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Hon. Greg Smith, Vice Chairman
Hon. David Haley, R.M. Member
March 14, 2013
10:30 a.m.
Room 346-S

Chief Judge Richard M. (Dick) Smith
Sixth Judicial District
Chairman, Kansas Sentencing Commission
judgelndc@earthlink.net

TESTIMONY ON BEHALF OF KANSAS SENTENCING COMMISSION IN SUPPORT OF HB 2170

I wish to thank this honorable committee for extending the opportunity to appear and present testimony in support of HB 2170. I am Richard M. Smith, Chief Judge of the Sixth Judicial District and Chairman of the Kansas Sentencing Commission.

When it appears that Kansas will reach capacity of its prisons the Kansas Sentencing Commission has a specific duty to analyze and identify the impact of specific legislative options for reducing prison admissions or adjusting the length of sentences for specific groups of offenders (K.S.A. 74-9109).

The Kansas Department of Corrections is at capacity with male inmates and projections suggest this trend will continue and we will be over 2000 inmates beyond capacity by 2022, just nine years away. The legislature is confronted with a choice of

either the future expenditure of millions of dollars for additional space or taking action to reduce prison population growth. HB 2170 represents a package of changes to the way we do business which targets the real causes of this increasing prison population. Those changes seek to reduce crime in the form of "recidivism" (offenders reoffending) and probation/post release revocations (probationers/parolees failing on supervision).

Based on an apparent disconnect and a resultant need for accurate information I am forced to begin with an explanation of what HB 2170 is not. First, it is not soft on crime or some erosion in the principles of truth in sentencing. Not a single current sentence is reduced. No one currently incarcerated is released any earlier. It does not change any existing sentences. There is one area of future sentencing that may be changed which I will discuss later, but it has no impact on existing sentences and will not affect the vast majority of future underlying sentences. Secondly, it is not a radical departure from current practices resulting in the softening of sanctions for those that violate conditions of supervision. On the contrary it preserves all the options currently at the disposal of the criminal justice system. HB 2170 adds new tougher sanctions, provides for immediate consequences, provides for supervision of a whole new group who currently fail on probation but have no post-release supervision and more clearly defines the structure of these additional options or tools to be used by Court Service Officers, Intensive Supervision Officers, Prosecutors and Judges. No existing sanctions are eliminated.

HB 2170 represents a package of options, where, rather than reduce sentences or release persons from prison we can look to reducing crime and probation revocations through swift and certain sanctions and retargeting our resources at high risk individuals

thereby reducing recidivism (which means fewer victims of new crimes) and fewer probation revocations. While other conferees are more competent than I to provide the statistical proof of what is known as Evidence Based Practices, it simply makes sense to me as a former prosecutor and judge with nearly 30 years of experience that our state should focus our resources on those most likely to harm society. We have learned that there is a group of low risk individuals that require very little supervision to protect our communities. It is now proven that we actually increase the risk that they will reoffend and create new victims if we lump them in with and literally force them to associate with high risk individuals. HB 2170 allows the field officers more flexibility and targets our resources where they are needed, not where they may actually be counterproductive.

First, we need to look at "who" this bill is dealing with. The vast majority of offenders this bill contemplates are those who are presumptive probation and under the sentencing guideline grid have a sentence between 5 and 29 months (Non Drug) or a sentence of between 10 – 22 months (Drug Grid). In considering the actual length of sentence it is important to remember that many of these offenders actually face a period of DOC incarceration less than the numbers suggested by simply looking at the grid. Time to be spent in the Department of Corrections represents the hammer the judge holds over the offender's head. For various reasons by the time the offender is before the Court facing possible revocation these offenders have county jail time credit which effectively reduces the size of the hammer. Therefore the total amount of prison time an offender may be facing can be reduced from the original sentence imposed.

The second characteristic that needs to be emphasized when discussing "who" the bill contemplates is that it targets conditional (sometimes called technical) violators. This

legislation specifically excludes persons who commit new crimes or persons who effectively abscond from supervision. If an offender commits a new crime or absconds from supervision they continue to be subject to immediate revocation and remand the DOC. The bill concerns those who commit technical violations of the conditions of their probation. The vast majority of these technical violations are violations related to substance abuse. Other examples of these types of violations include failing to maintain employment, failing to make payments as directed or associating with others who are on probation.

HB 2170 addresses a problem with offenders that have these two characteristics. Under current law a person whose probation is revoked for technical violations and who serves their underlying sentence has no post release supervision. Under the provisions of HB 2170 if a person has committed a technical violation and is in custody as the result the court imposing sanctions at the time they have served their sentence they will then be subject to post release supervision. This makes an infinite amount of sense. Those persons have obviously failed on their probation and deserve additional supervision in the form of post release supervision. I have seen many instances where a defendant would rather serve a brief period of time in the DOC or county jail, flatten their time and be released without supervision as opposed to continue to have to report and abide by the terms and conditions of supervised release.

