were at 100% capacity or higher
- Empower the Secretary of Corrections with the authority to allow for "early release" of these selected inmates falling into the defined category of 10 days or less remaining sentence.

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KANSAS ASSOCIATION OF COUNTIES

TESTIMONY TO THE SENATE JUDICIARY COMMITTEE
FEBRUARY 2, 2010
SB 346

Chairman Owens and Members of the Committee:

I am Melissa Wangemann, General Counsel to the Kansas Association of Counties. I am here to oppose SB 346.

SB 346 requires any offender having 10 or fewer days to serve in prison to remain in the custody of the county sheriff until completion of the sentence.

Three concerns have emerged from my counties when I asked about the impact of this legislation: overcrowding of county jails, the costs of housing the inmates, and the costs of transporting the inmates due to unavailability of space at the county jail.

Daily care seems to range from $30 per day to $75 per day among the counties. The question then becomes whether the daily care costs would be cheaper than the costs of transporting the prisoner to a Department of Corrections facility. For most counties, the costs of daily care exceed the transportation costs.

Several counties have overcrowded jails and cannot house inmates for additional time. To do so would require that the county transport the person to another county's jail and incur those transportation costs.

Counties also expressed concern about costs relating to prisoners' medical conditions. We are seeing more and more of our jail population suffering from illness (often mental illness), and those costs will also be born for the 10 days of incarceration at the county jail.

One county raised a concern about a shift in liability relating to the paperwork required to release the prisoner on time. If the Department of Corrections does not process the paperwork in a timely fashion and the inmate remains in the jail longer than the balance of his sentence, who is legally responsible for the delayed release? Will the county be held harmless?

For these reasons, the Kansas Association of Counties stands in opposition to this bill. However, we are willing to continue the discussion on this bill and work towards another approach.

Respectfully Submitted,

Melissa A. Wangemann

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Senate Judiciary
2-2-10
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