Now that we have addressed "who" the bill is aimed at I would like to discuss "what" we are talking about. First, let me reiterate, we are not talking about a modification of the original sentence. We are talking about the availability of incarceration as a sanction for a probation violator. There are multiple alternative

sanctions other than incarceration. These alternatives all remain in place and are unchanged. HB 2170 focuses on the incarceration sanction therefore I will as well.

Under current law if a person commits a technical violation the court has 2 incarceration options. One option is to require that the defendant serve up to 60 days in the county jail. The second option is to revoke and remand to the DOC to serve the entire remaining sentence. Under HB 2170 an offender would face additional incarceration options. Before describing those additional incarceration options it might be helpful to fully appreciate the operation of the current system.

Under the current structure an offender is reporting to either a Court Services Officer or a Community Corrections (ISP) Officer. If the supervising officer finds a violation worthy of sanction the officer files a Violation Report with the prosecutor and the court. The prosecutor then files a Motion to Revoke Probation and may or may not request a bench warrant. In the majority of cases, based on my experience, a warrant is then issued by the court. A sheriff's deputy must then apprehend the defendant and he or she is taken into custody. The offender then appears before the judge, has counsel appointed and the matter is scheduled for a revocation hearing. The revocation hearing, again based on my experience, occurs sometime from approximately 7 to 21 days after counsel is appointed. The State, the supervising officer and defense counsel (usually at the expense of the State) then appear at the hearing. Assuming a violation is proven the court has 3 basic options. (1) revoke and reinstate probation,(2) revoke, impose a county jail sanction of up to 60 days, then place the offender back on probation or (3) revoke and if the probationer is on supervision with Court Services reinstate probation with Community Corrections. If the probationer is on ISP the court can revoke and

impose the underlying prison term with the DOC. All of these options are considered along with the imposition of non-incarceration sanctions such as treatment, programming, community service, etc.

Under HB 2170 if the offender commits a technical violation the Court Service Officer could immediately jail the defendant for up to 3 consecutive days not to exceed 6 in any given month and not to exceed 18 total. This step has the obvious advantage of swift and certain consequences. As an example consider a defendant who drops a dirty UA. The offender can be immediately sanctioned rather than potentially continuing detrimental behavior while awaiting the filing of a motion and the issuance of a warrant.

Under HB 2170 if an immediate sanction has been imposed at least one time and the offender commits another technical violation then the offender can be sent to DOC for either 120 or 180 days. This represents a tougher sanction short of total revocation that is not available under current law. If this same offender, after serving a DOC sanction, commits a technical violation he or she can then be ordered to serve their underlying sentence.

At any time during this revocation process if the court ever finds that the offender presents a risk to the community or is not amenable to probation the structure for technical violations can be skipped and the offender can be sent to the DOC to serve their underlying sentence. When we consider the nature of the violations which are considered "condition" or technical violations such as a dirty UA, failing to make a payment or the like it is not an unreasonable burden to suggest that a court should make a finding of this nature in order to send the offender directly to the DOC. Nevertheless for those persons this option is available.

To be candid, the current probation revocation scheme and lack of a more severe consequence short of full revocation has resulted in a system where offenders who commit technical violations of their probation often times appear before the court on multiple violations before full revocation is imposed. Judges understand that once a defendant has served the total of their sentence they do not have post release supervision. The result often times becomes a cycle of defendants technically violating their probation and the court imposing county jail sanctions in an effort to rehabilitate the defendant. I understand one of the criticisms being voiced is that HB 2170 gives an offender "multiple bites at the apple." It is very disingenuous to suggest that this is not the case with the current system. Further, my experience is that supervising officers often wait until there are multiple violations before they file for revocation either because of the potential severity of full revocation or because of the lack of swift consequences or both.

HB 2170 gives CSOs, ISOs, prosecutors and judges more tools with which to work in an attempt to rehabilitate offenders, prevent future crimes and terminate supervisions successfully. The only additional requirement imposed on the court system for direct revocation to prison based on a technical violation is a finding that the offender is a danger to the community or simply not amenable to probation. I am currently the Past President of the Kansas District Judges Association (KDJA). The Executive Committee of that association has considered this legislation. The KDJA has a general policy of not taking a position on substantive law as those questions are best left to the legislature. There is one exception and that is where it is felt that legislation might unreasonably restrict judicial discretion. I have been authorized on behalf of the KDJA to express the opinion that as viewed by the KDJA Executive Committee this legislation

does not inappropriately restrict judicial discretion. Outside of the context of our official association I have discussed this legislation and its provisions with a significant number of judges that regularly hear criminal cases. As individual judges they have all supported the concepts behind this legislation. I have yet to discuss this bill with a judge that is opposed to HB 2170 as written.

The one provision that will affect the length of sentences, in future cases only, is the provision that would allow courts to run sentences concurrent where the defendant was on bond or supervision at the time the offense was committed. Under current law these sentences must be mandatorily consecutive. This provision would allow (but NOT make presumptive) the option of non-person felonies to be run concurrently. I can only speak for myself, but I strongly suspicion that courts will rely, as they have in the past, heavily on the recommendation of the prosecutor. This provision will allow a defendant to serve concurrent sentences where the longer sentence might be viewed as sufficient punishment for the crimes. I have personally seen situations where a defendant was going to another state to serve a very lengthy sentence and the addition of a few or even several months in the KDOC appeared unnecessary. Because of the "mandatorily consecutive" rule that prisoner was then processed into the KDOC taking up resources for a relatively insignificant time considering the sentence yet to be served in another jurisdiction. The question is thus presented; on balance is it worth the expense to intake and process a prisoner for a few months when that same prisoner is facing many years somewhere else? The current "safety valve" of *manifest injustice* cannot be applied to those facts in my opinion without abrogating the true legislative intent of the statute. Further, with the limitation to non-person felonies obviously the majority of these cases will be lower level

felonies with shorter sentence lengths. Finally, this will also give greater flexibility for prosecutors in securing pleas and avoiding trials.

Kansas and many other states have instituted a more structured system of criminal justice. That began in 1993 with the Sentencing Guidelines. The structure of utilizing evidence based practices in the supervision of offenders and the imposition of sanctions for technical violators as represented in HB 2170 represents the next logical step. HB 2170 provides an outline of graduated sanctions and swift and immediate consequences which have been demonstrated in other states to effect offender reformation and greater community safety. As Chairman of the Kansas Sentencing Commission in fulfilling the commission's statutory obligation to identify and analyze legislation which will enhance community safety while addressing the increase in prison population I would recommend that you act favorably upon this legislation.

Respectfully submitted,

Richard M. (Dick) Smith
Chairman, KSC

Background and Experience

District Judge since February 1989
Linn County Attorney 1983-1989
Member of "3 R's" Commission (Rehabilitation, Reentry and Recodification)
Chief Judge 6th Judicial District 2005 to present
KDJA Executive board member 2004 to present
Past President KDJA
Legislative Chair KDJA 2009-2012
Member Kansas Criminal Code Recodification Commission

SENTENCING RANGE- DRUG OFFENSES

Categories→	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felony	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 46	47 44 41	42 40 37	36 34 32					
V	42 40 37	36 34 32			22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

Presumptive Probation

Presumptive Imprisonment

- **Fines not to exceed $500,000 (SL1-SL2), $300,000 (SL3-SL4), $100,000 (SL5)**
- **Severity level of offense increases one level if controlled substance or analog is distributed or possessed w/ intent to distribute on or w/in 1000 ft of any school property.**

	Distribute or Possess w/ intent to Distribute								
Levels	**Cocaine**	**Meth & Heroin**	**Marijuana**	**Manufacture (all)**	**Cultivate**	**Dosage Units**	**Postrelease**	**Probation**	**Good Time**
I	≥ 1 kg	≥ 100 g	≥ 30 kg	2nd or Meth	>100 plants	>1000	36	36	15%
II	100 g - 1 kg	3.5 g - 100 g	450 g - 30 kg	1st	50-99 plants	100-999	36	36	15%
III	3.5 g - 100 g	1 g - 3.5 g	25 g - 450 g		5-49 plants	10-99	36	36	15%
IV	< 3.5 g	< 1 g	< 25 g			<10	24	≤ 18	20%
V	Possession		Possession-2nd offense				12	*≤12	20%

* ≤ 18 months for 2003 SB123 offenders

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	[illegible]	[illegible]
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	[illegible]	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

Probation Terms are:

36 months recommended for felonies classified in Severity Levels 1-5

24 months recommended for felonies classified in Severity Levels 6-7

18 months (up to) for felonies classified in Severity Level 8

12 months (up to) for felonies classified in Severity Levels 9-10

Postrelease Supervision Terms are:

36 months for felonies classified in Severity Levels 1-4

24 months for felonies classified in Severity Levels 5-6

12 months for felonies classified in Severity Levels 7-10

Postrelease for felonies committed before 4/20/95 are:

24 months for felonies classified in Severity Levels 1-6

12 months for felonies classified in Severity Level 7-10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment