

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Pat Colloton at 1:30 pm. on January 12, 2011, in Room 144-S of the Capitol.

All members were present.

Committee staff present:

Sean Ostrow, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Jackie Lunn, Committee Assistant

Conferees appearing before the Committee:

Patti Biggs, Kansas Parole Board
Director Blecha, Kansas Bureau of Investigation (KBI)

Chairperson Colloton called the meeting to order and referred the Committee to the *Report of the Joint Committee on Corrections and Juvenile Justice Oversight to the 2011 Legislature*. (Attachment 1) She then opened the floor for bill requests and recognized Patrick Vogelsburg, representing the Kansas County and District Attorneys' Association, to make a request for three committee bills which are listed below:

- A bill that would address forensic scientists, especially in the Johnson County Lab and the Sedgewick County, being able to testify as experts in a case.

Representative Kinzer made a motion to accept the bill request and introduce as a committee bill. Representative McCray-Miller seconded. Motion carried.

- A bill concerning report to the Department of Corrections from the DA's office when a person is convicted.

Representative Kinzer moves that it be introduced as a committee bill. Representative Brookens seconded. Motion carried.

- A bill concerning a person that has been sent to the State Hospital and is conditionally released in the same district as the hospital.

Representative Pauls moved the bill request. Representative Smith seconded. Motion carried.

- A bill concerning a waiver of trial addressing the Horn issue.

Representative Brookens moves the request as a committee bill. Representative Pauls seconded. Motion carried.

- A bill adding language to the eavesdropping bill statutes

Representative Meier moves the request as a committee bill. Representative Cassidy seconded. Motion carried.

Chairperson Colloton requested a bill on behalf of the Kansas Board of Pharmacy to bring the Kansas schedule of substances in line with the federal guidelines for substances.

Representative Kinzer moves the request. Representative McCray-Miller seconded. Motion carried.

Chairperson Colloton recognized Ed Klumpp, representing the Kansas Association of Chiefs of Police and the Kansas Peace Officers Association, to request a bill that would prohibit the use and sale of K3.

Representative Roth made a motion to move the request as a committee bill. Representative Brookens seconded. Motion carried.

Chairperson Colloton recognized Nancy Strouse representing the Kansas Judicial Council Advisory Committee, to request bills that would be a cleanup on the large recodification bill of last year, to amend the drug code, and some new recommendations for the recodification of the criminal code. (Attachment 2)

Representative Kinzer moved the request. Representative Smith seconded. Motion carried.

A short discussion followed with Jason Thompson, Office of the Revisor of Statutes, stating that the request

CONTINUATION SHEET

The minutes of the Corrections and Juvenile Justice Committee at 1:30 p.m. on January 12, 2011, in Room 144-S of the Capitol.

A short discussion followed with Jason Thompson, Office of the Revisor of Statutes, stating that the request would need to be split into two bills.

Chairperson Colloton introduced Patti Biggs, Parole Board, to give an overview of the Kansas Parole Board. Ms. Biggs presented written copy of her presentation. (Attachment 3) (A copy of Ms. Biggs presentation can be found in its entirety in the offices of Legislative Administrative Services, 5th Floor, Statehouse.) Ms. Biggs took questions from Committee Members while giving her presentation.

Upon the conclusion of Ms. Biggs' presentation Chairperson Colloton introduced Robert Blecha, Director of the KBI, to give an overview of the KBI. Director Blecha presented a printed brochure regarding the KBI to the Committee. (Attachment 4) Director Blecha gave a brief history of the bureau and continued on including the hot spots of the state regarding meth labs. He also addressed the issue of the DNA Fund and the Lab Fee Fund. Director Blecha addressed questions of the Committee during his presentation.

Chairperson Colloton adjourned the meeting at 3:00 p.m. with the next meeting scheduled for January 13, 2011 at 1:30 p.m. In room 144-S.

Report of the Joint Committee on Corrections and Juvenile Justice Oversight to the 2011 Kansas Legislature

CHAIRPERSON: Senator Pete Brungardt

VICE-CHAIRPERSON: Representative Pat Colloton

OTHER MEMBERS: Senators Karin Brownlee, Terry Bruce, David Haley, Dick Kelsey, Janis Lee, and Thomas Owens; and Representatives Barbara Craft, Doug Gatewood, John Grange, Jerry Henry, Joe Patton, and Jim Ward

STUDY TOPICS

- **Statutory Charge.** The Joint Committee on Corrections and Juvenile Justice Oversight is statutorily directed to monitor the adult inmate population and study the programs, activities, plans and operations of the Kansas Department of Corrections and the adult correctional institutions; monitor the establishment of the Juvenile Justice Authority and study its programs, activities, plans and operations and the juvenile correctional facilities; review and study the adult correctional and juvenile offender local programs and related entities; and report annually to the Legislative Coordinating Council; and
- **Sex Offenders.** Review the current procedure followed by Kansas sheriffs to ensure that those steps required by the interstate compact were taken prior to the offender leaving his or her state of origin. Also, review the current number of sex offenders living in Kansas and compare those numbers to other states to determine whether Kansas' lack of residency requirements has drawn additional sex offenders to Kansas.

December 2010

Joint Committee on Corrections and Juvenile Justice Oversight

FINAL REPORT

CONCLUSIONS AND RECOMMENDATIONS

The Committee agreed to recommend, for the Kansas Department of Corrections (KDOC), the following:

- Replacement of KDOC core information technology systems known as the Offender Management Information System and the Total Offender Activity and Document System (OMIS/TOADS);
- Replacement of aging vehicle fleet;
- Conversion to narrowband radio communications;
- Budgeting for KDOC Personnel;
- Take action to avoid overcrowding in the prisons by addressing expansion and planning of facilities, including the possibility of a specialty prison for mental illness, felony DUI's, and drug offenders; and
- Restoration of funding for offender treatment, education, and supportive services.

For the Juvenile Justice Authority, the Committee recommends the list of budget enhancements requested by the Commissioner of the Juvenile Justice Authority:

- \$57,159 for the Kansas Juvenile Correctional Complex (KJCC) and \$56,547 for Larned Juvenile Correctional Facility (LJCF) to fund two classified social work specialists for sex offender treatment and programming. \$65,662 for JJA to fund a master-level psychologist with adolescent sex offender evaluation expertise to provide sex offender evaluations statewide prior to a court's disposition of juvenile sex offender cases;
- \$378,885 shared between the two juvenile correctional facilities to replace lost Recovery Act-Justice Assistance Grant (RA-JAG) funds that currently fund seven Topeka and three Larned juvenile correctional officer positions;
- \$500,000 to replace lost RA-JAG funds in order to maintain the current resource level for juvenile community corrections programs including prevention juvenile intake and assessment, intensive supervision probation, and community case management;
- \$192,314 in FY 2011 and \$228,439 in FY 2012 to fill five (5) Juvenile Corrections Officer I (JCOI) positions at KJCC. Insufficient funding was provided in the FY 2011 budget to fully fund the KJCC West Campus operation following the closure of the Beloit Juvenile Correctional Facility. This enhancement will allow KJCC to hire the staff necessary to ensure a safe and secure environment for the female operation and will reduce the need to draw from the KJCC male operation to meet minimum staff requirements for the female operation; and

- A permanent wage increase of 2.5% for juvenile correctional officers with a cost of approximately \$160,000.

Finally, the Committee also stated that child safety zones, GPS, and other tools to manage sex offenders may be good tools to use, when appropriate.

Proposed Legislation: None.

BACKGROUND

The 1997 Legislature created the Joint Committee on Corrections and Juvenile Justice Oversight (Committee) to provide Legislative oversight of two executive agencies: the Kansas Department of Corrections and the Juvenile Justice Authority.

The Kansas Department of Corrections (KDOC) created in 1975, is a cabinet-level criminal justice agency that provides effective containment, risk management, and supervision of adult offenders. KDOC operates eight correctional facilities: El Dorado Correctional Facility, Ellsworth Correctional Facility, Hutchinson Correctional Facility, Lansing Correctional Facility, Larned Correctional Mental Health Facility, Norton Correctional Facility, Topeka Correctional Facility, and Winfield Correctional Facility. KDOC operates parole offices located in 19 communities throughout the state. KDOC also is responsible for the administration of funding and oversight of 31 local community corrections programs. The two correctional conservation camps in Labette County, one for men and one for women, are now closed.

The Kansas Juvenile Justice Authority (JJA) is a cabinet-level criminal justice agency that began operating on July 1, 1997. Individuals as young as ten years of age and as old as 17 years of age may be adjudicated as juvenile offenders and ordered into the custody of the Commissioner of Juvenile Justice. The JJA may retain custody of a juvenile offender in a juvenile correctional facility

to the age of 22.5 and in the community to the age of 23. The JJA has four correctional facilities, but only two remain operational as correctional facilities: Larned Juvenile Correctional Facility (LJCF) and Kansas Juvenile Correction Complex (KJCC), East and West. LJCF exclusively serves male offenders. KJCC is divided into two separate campuses. The west campus exclusively serves female juvenile offenders and the east campus exclusively serves male offenders. The third facility, the Atchison Juvenile Correctional Facility, suspended operations as a juvenile correctional facility on December 8, 2008. The fourth facility, Beloit Juvenile Correctional Facility, suspended operations as a juvenile correctional facility in September 2009.

The Committee is composed of 14 members: seven members each from the House and Senate. The Committee is directed statutorily in KSA 46-2801 to monitor the adult inmate population and study the programs, activities, plans, and operations of the KDOC and the adult correctional institutions; monitor the establishment of the JJA and study its programs, activities, plans, and operations and the juvenile correctional facilities; review and study the adult correctional and juvenile offender local programs and related entities; and report annually to the Legislative Coordinating Council (LCC).

2006 HB 2555 repealed the provision in KSA 46-2801 requiring the Committee to expire in December 2005. There have been no further revisions to the statute to this date.

The Committee began its discussions with the salient point that there remains urgent and critical needs for the KDOC and the JJA despite the inclination to reduce budgets. The needs do not cease just because there is no money made available to meet the needs. The Committee is concerned about the cumulative effects of the budget reductions made to these agencies. The Committee notes that these reductions affect the ability of these agencies to safely and adequately incarcerate offenders or prepare for the reentry of offenders, which negatively affects the public safety of the citizens of Kansas and may ultimately cost the state more money.

In particular, the reductions have prompted the KDOC to do the following:

- Reduce offender programming from \$12.6 million in FY 2009 to \$5.4 million in FY 2011;
- Close the correctional conservation camps in Labette County, suspend operations at the Stockton, Osawatomie, and Toronto Correctional Facilities, and the north unit at the El Dorado Correctional Facility;
- Reduce funding for the Community Corrections grants;
- Reduce the number of high-risk parolees with global positioning system (GPS) tracking devices;
- Increase shrinkage rates by holding open positions at the central office and the correctional facilities;
- Close the day reporting centers in Shawnee and Sedgwick counties; and
- Increase the transfer of funds from the Corrections Industries Fund to offset State General Fund reductions and in FY 2011 transfer \$500,000 from the Correctional Industries Fund to the State General Fund. These actions have reduced the balance of the Correctional Industries Fund, which is

used to purchase commodities for projects being completed by the Kansas Correctional Industries.

COMMITTEE ACTIVITIES

The Committee requested eight meeting days, but was granted only three meeting days. JCCJJO met on September 9, 10, and 23. Items discussed by the 2010 Committee relating to its charge by LCC are reviewed in the following material, along with the Committee's conclusions and recommendations to the 2011 Legislature.

September 9

The Chairperson provided an overview of the statutory requirements of the Committee. He advised that in order to meet its statutory duties, the Committee will receive testimony on adult inmate population projections; an update on Court Services; an update on Community Corrections; an overview of food service and medical contracts; an overview of expansion projects and facilities; and a review of current fiscal conditions in the adult Corrections system.

Population Projections

Helen Pedigo, Executive Director, Kansas Sentencing Commission (KSC), provided the Committee with an update on adult inmate prison population projections. Ms. Pedigo stated that new admissions have increased in drug level 4, nondrug level 7, and nondrug level 9. The increase in nondrug level 7 through 10 are probation condition violators. The KSC also provided an average calculation by severity level of the amount of jail credits that offenders receive.

Ms. Pedigo stated that, based upon the available bed space and the population trends, some action in the 2011 Legislative Session will be required to prevent an overcrowding situation. This has been the highest number of admissions

since 1994 and the forecast is to grow 2.75 percent over the next two years. The full report is located on the KSC's web site: <http://www.accesskansas.org/ksc/documents>.

Update on Court Services

Mark Gleeson, Family and Children Program Coordinator, Office of Judicial Administration, provided an update on court services operations and programs. Currently, there are 351 full time equivalent (FTE) court services positions, all of which are funded primarily from the State General Fund (SGF). These positions are supported by state dollars for personnel costs only. All other operating expenses are provided by counties.

Statewide, each of the 31 judicial districts has a court services division. A court services officer may not be located in each of the 105 counties. Services are provided to each county by a court services officer located somewhere within the judicial district of the county.

The primary role of court services is to assist the district court by performing investigations and supervision. Kansas statutes provide a general definition of the responsibilities of court services officers. Chief judges, within the limits of fiscal resources in individual judicial districts, are able to emphasize certain roles of court services officers from district to district in order to best serve each individual judicial district. Duties performed by court services officers are governed by statute, administrative rule, and court policy.

2010 HB 2581 established the Correctional Supervision Fund effective July 1, 2010. This legislation also raised the probation supervision fee from \$50 to \$120 for each adult offender convicted of a felony offense. The supervision fee for each adult convicted of a misdemeanor crime was increased from \$25 to \$60. Revenues from the base fee in effect prior to July 1, 2010, continue to go into the SGF. Revenues from the supervision fee increase are credited to the

Correctional Supervision Fund to be used to train court services officers to administer the risk-assessment tool called the Level of Services Inventory, Revised (LSI-R) and to implement evidence-based practices once the initial training has been completed.

Update on Community Corrections

Keven Pellant, Deputy Secretary of Corrections for Community and Field Services, KDOC, provided testimony on the Community Corrections Services Division. She reported that thirty-one county-operated Intensive Supervision Probation programs comprise Kansas Community Corrections, which provides services to all 105 counties in Kansas. Sedgwick and Johnson counties also operate two residential centers. Community Corrections' legislatively defined target population includes high risk and high need probationers, and non-violent first- and second-time drug possession offenders.

Deputy Secretary Pellant also reported that statewide efforts have continued through targeted training opportunities for officers and case managers and continued technical assistance for local agencies from the KDOC community corrections services team. To continue enhancing community corrections agencies' ability to plan with their partners to promote probationer success and reduce probationer risk, the KDOC began the Facilitated Strategic Planning Initiative (FSPI). The FSPI was designed to assist local community corrections agencies in building on the efforts that were established with the original statewide risk reduction initiative (2007 SB 14). In the first phase of the FSPI, the community corrections services team was supported in these efforts through a cooperative agreement between the National Institute of Corrections; four agencies completed this period of intensive assistance. The capacity of the KDOC community corrections services team has increased to enable them to facilitate this work independently, and the second phase of initiative has begun with three additional local agencies. Community

corrections services has provided training on and coaching throughout a strategic comprehensive planning and evidence-based practice initiative. This initiative will serve to support and enhance the work already occurring as a part of the statewide risk reduction activities.

Overview of Food Service and Medical Contracts

Roger Haden, Deputy Secretary for Programs and Staff Development, KDOC, provided an overview on the food service and medical contracts. The food service contract was entered into with Aramark Correctional Services, Inc. in 1997. The general contract information is as follows:

- Daily population - \$1.428 per inmate per meal per day;
- The food service budget for FY 2011 is \$13,700,482; and
- Projected expenditure for FY 2012 is \$14,044,424.

Aramark employed 113 staff for the performance of the KDOC contract as of July 2010, and cooks for all of the KDOC operated facilities, 12 kitchens in 8 facilities, with the exception of the Larned Correctional Mental Health Facility, which receives food from the Larned State Hospital. Aramark operates food service vocational programs at four KDOC facilities at no extra cost to the state. Fifteen inmates are employed as "industry workers" and receive minimum wage.

With regard to special diets, the vast majority of Kansas inmates eat from the regular menu; however, accommodations are made for medical needs, religious needs, and vegetarian preference. The KDOC offers 13 types of medical diets, which must be ordered by a physician.

The KDOC's health care services contract was entered into July 1, 2010, with Correct Care

Solutions, Inc. (CCS). This contract is for the delivery of medical, dental, and mental health care services to inmates. The bid term of the current contract allows for up to three additional two-year renewals with an expiration date of June 30, 2018. The coverage provided to the state for inmates is comprehensive and has no deductible or co-pay from the KDOC, however, inmates pay a \$2.00 co-pay for initial sick call visits that helps offset healthcare spending.

The coverage fully indemnifies the state from any litigation filed by an inmate regarding medical or mental health care.

As of July 1, 2010, CCS employed a total of 358.80 FTE staff for the performance of the KDOC contract, including 250.40 medical and dental staff, 96.6 mental health staff, and 11.8 staff for administrative and clinical oversight.

Deputy Secretary Haden advised that decreases in both services and staffing were necessary to achieve budget reductions. Service cuts include the following: 39 FTE positions were eliminated, reduction in onsite medical care (*i.e.*, the number of physical exams and laboratory tests), reduction in mental health segregation rounds, reduced re-entry services, and reduced or eliminated activity therapy. Deputy Secretary Haden suggests these services need to be restored to preserve the stability of the correctional clinical environment.

Overview of Expansion Projects and Facilities

Roger Werholtz, Secretary, KDOC, provided an overview of expansion projects and facilities. Secretary Werholtz provided a chart on capacity by facility, security designation of bed space, and gender. Male beds by custody level is the main issue. Secretary Werholtz provided the following information on current capacities and estimated the male bed capacity need in the future:

- 8,259 current aggregate male capacity;

- 8,326 aggregate male population;
- 2,326 maximum male beds;
- 2,634 high medium male beds;
- 1,019 low medium male beds;
- 2,280 minimum male beds; and

Estimated additional male beds needed by:

- 2012 - 394;
- 2013 - 571;
- 2014 - 737;
- 2015 - 879;
- 2016 - 1,085 with a continued increase to 2020 - 1,960.

The Secretary stated that parole has capacity issues as well and has increased by almost 2,000 over the past ten years. Staff in 2000 was 128 parole officers and supervisors and in 2010 136. Of those positions, 13 are currently being held open to balance the budget, ten more of those positions could be forced open if the KDOC makes an allocated resource budget for FY 2012. Another ten positions are funded with Stimulus/Bryne/JAG grant money, which included 12 special enforcement officers to locate absconders.

One factor explaining the capacity issues is that while the Kansas Bureau of Investigation's Crime Index reflects that crime has decreased, violent crimes have increased.

Another factor Secretary Werholtz referred to was a listing of major legislative changes increasing or decreasing felony criminal sentences. The information references the 108 statutory changes that have a global impact on sentencing from 1993 and for specific crimes since 2005. The Secretary advised that there were 97 statutory changes that increased penalties and 7 statutory changes that decreased penalties.

He mentioned one statutory change would have increased and two would have decreased penalties if funding had been provided (secure substance abuse treatment facility statute).

Secretary Werholtz provided a chart with housing expansion options. Planning has been done on the original four projects and will cut six to six and one half months off the time line to get the beds operational for those four projects. The projects are:

- 512 medium beds at El Dorado;
- Housing Project at Ellsworth;
- Expansion at Stockton; and
- Construction of the El Dorado facility.

The KDOC could have a bid package ready in about two weeks from the time that the Legislature authorizes it, but planning has not been done on the other projects.

The Committee asked if there is anything that could be done to lower the bed space requirement and reduce the number of offenders coming into the system that was less expensive. Secretary Werholtz stated that there is not anything regarding programming that could have an immediate effect. There is always a delay in the sentencing policy between the time it is implemented and the time the system experiences the impact. Other options would be to implement retroactive application for good time credits (this was done in Mississippi) or periods of time on postrelease supervision. During the past six weeks, the Secretary has visited all of the facilities and staff to prepare a briefing for the new administration on what the facilities need. Every facility stated the need for program restoration. Secretary Werholtz concluded that program restoration is critical, because the impact the programs increases the facility safety, and parole officers are getting worn out because of lack of options and tools.

Secretary Werholtz reported that current capacities for severely and persistently mentally ill (SPMI) inmates and behaviorally disordered (BD) inmates are limited. Because of the characteristics and behaviors that accompany this population of inmates, they are high consumers of medical services and staff attention. The characteristics of this population include mental illness, alcohol and drug addiction, homelessness, mental retardation or developmental disabilities, traumatic brain injury, physical health problems, limited education, limited family support, poor work history, fetal alcohol syndrome, prior civil commitments to state hospitals, and a history of Axis I and Axis II diagnosis. Common behaviors of this population include frequent suicidal gestures, aggressive/assaultive, self-mutilating (cutting, gouging, piercing, chewing), throwing/smearing feces and urine, and poor hygiene.

SRS is not able to handle inmates with these illnesses at the state hospital and has no way to treat these offenders or handle such behavior. The KDOC is not equipped to handle these types of illnesses. Housing is an issue because these offenders require a high level of health care. A facility for those offenders would be very expensive to build and operate. The funds for planning this facility are \$992,000. It would be similar to planning a segregated bed unit; these offenders would need to be escorted at all times when not in lock up. The capacity would be between 100-400 males and 25-50 females.

Secretary Werholtz discussed the recommendations he asked the Committee to adopt.

He stated replacement of the KDOC core information technology systems, known as the Offender Management Information System and the Total Offender Activity and Document System (OMIS/TOADS) is absolutely necessary. OMIS/TOADS is the second oldest inmate computer system in the nation and it is becoming more difficult to maintain. Those who are qualified to maintain the system are also aging. If OMIS/

TOADS crashed as the Kansas Department of Health and Environment's information system did in August 2010, the KDOC would lose the ability to obtain inmate information, provide inmate information to other agencies involved with inmates, print escape packets, and all other functions currently operated by OMIS/TOADS. The Committee believes the Legislature and the Governor would be held remiss, and therefore, needs to prevent a potential public safety hazard by replacing these systems. Over the last four years (including FY 2011), the KDOC has deferred \$3,000,000 in Information Technology investment and has used approximately \$500,000 in outside grant money and some project funds intended for system replacement to conduct the Enterprise Architecture study required by the Joint Committee on Information Technology. The KDOC needs to recover those funds and begin to rebuild KDOC's Information Technology environment. The Information Technology enhancement request is \$3 million for the first year of a four to five year system replacement plan for OMIS/TOADS; \$845,000 for scheduled replacement of Information Technology assets; and \$235,000 for video conferencing capacity expansion for release planning.

Secretary Werholtz talked about replacement of the KDOC's aging vehicle fleet. There are over 164 vehicles already beyond the replacement schedule. KDOC contemplated ceasing perimeter patrols because of worn out vehicles and staffing shortages, but decided it was too risky. The KDOC requests the replacement of 154 cars, light trucks, and vans which would cost \$3,115,000. Additionally, replacement of two buses would cost \$420,000.

The KDOC would need to convert to narrowband radio communications. There is a federal mandate by the Federal Communications Commission to convert to narrowband radio communications by January 1, 2013. To be compliant, the KDOC would require lead time to make arrangements for towers, bidding, and other similar items. The current revised estimated cost

is \$600,000 (previously \$742,945 but the KDOC used some remaining bond funds to purchase security upgrades, including radios that will meet these requirements). Secretary Werholtz advised the Committee of the needs regarding personnel budgeting for the KDOC. Currently, the KDOC is holding 34 central office positions open to balance the budget (reentry and parole are in the central office budget). The KDOC would need:

- \$919,000 to reduce the shrinkage rate from 8.1% to 3.5%;
- \$207,723 to replace federal funding for victims services positions;
- \$224,415 to replace and enhance training staff;
- \$1,205,000 to replace ARRA funding for Special Enforcement Officers and Parole Officers;
- \$1,500,000 in ARRA/Byrne/JAG funding each year to restore community corrections funding upon which the community corrections budget relies;
- \$3,297,000 in enhanced funding for community corrections as recommended by the Kansas Community Corrections Association.

Secretary Werholtz would like to see the parole staff placed in the Corrections' Kansas Public Employee Retirement System, and the inclusion of the KDOC correctional officers in Kansas Police and Firemen or a comparable system.

Finally, the Secretary would like to see restoration of funding for offender treatment, education, and supportive services.

September 10

J. Russell Jennings, Commissioner, JJA, provided the Committee an overview on programs and current information in JJA.

Commissioner Jennings informed the Committee about an event on July 3 at Larned Juvenile Correctional Facility where two youths escaped over the fence. The Commissioner stated that three fundamental failures enabled the youths to escape:

- The design and construction of the fence;
- When 30 or more kids are in the recreation area, an officer is to be posted outside the perimeter fence; the shift manager failed to make that assignment;
- The three officers assigned to supervise and monitor the youth were standing and visiting with each other.

The juveniles were captured about 5:30 p.m. the same day about a mile from the facility. The youths were out about six hours. Unfortunately, because of the failure and lapses, an opportunity presented itself and the youths acted on the opportunity. The youths will pay a substantial price that Commissioner Jennings believed could have been avoided.

The JJA budget was adopted for FY 2011. Commissioner Jennings stated the Legislature took affirmative steps to assure public safety agencies, including JJA, were able to continue to meet basic service requirement and not unnecessarily place the public at risk. In the area of prevention and graduated sanctions programs, \$9 million was appropriated from the SGF to replace Children's Initiative Funds (CIF) as a source of funding. This change was made in order to provide relief to CIF, because of reduced revenues to CIF. This allowed for JJA to sustain remaining prevention, intervention, and graduated sanctions programs provided through

juvenile community corrections organization while reducing the demand upon CIF.

A shift of funds from prevention programs, significant reduction in operating expenses at juvenile correctional facilities through the closure of two facilities, and gaining Recovery Act-Justice Assistance Grant (RA-JAG) funds to support both community and facility operations have allowed the juvenile justice system to remain fairly healthy through very challenging financial times. The most significant budget challenge JJA will face in FY 2012 is the loss of RA-JAG funds. Failing to budget for replacement of these lost funds will result in a \$500,000 reduction to juvenile community corrections graduated sanction programs and a \$378,885 loss of funds between the two juvenile correctional facilities. The \$500,000 loss to communities will be shared among the 31 judicial districts proportionally, in accordance with the formula distribution of state grant funds to communities. In the case of the juvenile correctional facilities, reduction in the number of direct supervision staff is not a viable option. Program staff positions will have to be eliminated, either through attrition or layoff. A reduction in program capacity will negatively impact youth outcomes. The impact of such a reduction in programming likely will be revealed through lower success rates among youth upon their release, ultimately leading to higher rate of return to juvenile correctional facilities and admission to adult corrections. In order for JJA to meet its public safety responsibility and to improve the likelihood of law-abiding behavior among committed youth, behavioral change must occur in the youth.

A budget enhancement for FY 2012 of \$160,605 will be requested to fund the compensation rate adjustment for juvenile corrections officers. The disparity in the rate of compensation creates a competitive disadvantage in recruiting and retaining a qualified staff.

In 2008, JJA received a grant, Project Successful Outcomes Achieving Reentry

(SOAR), funded by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to develop and implement sex offender programming for moderate to high risk youth, and to provide a predisposition sex offender evaluation protocol. The current Project SOAR sex offender program is at least 9 to 12 months in duration, and addresses the unique needs of juvenile sex offenders to reduce their risk for re-offending. Many times, the courts would not have this information readily available when making sentencing decisions. If approved, the enhancement will allow for statewide juvenile sex offender evaluation by a licensed psychologist with adolescent sex offender training and experience. This person also would provide sex offender programming oversight in juvenile correction facilities to assure program fidelity and effectiveness.

The Committee was advised by the Commissioner that the modifications to Youth Residential Center II (YRC II) it requested last year are being implemented. Standards were amended to assure a formal method for classification of youth in double occupancy rooms is used by operators of YRC II. Community based standards (CbS), a formal process for evaluating the conditions within a YRC II, is currently being implemented with the first round of surveys scheduled for October 2010. A work group continues to develop a plan for assignment of youth to a YRC II according to their risk and needs to assure a proper match at the highest level between the youth and service provider. The Commissioner also informed the Committee that JJA, in partnership with a number of counties and the Annie E. Casey Foundation, has commenced an effort to reform juvenile detention practices. The Annie E. Casey Foundation has chosen to support the Kansas Juvenile Detention Alternatives Initiative expansion project this year. The Annie E. Casey Foundation is a private charitable organization dedicated to helping build better futures for disadvantaged children in the United States. It was established in 1948 by Jim Casey, one of the

founders of UPS, and his siblings, who named the Annie E. Casey Foundation in honor of their mother. The primary mission of the Annie E. Casey Foundation is to foster public policies, human-service reforms, and community supports that more effectively meet the needs of today's vulnerable children and families. In pursuit of this goal, the Annie E. Casey Foundation makes grants to help states, cities, and neighborhoods fashion more innovative, cost-effective responses to these needs.

For the JJA, the Committee recommends the list of budget enhancements by the JJA's Commissioner.

- \$57,159 for the Kansas Juvenile Correctional Complex (KJCC) and \$56,547 for the Larned Juvenile Correctional Facility (LJCF) to fund two classified social work specialists for sex offender treatment and programming. \$65,662 for the JJA to fund a master-level psychologist with adolescent sex offender evaluation expertise to provide sex offender evaluations statewide prior to the disposition of juvenile sex offender cases by the court;
- \$378,885 shared between the two juvenile correctional facilities to replace lost RA-JAG funds that currently funds seven Topeka and three Larned juvenile correctional officer positions;
- \$500,000 to replace lost RA-JAG funds in order to maintain the current resource level for juvenile community corrections programs, including prevention juvenile intake and assessment, intensive supervision probation, and community case management;
- \$192,314 in FY 2011 and \$228,439 in FY 2012 to fill five Juvenile Corrections Officer I (JCO I) positions at the KJCC. Insufficient funding was provided in the FY 2011 budget to fully fund the KJCC West Campus operation following the closure of the Beloit Juvenile Correctional Facility. This enhancement will allow the KJCC to

hire the staff necessary to ensure a safe and secure environment for the female operation and will reduce the need to draw from the KJCC male operation to meet minimum staff requirements for the female operation; and

- A permanent wage increase of 2.5 percent for juvenile correctional officers with a cost of approximately \$160,000.

September 23

The study of the sex offender topic was requested by Senator Karin Brownlee after she was contacted by a group of concerned parents who live near an elementary school in Olathe, Kansas. The parents, a number of whom testified or submitted written testimony before the Committee, discovered that a man, who was convicted in California of a sexual offense involving a minor, moved into their neighborhood. The parents also discovered that Kansas law does not restrict where convicted child sex offenders live, how they interact with children in volunteer capacities, and that there is no active notification of neighbors of a child sex offender. This led to forming a group they called Kansas Rights 4 Kids and taking action to cause this topic to be heard before this Committee. The parents informed the Committee that they are working with another Legislator on a bill which they anticipate would include residency restrictions, child safety zones, and active notification.

The Committee also heard from Keven Pellant, the Kansas Compact Administrator of the Interstate Compact for Adult Offender Supervision (the Compact). She advised that the Compact is a contract amongst the states which was born out of a need to promote public safety, protect the rights of victims, control movement of offenders, supervision, rehabilitation, and provide for effective tracking. The Compact Administrator stated Kansas has received 1,826 offenders and 86 sex offenders from other states

pursuant to the Compact. Kansas has sent 1,544 offenders and 72 sex offenders to other states pursuant to the Compact. She also was able to provide facts to the Committee regarding the sex offender who moved to Olathe from California. It was discovered that the sentencing judge failed to inform the sex offender of the need to transfer to Kansas pursuant to the Compact. The sex offender has since complied with the Compact and was approved to live in Olathe. Additionally, training on the Compact was provided to the judges in the sentencing judge's judicial district in California.

Sheriff Frank Denning, Johnson County Sheriff's Office, on behalf of the Kansas Sheriff's Association (KSA), provided testimony on the Compact, offender registration, and residency restrictions. He testified that the KSA is working with the Secretary of Corrections and the Compact Administrator to develop notification protocols for offenders who fall under the provisions of the compact and assume residence in Kansas. These protocols will provide sheriffs with the information they need regarding offenders who live in their jurisdictions, but who may not be subject to a registration requirement.

Sheriff Denning told the Committee that laws and ordinances placing residency or visiting restrictions on sexual offenders have been enacted in several states and other localities, but there remains a lack of empirical data to show the effectiveness of these measures. The KSA suggests that close supervision of sexual offenders by court services personnel, who in turn communicate regularly with sheriffs, is one solution for the Committee to consider as it studies this issue.

Nicole Dekat, Supervisor of the Offender Registration Unit, KBI, provided testimony on residency restrictions requirements in other states and reviewed whether neighboring states' policies are pushing sex offenders into Kansas. The information provided indicates that the

neighboring states' policies are not causing sex offenders to move to Kansas.

Sandy Jacquot, Director of Law and General Counsel, Kansas League of Municipalities, testified in support of the ability of cities to adopt reasonable regulations regarding the residency of registered sex offenders.

Melissa Wangemann, Legislative Director, Kansas Association of Counties, (KAC) testified that the topic of residency restrictions for sex offenders has not been brought forward by any member of KAC in the two years she has been the Legislative Director.

Staff from the Kansas Legislative Research Department provided the Committee with information on the committees in Kansas that have studied sex offender residency restrictions. Additionally, staff provided information on other states' studies and experiences with laws restricting sex offender residency. Studies have not proven the laws are effective.

Roger Werholtz, Secretary of the KDOC stated that the community's fear is justifiable in regard to the safety of children, and that the KDOC's responsibility is to do what is best within the agency's ability to assure that Kansas kids and families are safe. It is the KDOC's position that residency restrictions are not good policy and that they do not make children more safe but actually make them less safe. He stated research conducted in other states that have sex offender residency restrictions have shown the restrictions actually drive sex offenders "underground." A lot of the sex offenders who were required to register absconded from supervision because they were losing their places to live. Additionally, other states have found that residency restrictions can force offenders out of areas where they can get the treatment they need and away from available jobs which causes the sex offender to be destabilized. He concluded by stating that sex offender residency

restrictions draw resources away from programs that are proven to work.

According to Secretary Werholtz, child safety zones are worth further consideration, as is active public notification.

CONCLUSIONS AND RECOMMENDATIONS

Therefore, the KDOC, the Committee recommends the following:

- Replacement of the KDOC core information technology systems, OMIS/TOADS;
- Replacement of aging vehicle fleet;
- Conversion to narrowband radio communications;
- Provide budgeting for the KDOC personnel;
- Take action to avoid overcrowding in the prisons by addressing expansion and planning of facilities, including the possibility of a specialty prison for mental illness, felony DUI's, and drug offenders; and
- Restore funding for offender treatment, education, and supportive services.

For the JJA, the Committee recommends the list of budget enhancements requested by the Commissioner of the JJA.

- \$57,159 for KJCC and \$56,547 for LJCF to fund two classified social work specialists for sex offender treatment and programming. \$65,662 for JJA to fund a master-level psychologist with adolescent sex offender

evaluation expertise to provide sex offender evaluations statewide prior to the disposition of juvenile sex offender cases by the court;

- \$378,885 shared between the two juvenile correctional facilities to replace lost RA-JAG funds that currently funds seven Topeka and three Larned juvenile correctional officer positions;
- \$500,000 to replace lost RA-JAG funds in order to maintain the current resource level for juvenile community corrections programs including prevention juvenile intake and assessment, intensive supervision probation, and community case management;
- \$192,314 in FY 2011 and \$228,439 in FY 2012 to fill five JCO I positions at KJCC. Insufficient funding was provided in the FY 2011 budget to fully fund the KJCC West Campus operation following the closure of the Beloit Juvenile Correctional Facility. This enhancement will allow the KJCC to hire the staff necessary to ensure a safe and secure environment for the female operation and will reduce the need to draw from the KJCC's male operation staff to meet minimum staff requirements for the female operation; and
- A permanent wage increase of 2.5 percent for juvenile correctional officers with a cost of approximately \$160,000.

Finally, the Committee also stated that child safety zones, GPS, and other tools to manage sex offenders may be good tools to use, when appropriate.



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MEMORANDUM

TO: House Correction and Juvenile Justice Committee
FROM: Kansas Judicial Council – Nancy J. Strouse
DATE: January 12, 2011
RE: 2011 Judicial Council Bill Request

The Judicial Council respectfully requests introduction of the following bill:

- A bill containing cleanup amendments from last session's recodification of the criminal code (2010 HB 2668) and implementing a number of the Criminal Code Recodification Commission's policy recommendations. The bill also includes a number of amendments to the drug code.

House Corrections and Juvenile Justice
Committee
2011 Session
Date 1-12-11
Attachment # 2 - 1

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AN ACT concerning crimes, punishment and criminal procedure; amending Section 9 of chapter 136 of the 2010 Session Laws, Section 34 of chapter 136 of the 2010 Session Laws, Section 37 of chapter 136 of the 2010 Session Laws, Section 61 of chapter 136 of the 2010 Session Laws, Section 68 of chapter 136 of the 2010 Session Laws, Section 71 of chapter 136 of the 2010 Session Laws, Section 81 of chapter 136 of the 2010 Session Laws, Section 92 of chapter 136 of the 2010 Session Laws, Section 93 of chapter 136 of the 2010 Session Laws, Section 129 of chapter 136 of the 2010 Session Laws, Section 130 of chapter 136 of the 2010 Session Laws, Section 132 of chapter 136 of the 2010 Session Laws, Section 136 of chapter 136 of the 2010 Session Laws, Section 165 of chapter 136 of the 2010 Session Laws, Section 197 of chapter 136 of the 2010 Session Laws, Section 223 of chapter 136 of the 2010 Session Laws, Section 224 of chapter 136 of the 2010 Session Laws, Section 300 of chapter 136 of the 2010 Session Laws and K.S.A. 21-36a01, 21-36a05, 21-36a09, 21-36a10, 21-36a13, 21-36a14, 21-4010 and 21-4012 and repealing the existing section; **also repealing K.S.A. 21-4006, 21-4211, 21-4216, and 21-4309.**

New Section 1. (a) Armed criminal action is committing or attempting to commit any felony under the laws of this state by use of a firearm.

(b) Armed criminal action is a nonperson felony. Upon conviction, a person shall be sentenced to a term of 12 months imprisonment. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the mandatory 12 months imprisonment, unless application of such a mandatory sentence would result in a manifest injustice.

(c) The crime of armed criminal action shall be treated as a separate and distinct offense from the crime or crimes committed, and the sentence imposed under this section shall be consecutive to any other sentence imposed.

(d) This section shall not apply when the felony committed is criminal distribution of a firearm to a felon, as defined in section 188 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, criminal possession of a firearm by a convicted felon, as defined in section 189 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, criminal possession of a firearm by a juvenile, as defined in section 186 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, criminal discharge of a firearm, as defined in section 193 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, or unauthorized possession of a firearm on the grounds of or within certain state-owned or leased buildings, as defined in section 194 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto.

(e) As used in this section:

(1) "Use of a firearm" includes the discharge, employment, or visible display of any part of a firearm during, immediately prior to, or immediately after the commission of a felony or communication to another indicating the presence of a firearm during, immediately prior to, or immediately after the commission of a felony, regardless of whether such firearm was discharged, actively employed, or displayed.

(2) "Firearm" means any weapon designed or having the capacity to propel a projectile by force or explosion or combustion.

Comment: This proposed armed criminal action statute is similar to the armed criminal action statute in Missouri. It penalizes use of a firearm in the commission of a felony, unless the underlying felony is one where use of a firearm is a necessary element. Crimes involving the use of a firearm are especially dangerous and justify more severe punishment.

New Sec. 2. (a) Endangerment is recklessly exposing another person to a danger of great bodily harm or death.

(b) Endangerment is a Class A person misdemeanor.

Comment: This proposed general reckless endangerment offense is similar to several other jurisdictions. The Kansas code contains numerous offenses that are based on the

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principle of criminalizing recklessly exposing someone to danger when no injury or death occurs, such as endangerment of a child, casting rocks onto a public road or street, hazing, use or possession of traffic control preemption devices, etc. This general offense provides liability for acts of endangerment that do not fit within these several specific statutes.

Sec. 3. Section 9 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5109) is hereby amended to read as follows:

(a) When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes. Each of such crimes may be alleged as a separate count in a single complaint, information or indictment.

(b) Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both. A lesser included crime is:

(1) A lesser degree of the same crime;

(2) a crime where all elements of the lesser crime are identical to some of the elements of the crime charged;

(3) an attempt to commit the crime charged; or

(4) an attempt to commit a crime defined under paragraph (1) or (2).

(c) Whenever charges are filed against a person, accusing the person of a crime which includes another crime of which the person has been convicted, the conviction of the lesser included crime shall not bar prosecution or conviction of the crime charged if the crime charged was not consummated at the time of conviction of the lesser included crime, but the conviction of the lesser included crime shall be annulled upon the filing of such charges. Evidence of the person's plea or any admission or statement made by the person in connection therewith in any of the proceedings which resulted in the person's conviction of the lesser included crime shall not be admissible at the trial of the crime charged. If the person is convicted of the crime charged, or of a lesser included crime, the person so convicted shall receive credit against any prison sentence imposed or fine to be paid for the period of confinement actually served or the amount of any fine actually paid under the sentence imposed for the annulled conviction.

(d) Unless otherwise provided by law, when crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct, the defendant:

(1) May not be convicted of the two crimes based upon the same conduct; and

(2) shall be sentenced according to the terms of the more specific crime.

~~(e) Defendant may not be convicted of identical offenses based upon the same conduct. The prosecution may choose which such offense to charge and, upon conviction, the defendant shall be sentenced according to the terms of that offense.~~

Comment: Subsection (e) should be added in order to eliminate the identical offense doctrine of cases such as *State v. McAdam*, 277 Kan. 136 (2004). Under the proposed language, the existence of identical offenses would not automatically demand imposition of the lesser punishment as the prosecutor may choose which offense to charge.

Sec. 4. Section 34 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5302) is hereby amended to read as follows:

(a) A conspiracy is an agreement with another person to commit a crime or to assist in committing a crime. No person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a co-conspirator.

~~(b) It is immaterial to the criminal liability of a person charged with conspiracy that any other person with whom the defendant conspired lacked the actual intent to commit the underlying crime provided that the defendant believed the other person did have the actual intent to commit the underlying crime.~~

~~(b)(c)~~ It shall be a defense to a charge of conspiracy that the accused voluntarily and in good faith withdrew from the conspiracy, and communicated the fact of such withdrawal to one or more

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of the accused person's co-conspirators, before any overt act in furtherance of the conspiracy was committed by the accused or by a co-conspirator.

~~(e)~~ ~~(d)~~ Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2. Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10. The provisions of this subsection shall not apply to a violation of conspiracy to commit the crime of terrorism pursuant to section 56, and amendments thereto, or of illegal use of weapons of mass destruction pursuant to section 57, and amendments thereto.

~~(e)~~ ~~(e)~~ Conspiracy to commit a felony which prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.

~~(e)~~ ~~(f)~~ A conspiracy to commit a misdemeanor is a class C misdemeanor.

Comment: Subsection (b) should be added to provide for the unilateral theory of conspiracy. Under current law, an offender who intends to enter into a conspiracy is not guilty unless there was an additional guilty co-conspirator. Under the unilateral theory of conspiracy, an offender who mistakenly or falsely agreed to commit a crime would be guilty of conspiracy. This distinction is often important as many police investigations employ the use of an agent or under cover informant who is not a genuine co-conspirator. This proposal is consistent with the Model Penal Code and the law of many jurisdictions.

Sec. 5. Section 37 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5402) is hereby amended to read as follows:

- (a) Murder in the first degree is the killing of a human being committed:
- (1) Intentionally, and with premeditation; or
 - (2) in the commission of, attempt to commit, or flight from any inherently dangerous felony.
- (b) Murder in the first degree is an off-grid person felony.
- (c) As used in this section, an "inherently dangerous felony" means:
- (1) Any of the following felonies, whether such felony is so distinct from the homicide alleged to be a violation of subsection (a)(2) as not to be an ingredient of the homicide alleged to be a violation of subsection (a)(2):
 - (A) Kidnapping, as defined in subsection (a) of section 43, and amendments thereto;
 - (B) aggravated kidnapping, as defined in subsection (b) of section 43, and amendments thereto;
 - (C) robbery, as defined in subsection (a) of section 55, and amendments thereto;
 - (D) aggravated robbery, as defined in subsection (b) of section 55, and amendments thereto;
 - (E) rape, as defined in section 67, and amendments thereto;
 - (F) aggravated criminal sodomy, as defined in subsection (b) of section 68, and amendments thereto;
 - (G) abuse of a child, as defined in section 79, and amendments thereto;
 - (H) felony theft of property as defined in subsection (a)(1) or (a)(3) of section 87, and amendments thereto;
 - (I) burglary, as defined in subsection (a) of section 93, and amendments thereto;
 - (J) aggravated burglary, as defined in subsection (b) of section 93, and amendments thereto;
 - (K) arson, as defined in subsection (a) of section 98, and amendments thereto;
 - (L) aggravated arson, as defined in subsection (b) of section 98, and amendments thereto;
 - (M) treason, as defined in section 126, and amendments thereto;
 - (N) any felony offense as provided in K.S.A. 2009 Supp. 21-36a03, 21-36a05 or 21-36a06, and amendments thereto;
 - (O) any felony offense as provided in subsection (a) or (b) of section 193, and amendments thereto;
 - (P) endangering the food supply, as defined in subsection (a) of section 202, and amendments thereto;
 - (Q) aggravated endangering the food supply, as defined in subsection (b) of section 202, and amendments thereto;

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(R) fleeing or attempting to elude a police officer, as defined in subsection (b) of K.S.A. 8-1568, and amendments thereto; or

(S) aggravated endangering a child, as defined in subsection (b)(1) of section 78, and amendments thereto; and

~~(T) abandonment of a child, as defined in section 82, and amendments thereto; and~~

(2) any of the following felonies, only when such felony is so distinct from the homicide alleged to be a violation of subsection (a)(2) as to not be an ingredient of the homicide alleged to be a violation of subsection (a)(2):

(A) Murder in the first degree, as defined in subsection (a)(1);

(B) murder in the second degree, as defined in subsection (a)(1) of section 38, and amendments thereto;

(C) voluntary manslaughter, as defined in subsection (a)(1) of section 39, and amendments thereto;

(D) aggravated assault, as defined in subsection (b) of section 47, and amendments thereto;

(E) aggravated assault of a law enforcement officer, as defined in subsection (d) of section 47, and amendments thereto;

(F) aggravated battery, as defined in subsection (b)(1) of section 48, and amendments thereto; or

(G) aggravated battery against a law enforcement officer, as defined in subsection (d) of section 48, and amendments thereto.

Comment: Subsection (c)(1)(T) should be added to the list of inherently dangerous felonies. Abandonment of a child possesses the same dangers as aggravated endangering of a child.

Sec. 6. Section 61 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5426) is hereby amended to read as follows: (a) Trafficking is:

(1) Recruiting, harboring, transporting, providing or obtaining, by any means, another person with knowledge that force, fraud, threat or coercion will be used to cause the person to engage in forced labor or involuntary servitude; or

(2) benefitting financially or by receiving anything of value from participation in a venture that the person has reason to know has engaged in acts set forth in subsection (a)(1).

(b) Aggravated trafficking is:

~~(1)~~ Trafficking, as defined in subsection (a):

~~(A) (1)~~ Involving the commission or attempted commission of kidnapping, as defined in subsection (a) of section 43, and amendments thereto;

~~(B) (2)~~ committed in whole or in part for the purpose of the sexual gratification of the defendant or another; or

~~(C) (3)~~ resulting in a death; or

~~(2) (4) involving~~ recruiting, harboring, transporting, providing or obtaining, by any means, a person under 18 years of age knowing that the person, with or without force, fraud, threat or coercion, will be used to engage in forced labor, involuntary servitude or sexual gratification of the defendant or another.

(c) (1) Trafficking is a severity level 2, person felony.

(2) Aggravated trafficking is a:

(A) Severity level 1, person felony, except as provided in subsection (c)(2)(B); and

(B) off-grid person felony, when the offender is 18 years of age or older and the victim is less than 14 years of age.

Comment: Current law has subsection (b)(2) as a stand-alone provision which could lead to the criminalization of trivial behavior, such as a young person driving a date to a place where both intend to engage in sexual conduct. The correction is proposed to bring the statute in line with the perceived intent of the statute.

Sec. 7. Section 68 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5504) is hereby amended to read as follows: (a) Criminal sodomy is:

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(1) Sodomy between persons who are 16 or more years of age and members of the same sex;

(2) (1) sodomy between a person and an animal;

(3) (2) sodomy with a child who is 14 or more years of age but less than 16 years of age; or

(4) (3) causing a child 14 or more years of age but less than 16 years of age to engage in sodomy with any person or animal.

(b) Aggravated criminal sodomy is:

(1) Sodomy with a child who is under 14 years of age;

(2) causing a child under 14 years of age to engage in sodomy with any person or an animal;

or

(3) sodomy with a victim who does not consent to the sodomy or causing a victim, without the victim's consent, to engage in sodomy with any person or an animal under any of the following circumstances:

(A) When the victim is overcome by force or fear;

(B) when the victim is unconscious or physically powerless; or

(C) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by, or was reasonably apparent to, the offender.

(c) (1) Criminal sodomy as defined in:

(A) Subsection (a)(1) or (a)(2) is a class B nonperson misdemeanor; and

(B) subsection (a)(3) or (a)(4) is a severity level 3, person felony.

(c) (2) Aggravated criminal sodomy as defined in:

(A) subsection (b)(3) is a severity level 1, person felony; and

(B) subsection (b)(1) or (b)(2) is a:

(i) Severity level 1, person felony, except as provided in subsection (c)(2)(B)(ii); and

(ii) off-grid person felony, when the offender is 18 years of age or older.

(d) It shall be a defense to a prosecution of criminal sodomy, as defined in subsection (a)(3)(2), and aggravated criminal sodomy, as defined in subsection (b)(1), that the child was married to the accused at the time of the offense.

(e) Except as provided in subsection (b)(3)(C), it shall not be a defense that the offender did not know or have reason to know that the victim did not consent to the sodomy, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless.

Comment: Subsection (a)(1) should be removed as it is unconstitutional in light of the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The State or local government could be exposed to civil liability if this offense is retained in statute and results in an arrest. The best practice is to remove unconstitutional statutes from the criminal code.

Sec. 8. Section 71 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5507) is hereby amended to read as follows:

(a) Unlawful voluntary sexual relations is:

(1) Engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:

(A) Voluntary sexual intercourse;

(B) voluntary sodomy; or

(C) voluntary lewd fondling or touching;

(2) when the offender is less than 19 years of age;

(3) when the offender is less than four years of age older than the child; ~~and~~

(4) when the child and the offender are the only parties involved; ~~and~~

~~(5) when the child and the offender are members of the opposite sex~~

(b) Unlawful voluntary sexual relations as defined in:

(1) Subsection (a)(1)(A) is a severity level 8, person felony;

(2) subsection (a)(1)(B) is a severity level 9, person felony; and

(3) subsection (a)(1)(C) is a severity level 10, person felony.

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Comment: Subsection (a)(5) is unconstitutional in light of the Kansas Supreme Court decision in *State v. Limon*, 280 Kan. 275 (2005) and the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The State or local governments could be exposed to civil liability if this offense is retained in statute and results in an arrest. The best practice is to remove unconstitutional statutes from the criminal code.

Sec. 9. Section 81 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5604) is hereby amended to read as follows: (a) Incest is marriage to or engaging in otherwise lawful sexual intercourse or sodomy, as defined in section 65, and amendments thereto, with a person who is 18 or more years of age and who is known to the offender to be related to the offender as any of the following biological relatives: Parent, child, grandparent of any degree, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(b) Aggravated incest is:

(1) Marriage to a person who is under 18 years of age and who is known to the offender to be related to the offender as any of the following biological, step or adoptive relatives: Child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece; or

(2) engaging in the following acts with a person who is 16 or more years of age but under 18 years of age and who is known to the offender to be related to the offender as any of the following biological, step or adoptive relatives: Child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece:

(A) Otherwise lawful sexual intercourse or sodomy as defined by section 65, and amendments thereto; or

(B) any lewd fondling, as described in subsection (a)(1) of section 70, and amendments thereto.

(c) (1) Incest is a severity level 10, person felony.

(2) Aggravated incest as defined in:

~~(A) Subsection (b)(2)(A) is a severity level 3, person felony if the victim is a biological, step, or adoptive child;~~

~~(A) (B)~~ Subsection (b)(2)(A) is a severity level 5, person felony; and

~~(B) (C)~~ subsection (b)(1) or (b)(2)(B) is a severity level 7, person felony.

Comment: The addition of subsection (2)(A) as provided is recommended to increase the severity level of the violation when the victim and offender are in a parent/child relationship. A violation of the parental duty to care for a child deserves greater punishment than other forms of incest.

Sec. 10. Section 92 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5806) is hereby amended to read as follows:

(a) Unlawful use of recordings is:

(1) Knowingly, and without the consent of the owner, duplicating or causing to be duplicated any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, or recording or causing to be recorded any live performance, with the intent to sell, rent or cause to be sold or rented, any such duplicated sounds or any such recorded performance, or to give away such duplicated sounds or recorded performance as part of a promotion for any product or service;

(2) distributing or possessing with the intent to distribute, any article produced in violation of subsection (a)(1) knowing or having reasonable grounds to know that such article was produced in violation of law; ~~or~~

~~(3) possessing any article produced in violation of subsection (a)(1) knowing or having reason to know that such article was produced in violation of law; or~~

~~(3) (4)~~ knowingly selling, renting, offering for sale or rental, or possessing, transporting or manufacturing with intent to sell or rent, any phonograph record, audio or video disc, wire, audio or video tape, film or other article now known or later developed on which sounds, images, or both sounds and images are recorded or otherwise stored, unless the outside cover, box or jacket clearly and conspicuously discloses the name and address of the manufacturer of such recorded article.

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(b) Unlawful use of recordings:

(1) Is a severity level 9, nonperson felony, except as provided in ~~subsection (b)(3) and~~ (b)(2); ~~and~~

(2) as defined in subsection (a)(2) or ~~(a)(3)(4)~~, is a class A nonperson misdemeanor if the offense involves fewer than seven audio visual recordings, or fewer than 100 sound recordings during a 180-day period; ~~and~~

~~(3) as defined in subsection (a)(3), a class B nonperson misdemeanor~~

(c) The provisions of subsection (a)(1) shall not apply to:

(1) Any broadcaster who, in connection with or as part of a radio or television broadcast or cable transmission, or for the purpose of archival preservation, duplicates any such sounds recorded on a sound recording;

(2) any person who duplicates such sounds or such performance for personal use, and without compensation for such duplication; or

(3) any sounds initially fixed in a tangible medium of expression after February 15, 1972.

(d) The provisions of subsections (a)(1) and (a)(3) shall not apply to any computer program or any audio or visual recording that is part of any computer program or to any article or device on which is exclusively recorded any such computer program.

(e) As used in this section:

(1) "Owner" means the person who owns the original fixation of sounds embodied in the master phonograph record, master disc, master wire, master tape, master film or other device used for reproducing sounds on phonograph records, discs, wires, tapes, films or other articles now known or later developed upon which sound is recorded or otherwise stored, and from which the duplicated recorded sounds are directly or indirectly derived, or the person who owns the right to record such live performance; and

(2) "computer program" means a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

(f) It shall be the duty of all law enforcement officers, upon discovery, to confiscate all recorded devices that do not conform to the provisions of this section and that are possessed for the purpose of selling or renting such recorded devices, and all equipment and components used or intended to be used to knowingly manufacture recorded devices that do not conform to the provisions of such section for the purpose of selling or renting such recorded devices. The nonconforming recorded devices that are possessed for the purpose of selling or renting such recorded devices are contraband and shall be delivered to the district attorney for the county in which the confiscation was made, by court order, and shall be destroyed or otherwise disposed of, if the court finds that the person claiming title to such recorded devices possessed such recorded devices for the purpose of selling or renting such recorded devices. The equipment and components confiscated shall be delivered to the district attorney for the county in which the confiscation was made, by court order upon conviction, and may be given to a charitable or educational organization.

Comment: The addition of subsection (a)(3) as proposed would criminalize mere possession of recordings produced in violation of subsection (a)(1). Subsection (a)(3) does not require the further intent to sell or rent the recordings. Possession alone should be sufficient to trigger criminal liability.

Sec. 11. Section 93 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5807) is hereby amended to read as follows:

(a) Burglary is, without authority, entering into or remaining within any:

(1) Dwelling, with intent to commit a felony, theft or ~~sexual battery sexually motivated crime~~ therein;

(2) building, manufactured home, mobile home, tent or other structure which is not a dwelling, with intent to commit a felony, theft or ~~sexual battery sexually motivated crime~~ therein; or

(3) vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony, theft or ~~sexual battery sexually motivated crime~~ therein.

(b) Aggravated burglary is, without authority, entering into or remaining within any building, manufactured home, mobile home, tent or other structure, or any vehicle, aircraft, watercraft,

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1 railroad car or other means of conveyance of persons or property in which there is a human being
2 with intent to commit a felony, theft or ~~sexual battery, sexually motivated crime~~ therein.

3 (c) (1) Burglary as defined in:

4 (A) Subsection (a)(1) is a severity level 7, person felony;

5 (B) subsection (a)(2) is a severity level 7, nonperson felony; and

6 (C) subsection (a)(3) is a severity level 9, nonperson felony.

7 (2) Aggravated burglary is a severity level 5, person felony.

8 ~~(c) As used in this section, "sexually motivated" means that one of the purposes for which the~~
9 ~~defendant committed the crime was for the purpose of the defendant's sexual gratification.~~

10
11 **Comment:** The phrase "sexual battery" should be changed to "sexually motivated crime"
12 to expand liability to other sexually motivated crimes other than sexual battery. For
13 example, an offender who enters a home with the intent to rummage through the victim's
14 underwear enters with the intent to commit a misdemeanor, i.e. criminal deprivation of
15 property, which is not a theft. However, due to the sexually motivated nature of the
16 offense, such behavior should fall under the burglary statute. The definition of "sexually
17 motivated" is identical to how it is defined in K.S.A. 21-4642, 22-3717, 22-4902 and 59-
18 29a02.

19
20 **Sec. 12.** Section 129 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5904) is
21 hereby amended to read as follows:

22 (a) Interference with law enforcement is:

23 (1) Falsely reporting to a law enforcement officer or state investigative agency ~~that a crime~~
24 ~~has been committed, knowing that such information is false and intending that the officer or~~
25 ~~agency shall act in reliance upon such information;~~

26 ~~(A) that a particular person has committed a crime, knowing that such information is false and~~
27 ~~intending that the officer or agency shall act in reliance upon such information;~~

28 ~~(B) any information, knowing that such information is false and intending to influence,~~
29 ~~impede, or obstruct such officer's or agency's duty;~~

30 ~~(2) Concealing, destroying, or materially altering evidence with the intent to prevent or hinder~~
31 ~~the apprehension or prosecution of any person; or~~

32 ~~(2) (3) knowingly obstructing, resisting or opposing any person authorized by law to serve~~
33 ~~process in the service or execution or in the attempt to serve or execute any writ, warrant,~~
34 ~~process or order of a court, or in the discharge of any official duty.~~

35 (b) (1) Interference with law enforcement as defined in subsection (a)(1) ~~and (a)(2)~~ is a class
36 A ~~nonperson~~ misdemeanor;

37 ~~(2) Interference with a law enforcement involving a felony crime as defined in~~

38 ~~(A) subsection (a)(1)(A) or (a)(2) is a severity level 8, nonperson felony; and~~

39 ~~(B) subsection (a)(1)(B) is a severity level 9, nonperson felony.~~

40 (3) Interference with law enforcement as defined in subsection ~~(a)(2)(3)~~ is a:

41 (A) Severity level 9, nonperson felony in the case of a felony, or resulting from parole or any
42 authorized disposition for a felony; and

43 (B) class A nonperson misdemeanor in the case of a misdemeanor, or resulting from any
44 authorized disposition for a misdemeanor, or a civil case.

45
46 **Comment:** The recommendation is to expand liability under this statute. Under current law
47 it is a crime to falsely report a crime. Subsection (a)(1)(A) expands liability to cover
48 persons who falsely report that a particular person committed an offense. Targeting an
49 innocent person aggravates the offense and the severity level should be higher in such
50 cases. Subsection (a)(1)(B) expands liability to any person that provides false information
51 to law enforcement with the intent to obstruction the officer's official duty. This revision
52 goes beyond falsely reporting a crime and may cover instances where an offender
53 misleads law enforcement to prevent detection of a crime or the proper investigation of a
54 crime. Subsection (a)(2) expands liability to offenders who destroy, conceal or alter
55 evidence in order to prevent law enforcement from apprehending an offender. These acts
56 are clearly prohibited under the current statute.

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Sec. 13. Section 130 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5905) is hereby amended to read as follows:

(a) Interference with the judicial process is:

(1) Communicating with any judicial officer in relation to any matter which is or may be brought before such judge, magistrate, master or juror with intent improperly to influence such officer;

(2) committing any of the following acts, with intent to influence, impede or obstruct the finding, decision, ruling, order, judgment or decree of such judicial officer or prosecutor on any matter then pending before the officer or prosecutor:

(A) Communicating in any manner a threat of violence to any judicial officer or any prosecutor;

(B) harassing a judicial officer or a prosecutor by repeated vituperative communication; or

(C) picketing, parading or demonstrating near such officer's or prosecutor's residence or place of abode;

(3) picketing, parading or demonstrating in or near a building housing a judicial officer or a prosecutor with intent to impede or obstruct the finding, decision, ruling, order, judgment or decree of such judicial officer or prosecutor on any matter then pending before the officer or prosecutor;

(4) knowingly accepting or agreeing to accept anything of value as consideration for a promise:

(A) Not to initiate or aid in the prosecution of a person who has committed a crime; or

(B) to conceal, or destroy, or materially alter evidence of a crime; or

~~(5) concealing, destroying, or materially altering evidence with the intent to influence, impede, or obstruct any proceeding, civil or criminal;~~

~~(5) (6)~~ when performed by a person summoned or sworn as a juror in any case:

(A) Intentionally soliciting, accepting or agreeing to accept from another any benefit as consideration to wrongfully give a verdict for or against any party in any proceeding, civil or criminal;

(B) intentionally promising or agreeing to wrongfully give a verdict for or against any party in any proceeding, civil or criminal; or

(C) knowingly receiving any evidence or information from anyone in relation to any matter or cause for the trial of which such juror has been or will be sworn, without the authority of the court or officer before whom such juror has been summoned, and without immediately disclosing the same to such court or officer.

(b) Interference with the judicial process as defined in:

(1) Subsection (a)(1) is a severity level 9, nonperson felony;

(2) subsection (a)(2) and (a)(3) is a class A nonperson misdemeanor;

(3) subsection (a)(4) is a:

(A) Severity level 8, nonperson felony if the crime is a felony; or

(B) class A nonperson misdemeanor if the crime is a misdemeanor;

~~(4) subsection (a)(5) is a:~~

~~(A) class A nonperson misdemeanor; or~~

~~(B) severity level 8, nonperson felony if the proceeding is a felony prosecution;~~

~~(4) (5)~~ subsection ~~(a)(5)(A)~~ ~~(a)(6)(A)~~ is a severity level 7, nonperson felony; and

~~(5) (6)~~ subsection ~~(a)(5)(B)~~ ~~(a)(6)(B)~~ or ~~(a)(5)(C)~~ ~~(a)(6)(C)~~ is a severity level 9, nonperson felony.

(c) Nothing in this section shall limit or prevent the exercise by any court of this state of its power to punish for contempt.

Comment: The recommended changes to subsection (a)(4) and the addition of subsection (a)(5) is because there are several troubling limitations on the crime included in subsection (a)(4). First, the crime only applies when an offender agrees to accept some consideration for a promise to destroy evidence, etc. The destruction of evidence of a crime, in the absence of consideration, should be a crime. For that reason subsection

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(a)(5) is added and would apply to both criminal and civil cases because the offense deals with the judicial process generally, not just the criminal justice process.

Sec. 14. Section 132 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5907) is hereby amended to read as follows:

(a) Simulating legal process is:

(1) Distributing to another any document which simulates or purports to be, or is designed to cause others to believe it to be, a summons, petition, complaint or other judicial legal process, with intent thereby to induce payment of a claim ~~the intent to mislead the recipient and cause the recipient to take action in reliance thereon~~, or

(2) printing or distributing any such document, knowing that it shall be so used.

(b) Simulating legal process is a class A nonperson misdemeanor.

(c) This section shall not apply to the printing or distribution of blank forms of legal documents intended for actual use in judicial proceedings.

Comment: The proposed change is recommended to avoid the unintended consequence of criminalizing innocent conduct intended to "induce payment of a claim." The revision would require the "intent to mislead the recipient and cause the recipient to take action in reliance thereon." This revision provides a superior culpability standard and adequately targets the kind of behavior the legislature originally intended to criminalize.

Sec. 15. Section 136 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-5911) is hereby amended to read as follows:

(a) Escape from custody is escaping while held in custody on a: (1) Charge or conviction of ~~or arrest for~~ a misdemeanor;

(2) charge or adjudication ~~or arrest~~ as a juvenile offender where the act, if committed by an adult, would constitute a misdemeanor; or

(3) commitment to the state security hospital as provided in K.S.A. 22-3428, and amendments thereto, based on a finding that the person committed an act constituting a misdemeanor or by a person 18 years of age or over who is being held in custody on a adjudication of a misdemeanor.

(b) Aggravated escape from custody is:

(1) Escaping while held in custody:

(A) Upon a charge or conviction of ~~or arrest for~~ a felony;

(B) upon a charge or adjudication ~~or arrest~~ as a juvenile offender where the act, if committed by an adult, would constitute a felony;

(C) prior to or upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05, and amendments thereto;

(D) upon commitment to a treatment facility as a sexually violent predator as provided in K.S.A. 59-29a01 et seq., and amendments thereto;

(E) upon a commitment to the state security hospital as provided in K.S.A. 22-3428, and amendments thereto, based on a finding that the person committed an act constituting a felony;

(F) by a person 18 years of age or over who is being held on an adjudication of a felony; or

(G) upon incarceration at a state correctional institution while in the custody of the secretary of corrections.

(2) Escaping effected or facilitated by the use of violence or the threat of violence against any person while held in custody:

(A) On a charge or conviction of any crime;

(B) on a charge or adjudication as a juvenile offender where the act, if committed by an adult, would constitute a felony;

(C) prior to or upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05, and amendments thereto;

(D) upon commitment to a treatment facility as a sexually violent predator as provided in K.S.A. 59-29a01 et seq., and amendments thereto;

(E) upon a commitment to the state security hospital as provided in K.S.A. 22-3428, and amendments thereto, based on a finding that the person committed an act constituting any crime;

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(F) by a person 18 years of age or over who is being held on a charge or adjudication of a misdemeanor of felony; or

(G) upon incarceration at a state correctional institution while in the custody of the secretary of corrections.

(c) (1) Escape from custody is a class A nonperson misdemeanor.

(2) Aggravated escape from custody as defined in:

(A) Subsection (b)(1)(A), (b)(1)(C), (b)(1)(D), (b)(1)(E) or (b)(1)(F) is a severity level 8, nonperson felony;

(B) subsection (b)(1)(B), (b)(1)(G), (b)(2)(B) or (b)(2)(G) is a severity level 5, nonperson felony;

(C) subsection (b)(2)(A), (b)(2)(C), (b)(2)(D), (b)(2)(E) or (b)(2)(F) is a severity level 6, nonperson felony.

(d) As used in this section and section 137, and amendments thereto:

(1) "Custody" means arrest; detention in a facility for holding persons charged with or convicted of crimes or charged or adjudicated as a juvenile offender; detention for extradition or deportation; detention in a hospital or other facility pursuant to court order, imposed as a specific condition of probation or parole or imposed as a specific condition of assignment to a community correctional services program; commitment to the state security hospital as provided in K.S.A. 22-3428, and amendments thereto; or any other detention for law enforcement purposes.

"Custody" does not include general supervision of a person on probation or parole or constraint incidental to release on bail;

(2) "escape" means departure from custody without lawful authority or failure to return to custody following temporary leave lawfully granted pursuant to express authorization of law or order of a court;

(3) "juvenile offender" means the same as in K.S.A. 2009 Supp. 38-2302, and amendments thereto; and

(4) "state correctional institution" means the same as in K.S.A. 75-5202, and amendments thereto.

(e) The term "charge" shall not require that the offender was held on a written charge contained in a complaint, information or indictment, if such offender was arrested prior to such offender's escape from custody.

Comment: The recommendation is to add the phrase "or arrest" to subsections (a)(1), (a)(2), (b)(1)(A) and (b)(1)(B) and to add subsection (e). Under current case law, an offender may not be charged with escape from custody unless there is a formal written charge, not when the offender is only under arrest without a written charge. Escape while under arrest without a written charge may still be charged under obstruction of legal process, but that offense is subject to a lesser penalty. It was determined that the legislature intended this offense to apply to offenders under arrest, without a formal written charge, and the proposed changes clarify that intent.

Sec. 16. Section 165 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6001) is hereby amended to read as follows:

(a) Bribery is:

(1) *Offering, giving or promising to give, directly or indirectly, to any person who is a public officer, candidate for public office or public employee any benefit, reward or consideration to which the person is not legally entitled with intent thereby to influence the person with respect to the performance of the person's powers or duties as a public officer or employee with the intent to improperly influence a public official, offering, giving or promising to give, directly or indirectly, to any public official any benefit, reward or consideration which the public official is not permitted by law to accept, in exchange for the performance or omission of performance of the public official's powers or duties or a promise to perform or omit performance of such powers or duties; or*

(2) *the act of a person who is a public officer, candidate for public office or public employee, in requesting, receiving or agreeing to receive, directly or indirectly, any benefit, reward or consideration given with intent that the person will be so influenced the act of a public official, intentionally requesting, receiving or agreeing to receive, directly or indirectly, any benefit, reward*

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1 ~~or consideration, which the public official is not permitted by law to accept, with the intent to~~
2 ~~improperly influence such public official and in exchange for the performance or omission of~~
3 ~~performance of the public official's powers or duties or a promise to perform or omit performance~~
4 ~~of such powers or duties.~~

5 (b) Bribery is a severity level 7, nonperson felony. Upon conviction of bribery, a public ~~officer~~
6 ~~official or public employee~~ shall forfeit the person's office or employment. Notwithstanding an
7 expungement of the conviction pursuant to section 254, and amendments thereto, any person
8 convicted of bribery under the provisions of this section shall be forever disqualified from holding
9 public office or public employment in this state.

10 ~~(c) As used in this section, "public official" means any person who is a public officer~~
11 ~~candidate for public office or public employee.~~

12
13 **Comment:** The current bribery statute is flawed for several reasons. First, it lacks a quid
14 pro quo requirement, i.e. a requirement that a bribe be offered in exchange for the
15 improper performance of a public officer's duties. See, *State v. Campbell*, 271 Kan. 756
16 (1975). This is uncommon compared to bribery statutes in other jurisdictions. Second,
17 the statute does not apply to the omission of performance of a public duty. Third, the
18 current offense may criminalize violations of state ethics laws as it prohibits a public
19 official from accepting something to which they are not legally entitled.

20
21 The revision requires some consideration to be offered "in exchange for the performance
22 or omission of performance of the public official's powers or duties." This kind of quid
23 pro quo element is common in bribery offenses in other jurisdictions. The revision limits
24 the kind of property that can be offered or accepted to that which the public official "is not
25 permitted by law to accept." The revised language clarifies that a public official may
26 accept some gifts that are consistent with state ethics laws.

27
28 **Sec. 17.** Section 197 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6312) is
29 hereby amended to read as follows:

30 (a) Criminal possession of explosives is the possession of any explosive or detonating
31 substance by a person who, within five years preceding such possession, has been convicted of
32 a felony under the laws of this or any other jurisdiction or has been released from imprisonment
33 for a felony.

34 (b) Criminal disposal of explosives is knowingly ~~and without lawful authority~~ distributing any
35 explosive or detonating substance to a person:

36 (1) Under 21 years of age ~~regardless of whether the seller, donor or transferor knows the age~~
37 ~~of such person;~~

38 (2) who is both addicted to and an unlawful user of a controlled substance; or

39 (3) who, within the preceding five years, has been convicted of a felony under the laws of this
40 or any other jurisdiction or has been released from imprisonment for a felony.

41 (c) Carrying concealed explosives is carrying any explosive or detonating substance on the
42 person in a wholly or partly concealed manner.

43 (d) (1) Criminal possession of explosives is a severity level 7, person felony.

44 (2) Criminal disposal of explosives is a severity level 10, person felony.

45 (3) Carrying concealed explosives is a class ~~C~~ A person misdemeanor.

46 (e) As used in subsections (a) and (b), "explosives" means any chemical compound, mixture
47 or device, of which the primary purpose is to function by explosion, and includes, but is not limited
48 to, dynamite and other high explosives, black powder, pellet powder, initiating explosives,
49 detonators, safety fuses, squibs, detonating cord, igniter cord and igniters.

50
51 **Comment:** In light of the dangerous nature of explosives and the possibility for their
52 misuse when concealed, a C misdemeanor seems inadequate. The recommendation is to
53 increase the penalty to a class A person misdemeanor.

54
55 **Sec. 18.** Section 223 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6412) is
56 hereby amended to read as follows:

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- 1 (a) Cruelty to animals is:
- 2 (1) Knowingly and maliciously killing, injuring, maiming, torturing, burning or mutilating any
- 3 animal;
- 4 (2) knowingly abandoning any animal in any place without making provisions for its proper
- 5 care;
- 6 (3) having physical custody of any animal and knowingly failing to provide such food, potable
- 7 water, protection from the elements, opportunity for exercise and other care as is needed for the
- 8 health or well-being of such kind of animal;
- 9 (4) intentionally using a wire, pole, stick, rope or any other object to cause an equine to lose
- 10 its balance or fall, for the purpose of sport or entertainment;
- 11 (5) knowingly but not maliciously killing or injuring any animal; or
- 12 (6) administering any poison to any domestic animal.
- 13 (b) Cruelty to animals as defined in:
- 14 (1) Subsection (a)(1) or (a)(6) is a nonperson felony. Upon conviction of subsection (a)(1) or
- 15 (a)(6), a person shall be sentenced to not less than 30 days or more than one year's
- 16 imprisonment and be fined not less than \$500 nor more than \$5,000. The person convicted shall
- 17 not be eligible for release on probation, suspension or reduction of sentence or parole until the
- 18 person has served the minimum mandatory sentence as provided herein. During the mandatory
- 19 30 days imprisonment, such offender shall have a psychological evaluation prepared for the court
- 20 to assist the court in determining conditions of probation. Such conditions shall include, but not be
- 21 limited to, the completion of an anger management program; and
- 22 (2) subsection (a)(2), (a)(3), (a)(4) or (a)(5) are a:
- 23 (A) Class A nonperson misdemeanor, except as provided in subsection (b)(2)(B); and
- 24 (B) nonperson felony upon the second or subsequent conviction of cruelty to animals as
- 25 defined in subsection (a)(2), (a)(3), (a)(4) or (a)(5).
- 26 Upon such conviction, a person shall be sentenced to not less than five days or more than one
- 27 year's imprisonment and be fined not less than \$500 nor more than \$2,500. The person convicted
- 28 shall not be eligible for release on probation, suspension or reduction of sentence or parole
- 29 until the person has served the minimum mandatory sentence as provided herein.
- 30 (c) The provisions of this section shall not apply to:
- 31 (1) Normal or accepted veterinary practices;
- 32 (2) bona fide experiments carried on by commonly recognized research facilities;
- 33 (3) killing, attempting to kill, trapping, catching or taking of any animal in accordance with the
- 34 provisions of chapter 32 or chapter 47 of the Kansas Statutes Annotated, and amendments
- 35 thereto;
- 36 (4) rodeo practices accepted by the rodeo cowboys' association;
- 37 (5) the humane killing of an animal which is diseased or disabled beyond recovery for any
- 38 useful purpose, or the humane killing of animals for population control, by the owner thereof or
- 39 the agent of such owner residing outside of a city or the owner thereof within a city if no animal
- 40 shelter, pound or licensed veterinarian is within the city, or by a licensed veterinarian at the
- 41 request of the owner thereof, or by any officer or agent of an incorporated humane society, the
- 42 operator of an animal shelter or pound, a local or state health officer or a licensed veterinarian
- 43 three business days following the receipt of any such animal at such society, shelter or pound;
- 44 (6) with respect to farm animals, normal or accepted practices of animal husbandry, including
- 45 the normal and accepted practices for the slaughter of such animals for food or by-products and
- 46 the careful or thrifty management of one's herd or animals, including animal care practices
- 47 common in the industry or region;
- 48 (7) the killing of any animal by any person at any time which may be found outside of the
- 49 owned or rented property of the owner or custodian of such animal and which is found injuring or
- 50 posing a threat to any person, farm animal or property;
- 51 (8) an animal control officer trained by a licensed veterinarian in the use of a tranquilizer gun,
- 52 using such gun with the appropriate dosage for the size of the animal, when such animal is
- 53 vicious or could not be captured after reasonable attempts using other methods;
- 54 (9) laying an equine down for medical or identification purposes;
- 55 (10) normal or accepted practices of pest control, as defined in subsection (x) of K.S.A. 2-
- 56 2438a, and amendments thereto; or

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(11) accepted practices of animal husbandry pursuant to regulations promulgated by the United States department of agriculture for domestic pet animals under the animal welfare act, public law 89-544, as amended and in effect on July 1, 2006.

(d) The provisions of subsection (a)(6) shall not apply to any person exposing poison upon their premises for the purpose of destroying wolves, coyotes or other predatory animals.

(e) Any public health officer, law enforcement officer, licensed veterinarian or officer or agent of any incorporated humane society, animal shelter or other appropriate facility may take into custody any animal, upon either private or public property, which clearly shows evidence of cruelty to animals, as defined in this section. Such officer, agent or veterinarian may inspect, care for or treat such animal or place such animal in the care of a duly incorporated humane society or licensed veterinarian for treatment, boarding or other care or, if an officer of such humane society or such veterinarian determines that the animal appears to be diseased or disabled beyond recovery for any useful purpose, for humane killing. If the animal is placed in the care of an animal shelter, the animal shelter shall notify the owner or custodian, if known or reasonably ascertainable. If the owner or custodian is charged with a violation of this section, the board of county commissioners in the county where the animal was taken into custody shall establish and approve procedures whereby the animal shelter may petition the district court to be allowed to place the animal for adoption or euthanize the animal at any time after 20 days after the owner or custodian is notified or, if the owner or custodian is not known or reasonably ascertainable after 20 days after the animal is taken into custody, unless the owner or custodian of the animal files a renewable cash or performance bond with the county clerk of the county where the animal is being held, in an amount equal to not less than the cost of care and treatment of the animal for 30 days. Upon receiving such petition, the court shall determine whether the animal may be placed for adoption or euthanized. The board of county commissioners in the county where the animal was taken into custody shall review the cost of care and treatment being charged by the animal shelter maintaining the animal.

(f) The owner or custodian of an animal placed for adoption or killed pursuant to subsection (e) shall not be entitled to recover damages for the placement or killing of such animal unless the owner proves that such placement or killing was unwarranted.

(g) Expenses incurred for the care, treatment or boarding of any animal, taken into custody pursuant to subsection (e), pending prosecution of the owner or custodian of such animal for the crime of cruelty to animals, shall be assessed to the owner or custodian as a cost of the case if the owner or custodian is adjudicated guilty of such crime.

~~(h) Upon the filing of a sworn complaint by any public health officer, law enforcement officer, licensed veterinarian or officer or agent of any incorporated humane society, animal shelter or other appropriate facility alleging the commission of cruelty to animals, the county or district attorney shall determine the validity of the complaint and shall forthwith file charges for the crime if the complaint appears to be valid.~~

~~(i)~~ (h) If a person is adjudicated guilty of the crime of cruelty to animals, and the court having jurisdiction is satisfied that an animal owned or possessed by such person would be in the future subjected to such crime, such animal shall not be returned to or remain with such person. Such animal may be turned over to a duly incorporated humane society or licensed veterinarian for sale or other disposition.

~~(j)~~ As used in this section:

(1) "Equine" means a horse, pony, mule, jenny, donkey or hinny; and

(2) "maliciously" means a state of mind characterized by actual evil-mindedness or specific intent to do a harmful act without a reasonable justification or excuse.

Comment: Subsection (h) requires a county or district attorney to file charges of animal cruelty when a valid complaint is presented. This unnecessarily constrains the discretion of prosecutors and this kind of restriction on discretion is not employed in any other criminal statute. The recommendation is to strike subsection (h) because the better policy is to permit prosecutors to determine whether filing charges is justified on a case-by-case basis.

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1 **Sec. 19.** Section 224 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6413) is
2 hereby amended to read as follows:

3 (a) Unlawful disposition of animals is knowingly raffling, or giving as a prize or premium ~~or~~
4 ~~using as an advertising device or promotional display~~ living rabbits or chickens, ducklings or
5 goslings.

6 (b) Unlawful disposition of animals is a class C misdemeanor.

7 (c) The provisions of this section shall not apply to a person giving such animals to minors for
8 use in agricultural projects under the supervision of commonly recognized youth farm
9 organizations.

10
11 **Comment:** The recommendation is to strike the phrase "or using as an advertising device
12 or promotional display." Several legitimate businesses use these animals as part of a
13 promotional display, especially during holidays such as Easter. Prohibiting use of these
14 animals as part of an "advertising device" could possibly criminalize their use in
15 producing commercial advertisements. The committee agreed that the legislature did not
16 likely intend to criminalize this conduct.

17
18 **Sec. 20.** Section 300 of chapter 136 of the 2010 Session Laws of Kansas (K.S.A. 21-6819) is
19 hereby amended to read as follows:

20 (a) The provisions of subsections (a), (b), (c), (d), (e) and (h) of section 246, and
21 amendments thereto, regarding multiple sentences shall apply to the sentencing of offenders
22 pursuant to the sentencing guidelines. The mandatory consecutive sentence requirements
23 contained in subsections (c), (d) and (e) of section 246, and amendments thereto, shall not apply
24 if such application would result in a manifest injustice.

25 (b) The sentencing judge shall otherwise have discretion to impose concurrent or consecutive
26 sentences in multiple conviction cases. The sentencing judge ~~may consider the need to impose~~
27 ~~an overall sentence that is proportionate to harm and culpability~~ and shall state on the record if
28 the sentence is to be served concurrently or consecutively. In cases where consecutive
29 sentences may be imposed by the sentencing judge, the following shall apply:

30 (1) When the sentencing judge imposes multiple sentences consecutively, the consecutive
31 sentences shall consist of an imprisonment term which ~~is~~ ~~may not exceed~~ the sum of the
32 consecutive imprisonment terms, and a supervision term. ~~The sentencing judge shall have the~~
33 ~~discretion to impose a consecutive term of imprisonment for a crime other than the primary crime~~
34 ~~of any term of months not exceed the nonbase sentence as determined under paragraph (5).~~ The
35 postrelease supervision term will be based on the longest supervision term imposed for any of the
36 crimes.

37 (2) The sentencing judge shall establish a base sentence for the primary crime. The primary
38 crime is the crime with the highest crime severity ranking. An off-grid crime shall not be used as
39 the primary crime in determining the base sentence when imposing multiple sentences. If
40 sentences for off-grid and on-grid convictions are ordered to run consecutively, the offender shall
41 not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the
42 postrelease supervision term will be based on the off-grid crime. If more than one crime of
43 conviction is classified in the same crime category, the sentencing judge shall designate which
44 crime will serve as the primary crime. In the instance of sentencing with both the drug grid and
45 the nondrug grid and simultaneously having a presumption of imprisonment and probation, the
46 sentencing judge shall use the crime which presumes imprisonment as the primary crime. In the
47 instance of sentencing with both the drug grid and the nondrug grid and simultaneously having a
48 presumption of either both probation or both imprisonment, the sentencing judge shall use the
49 crime with the longest sentence term as the primary crime.

50 (3) The base sentence is set using the total criminal history score assigned.

51 (4) The total prison sentence imposed in a case involving multiple convictions arising from
52 multiple counts within an information, complaint or indictment cannot exceed twice the base
53 sentence. This limit shall apply only to the total sentence, and it shall not be necessary to reduce
54 the duration of any of the nonbase sentences imposed to be served consecutively to the base
55 sentence. The postrelease supervision term will reflect only the longest such term assigned to

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any of the crimes for which consecutive sentences are imposed. Supervision periods shall not be aggregated.

(5) Nonbase sentences shall not have criminal history scores applied, as calculated in the criminal history I column of the grid, but base sentences shall have the full criminal history score assigned. In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case the court shall follow all of the provisions of this section concerning the sentencing of multiple conviction cases.

(6) If the sentence for the primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison.

(7) If the sentence for the consecutive sentences is a prison term, the postrelease supervision term is a term of postrelease supervision as established for the primary crime.

(8) If the sentence for the primary crime is a nonprison sentence, a nonprison term will be imposed for each crime conviction, but the nonprison terms shall not be aggregated or served consecutively even though the underlying prison sentences have been ordered to be served consecutively. Upon revocation of the nonprison sentence, the offender shall serve the prison sentences consecutively as provided in this section.

(c) The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:

(1) The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively.

(2) When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime.

(3) The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation.

Comment: The recommendation is to add new language to subsection (b) that will provide guidance to district courts regarding when and how concurrent and consecutive sentences should be imposed. The new language in subsection (b)(1) provides judicial discretion to impose an entire consecutive sentence or any part of such a sentence. Under current law, a consecutive sentence may only be imposed if the entire sentence is imposed with the result being that consecutive sentences are not often imposed. Allowing judicial discretion to impose a portion of a consecutive sentence allows for greater proportionality.

Sec. 21. K.S.A. 21-36a01 is hereby amended to read as follows: 21-36a01. Definitions. As used in K.S.A. 2009 Supp. 21-36a01 through 21-36a17, and amendments thereto:

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

(b) (1) "Controlled substance analog" means a substance that is intended for human consumption, and:

(A) The chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in or added to the schedules designated in K.S.A. 65-4105 or 65-4107, and amendments thereto;

(B) which has a stimulant, depressant or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance included in the schedules designated in K.S.A. 65-4105 or 65-4107, and amendments thereto; or

(C) with respect to a particular individual, which the individual represents or intends to have a stimulant, depressant or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant or hallucinogenic effect on the central nervous

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1 system of a controlled substance included in the schedules designated in K.S.A. 65-4105 or 65-
2 4107, and amendments thereto.

3 (2) "Controlled substance analog" does not include:

4 (A) A controlled substance;

5 (B) a substance for which there is an approved new drug application; or

6 (C) a substance with respect to which an exemption is in effect for investigational use by a
7 particular person under section 505 of the federal food, drug, and cosmetic act (21 U.S.C. 355)
8 to the extent conduct with respect to the substance is permitted by the exemption.

9 (c) "Cultivate" means the planting or promotion of growth of five or more plants which
10 contain or can produce controlled substances.

11 (d) "Distribute" means the actual, constructive or attempted transfer from one person to
12 another of some item whether or not there is an agency relationship. "Distribute" includes, but is
13 not limited to, sale, offer for sale or any act that causes some item to be transferred from one
14 person to another. "Distribute" does not include acts of administering, dispensing or prescribing
15 a controlled substance as authorized by the pharmacy act of the state of Kansas, the uniform
16 controlled substances act, or otherwise authorized by law.

17 (e) "Drug" means:

18 (1) Substances recognized as drugs in the official United States pharmacopoeia, official
19 homeopathic pharmacopoeia of the United States or official national formulary or any
20 supplement to any of them;

21 (2) substances intended for use in the diagnosis, cure, mitigation, treatment or prevention
22 of disease in man or animals;

23 (3) substances, other than food, intended to affect the structure or any function of the body
24 of man or animals; and

25 (4) substances intended for use as a component of any article specified in paragraph (1),
26 (2) or (3). It does not include devices or their components, parts or accessories.

27 (f) "Drug paraphernalia" means all equipment and materials of any kind which are used, or
28 primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting,
29 manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing,
30 packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or
31 otherwise introducing into the human body a controlled substance and in violation of this act.

32 "Drug paraphernalia" shall include, but is not limited to:

33 (1) Kits used or intended for use in planting, propagating, cultivating, growing or harvesting
34 any species of plant which is a controlled substance or from which a controlled substance can
35 be derived;

36 (2) kits used or intended for use in manufacturing, compounding, converting, producing,
37 processing or preparing controlled substances;

38 (3) isomerization devices used or intended for use in increasing the potency of any species
39 of plant which is a controlled substance;

40 (4) testing equipment used or intended for use in identifying or in analyzing the strength,
41 effectiveness or purity of controlled substances;

42 (5) scales and balances used or intended for use in weighing or measuring controlled
43 substances;

44 (6) diluents and adulterants, including, but not limited to, quinine hydrochloride, mannitol,
45 mannite, dextrose and lactose, which are used or intended for use in cutting controlled
46 substances;

47 (7) separation gins and sifters used or intended for use in removing twigs and seeds from
48 or otherwise cleaning or refining marijuana;

49 (8) blenders, bowls, containers, spoons and mixing devices used or intended for use in
50 compounding controlled substances;

51 (9) capsules, balloons, envelopes, bags and other containers used or intended for use in
52 packaging small quantities of controlled substances;

53 (10) containers and other objects used or intended for use in storing or concealing
54 controlled substances;

55 (11) hypodermic syringes, needles and other objects used or intended for use in
56 parenterally injecting controlled substances into the human body;

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- (12) objects used or primarily intended or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish, hashish oil, phencyclidine (PCP), methamphetamine or amphetamine into the human body, such as:
- (A) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;
 - (B) water pipes, bongs or smoking pipes designed to draw smoke through water or another cooling device;
 - (C) carburetion pipes, glass or other heat resistant tubes or any other device used or intended to be used, designed to be used to cause vaporization of a controlled substance for inhalation;
 - (D) smoking and carburetion masks;
 - (E) roach clips, objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
 - (F) miniature cocaine spoons and cocaine vials;
 - (G) chamber smoking pipes;
 - (H) carburetor smoking pipes;
 - (I) electric smoking pipes;
 - (J) air-driven smoking pipes;
 - (K) chillums;
 - (L) bongs;
 - (M) ice pipes or chillers;
 - (N) any smoking pipe manufactured to disguise its intended purpose;
 - (O) wired cigarette papers; or
 - (P) cocaine freebase kits.
- (g) "Immediate precursor" means a substance which the board of pharmacy has found to be and by rules and regulations designates as being the principal compound commonly used or produced primarily for use and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit manufacture.
- (h) "Isomer" means all enantiomers and diastereomers.
- (i) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly or by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis ~~and includes any packaging or repackaging of the substance or labeling or relabeling of its container.~~ "Manufacture" does not include:
- (1) the preparation or compounding of a controlled substance by an individual for the individual's own lawful use or the preparation, compounding, packaging or labeling of a controlled substance;
 - ~~(2) (A) By a practitioner or the practitioner's agent pursuant to a lawful order of a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or~~
 - ~~(2) (B) by a practitioner or by the practitioner's authorized agent under such practitioner's supervision for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.~~
 - ~~(2) the addition of diluents and adulterants, including but not limited to, quinine hydrochloride, mannitol, mannite, extrose and lactose which are intended for use in cutting controlled substance.~~
- (j) "Marijuana" means all parts of all varieties of the plant Cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin. "Marijuana" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.
- (k) "Minor" means a person under 18 years of age.

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(l) "Narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis:

(1) Opium and opiate and any salt, compound, derivative or preparation of opium or opiate;
(2) any salt, compound, isomer, derivative or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1) but not including the isoquinoline alkaloids of opium;

(3) opium poppy and poppy straw;

(4) coca leaves and any salt, compound, derivative or preparation of coca leaves and any salt, compound, isomer, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(m) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. "Opiate" does not include, unless specifically designated as controlled under K.S.A. 65-4102, and amendments thereto, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). "Opiate" does include its racemic and levorotatory forms.

(n) "Opium poppy" means the plant of the species *Papaver somniferum* L. except its seeds.

(o) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association or any other legal entity.

(p) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(q) "Possession" means having joint or exclusive control over an item with knowledge of and intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

(r) "School property" means property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12. This definition shall not be construed as requiring that school be in session or that classes are actually being held at the time of the offense or that children must be present within the structure or on the property during the time of any alleged criminal act. If the structure or property meets the above definition, the actual use of that structure or property at the time alleged shall not be a defense to the crime charged or the sentence imposed.

(s) "Simulated controlled substance" means any product which identifies itself by a common name or slang term associated with a controlled substance and which indicates on its label or accompanying promotional material that the product simulates the effect of a controlled substance.

Comment: The recommendation is to revise the definition of "manufacture" in the drug code. The proposed language excludes the actions of packaging, repackaging and cutting controlled substances. It was determined that packaging, repackaging and cutting are not properly part of criminal drug manufacturing, but rather, they are acts more closely associated with drug distribution.

Sec. 22. K.S.A. 21-36a05 is hereby amended to read as follows: 21-36a05. **Unlawful cultivation or distribution of controlled substances.** (a) It shall be unlawful for any person to ~~cultivate~~ distribute or possess with the intent to distribute any of the following controlled substances or controlled substance analogs thereof:

(1) Opiates, opium or narcotic drugs, or any stimulant designated in subsection (d)(1), (d)(3) or (f)(1) of K.S.A. 65-4107, and amendments thereto;

(2) any depressant designated in subsection (e) of K.S.A. 65-4105, subsection (e) of K.S.A. 65-4107, subsection (b) or (c) of K.S.A. 65-4109 or subsection (b) of K.S.A. 65-4111, and amendments thereto;

(3) any stimulant designated in subsection (f) of K.S.A. 65-4105, subsection (d)(2), (d)(4) or (f)(2) of K.S.A. 65-4107 or subsection (e) of K.S.A. 65-4109, and amendments thereto;

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(4) any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105, subsection (g) of K.S.A. 65-4107 or subsection (g) of K.S.A. 65-4109, and amendments thereto;

(5) any substance designated in subsection (g) of K.S.A. 65-4105 and subsection (c), (d), (e), (f) or (g) of K.S.A. 65-4111, and amendments thereto; or

(6) any anabolic steroids as defined in subsection (f) of K.S.A. 65-4109, and amendments thereto.

(b) It shall be unlawful for any person to distribute or possess with the intent to distribute a controlled substance or a controlled substance analog designated in K.S.A. 65-4113, and amendments thereto.

(c) (1) Violation of subsection (a) is a drug severity level 3 felony, except that:

(A) Violation of subsection (a) is a drug severity level 2 felony if the trier of fact makes a finding that the offender is 18 or more years of age and the substance was distributed to or possessed with intent to distribute to a minor or the violation occurs on or within 1,000 feet of any school property;

(B) violation of subsection (a)(1) is a drug severity level 2 felony if that person has one prior conviction under subsection (a)(1), under K.S.A. 65-4161 prior to its repeal, or under a substantially similar offense from another jurisdiction; and

(C) violation of subsection (a)(1) is a drug severity level 1 felony if that person has two prior convictions under subsection (a)(1), under K.S.A. 65-4161 prior to its repeal, or under a substantially similar offense from another jurisdiction.

(2) Violation of subsection (b) is a class A nonperson misdemeanor, except that violation of subsection (b) is a drug severity level 4 felony if the substance was distributed to or possessed with the intent to distribute to a child under 18 years of age.

(d) It shall not be a defense to charges arising under this section that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance. It shall be unlawful for any person to cultivate any controlled substance or controlled substance analog listed in subsection (a).

(d) Except as provided by any part of this subsection:

(1) Violation of subsection (a) shall be:

(A) a drug severity level 4 felony if the quantity of the material was less than 3.5 grams;

(B) a drug severity level 3 felony if the quantity of the material was at least 3.5 grams but less than 100 grams;

(C) a drug severity level 2 felony if the quantity of the material was at least 100 grams but less than 1 kilogram; or,

(D) a drug severity level 1 felony if the quantity of the material was 1 kilogram or more.

(2) Violation of subsection (a) with respect to material containing any quantity of marijuana, or an analog thereof, shall be:

(A) a drug severity level 4 felony if the quantity of the material was less than 25 grams;

(B) a drug severity level 3 felony if the quantity of the material was at least 25 grams but less than 450 grams;

(C) a drug severity level 2 felony if the quantity of the material was at least 450 grams but less than 30 kilograms; or,

(D) a drug severity level 1 felony if the quantity of the material was 30 kilograms or more.

(3) Violation of subsection (a) with respect to material containing any quantity of heroin or methamphetamine, or an analog thereof, shall be:

(A) a drug severity level 4 felony if the quantity of the material was less than 1 gram;

(B) a drug severity level 3 felony if the quantity of the material was at least 1 gram but less than 3.5 grams;

(C) a drug severity level 2 felony if the quantity of the material was at least 3.5 grams but less than 100 grams; or,

(D) a drug severity level 1 felony if the quantity of the material was 100 grams or more.

(4) Violation of subsection (a) with respect to material containing any quantity of a controlled substance, designated in K.S.A. 65-4105, K.S.A. 65-4107, K.S.A. 65-4109 or K.S.A. 65-4111, and amendments thereto, distributed by dosage unit, shall be:

(A) a drug severity level 4 felony if the number of dosage units was fewer than 10;

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- (B) a drug severity level 3 felony if the number of dosage units was at least 10 but less than 100;
- (C) a drug severity level 2 felony if the number of dosage units was at least 100 but less than 1000; or
- (D) a drug severity level 1 felony if the number of dosage units was 1,000 or more.
- (5) For any violation of subsection (a), the severity level of the offense shall be increased one level if the controlled substance or controlled substance analog was distributed or possessed with the intent to distribute on or within 1,000 feet of any school property.
- (6) Violation of subsection (b) shall be a class A person misdemeanor except that it shall be a severity level 7 person felony if the substance was distributed to or possessed with the intent to distribute to a minor under 18 years of age.
- (7) Violation of subsection (c) shall be:
- (A) a drug severity level 3 felony if the number of plants cultivated was more than 4 but fewer than 50;
- (B) a drug severity level 2 felony if the number of plants cultivated was at least 50 but fewer than 100;
- (C) a drug severity level 1 felony if the number of plants cultivated was 100 or more.
- (e) In any prosecution under this section, there shall be a rebuttable presumption of an intent to distribute if any person possesses these quantities of the following controlled substances or analogs thereof:
- (1) 450 grams or more of marijuana;
- (2) 3.5 grams or more of heroin or methamphetamine;
- (3) 100 dosage units or more containing a controlled substance; or
- (4) 100 grams or more of any other controlled substance.
- (f) It shall not be a defense to charges arising under this section that:
- (1) the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance;
- (2) the defendant did not know the quantity of the controlled substance; or
- (3) the defendant did not know the specific controlled substance contained in the material that was distributed or possessed with the intent of distribution.
- (g) As used in this section:
- (1) "material" means the total amount of any substance, including a compound or a mixture, which contains any quantity of a controlled substance.
- (2) "dosage unit" means a controlled substance distributed or possessed with the intent to distribute as a discrete unit, including but not limited to, one pill, one capsule, or one microdot, and not distributed by weight.
- (a) For steroids, or controlled substances in liquid solution legally manufactured for prescription use, "dosage unit" means the smallest medically-approved dosage unit, as determined by the label, materials provided by the manufacturer, a prescribing authority, licensed health care professional or other qualified health authority.
- (b) Except as otherwise provided below, illegally manufactured controlled substances in liquid solution, or controlled substances in liquid products not intended for ingestion by human beings, "dosage unit" means 10 milligrams, including the liquid carrier medium.
- (c) For lysergic acid diethylamide (LSD) in liquid form, a dosage unit is defined as 0.4 milligrams, including the liquid medium.

Comment: The Commission/Committee recommends ranking the severity of drug distribution by the quantity of the drug. The idea for using quantity originated at the Kansas Sentencing Commission Proportionality Subcommittee. The Commission/Committee agreed with the Proportionality Subcommittee that quantity levels should be used and the two groups agreed to let the Commission determine the proper quantity levels.

Currently, the severity level for distribution is based on recidivism of the offender. However, the recidivism enhancement was created before the sentencing guidelines. Since the guidelines account for an offender's criminal history, drug quantity is a

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1 preferable alternative method of determining the severity level of the offense. Of the four
2 states that border Kansas, each ranks the severity of its drug distribution offense by
3 quantity in some way.
4

5 The Commission conducted a substantial amount of research and carefully considered the
6 proposed language. In 2008, staff members consulted with the KBI, the DEA, Kansas law
7 enforcement officers along with Kansas prosecutors and district court judges regarding
8 the proposal. The Commission also employed Kyle Smith, formerly of the KBI, as a staff
9 attorney to work on this proposal.
10

11 The quantity thresholds are based on four classifications: small, medium, large and super
12 large. The quantity thresholds are based on quantities that represent distribution units.
13 Subsection (c)(1) creates a generic quantity threshold into which drugs such as cocaine
14 and methamphetamine fall. There is a specific quantity threshold for heroin and
15 methamphetamine, due to its smaller distribution unit, and drugs sold by dosage unit such
16 as LSD or prescription drugs. Subsection (g)(2) defines a dosage unit similarly to the
17 definition used in the Drug Tax Stamp Act.
18

19 Subsection (e) contains a presumption of intent to distribute if certain quantities are
20 possessed. A defendant may rebut the presumption; however, it allows a jury to infer,
21 from the quantity alone, that a defendant intended to distribute.
22

23 Sec. 23. K.S.A. 21-36a09 is hereby amended to read as follows: 21-36a09. **Unlawful**
24 **possession of certain drug precursors and drug paraphernalia.** (a) ~~It shall be unlawful for~~
25 ~~any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium~~
26 ~~metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their~~
27 ~~salts, isomers or salts of isomers with an intent to use the product to manufacture a controlled~~
28 ~~substance.~~

29 ~~(b) It shall be unlawful for any person to use or possess with intent to use any drug~~
30 ~~paraphernalia to:~~

31 ~~(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled~~
32 ~~substance, or~~

33 ~~(2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled~~
34 ~~substance into the human body.~~

35 ~~(c) It shall be unlawful for any person to use or possess with intent to use anhydrous~~
36 ~~ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas~~
37 ~~department of agriculture.~~

38 ~~(d) It shall be unlawful for any person to purchase, receive or otherwise acquire at retail~~
39 ~~any compound, mixture or preparation containing more than 3.6 grams of pseudoephedrine~~
40 ~~base or ephedrine base in any single transaction or any compound, mixture or preparation~~
41 ~~containing more than nine grams of pseudoephedrine base or ephedrine base within any 30-~~
42 ~~day period.~~

43 ~~(e) (1) Violation of subsection (a) is a drug severity level 2 felony;~~

44 ~~(2) violation of subsection (b)(1) is a drug severity level 4 felony, except that violation of~~
45 ~~subsection (b)(1) is a class A nonperson misdemeanor if the drug paraphernalia was used to~~
46 ~~cultivate fewer than five marijuana plants;~~

47 ~~(3) violation of subsection (b)(2) is a class A nonperson misdemeanor;~~

48 ~~(4) violation of subsection (c) is a drug severity level 4 felony;~~

49 ~~(5) violation of subsection (d) is a class A nonperson misdemeanor.~~

50 ~~(f) For persons arrested and charged under subsection (a) or (c), bail shall be at least~~
51 ~~\$50,000 cash or surety, unless the court determines, on the record, that the defendant is not~~
52 ~~likely to reoffend, the court imposes pretrial supervision or the defendant agrees to participate in~~
53 ~~a licensed or certified drug treatment program. Possession of ephedrine, pseudoephedrine, red~~
54 ~~phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or~~
55 ~~phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to~~

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1 manufacture a controlled substance or controlled substance analog shall be an attempted
2 violation of subsection (a) of K.S.A. 21-36a03, and amendments thereto.
3 (b) Possession of drug paraphernalia with the intent to manufacture a controlled substance
4 or controlled substance analog shall be an attempted violation of subsection (a) of K.S.A. 21-
5 36a03, and amendments thereto.
6 (c) Possession of any drug paraphernalia
7 (1) with the intent to distribute or cultivate a controlled substance designated in subsection
8 (a) of K.S.A. 21-36a05, and amendments thereto, or a controlled substance analog thereof,
9 shall be an attempted violation of subsection (a) of K.S.A. 21-36a05, and amendments thereto.
10 (2) with the intent to distribute a controlled substance or controlled substance analog
11 designated in K.S.A. 65-4113, and amendments thereto, shall be an attempted violation of
12 subsection (b) of K.S.A. 21-36a05, and amendments thereto.
13 (d) Possession of any drug paraphernalia with the intent to possess or have under one's
14 control:
15 (1) any controlled substance designated in subsection (a) of K.S.A. 21-36a06, and
16 amendments thereto, or a controlled substance analog thereof, shall be an attempted violation
17 of subsection (a) of K.S.A. 21-36a06, and amendments thereto.
18 (2) any controlled substance designated in subsection (b) of K.S.A. 21-36a06, and
19 amendments thereto, or a controlled substance analog thereof, shall be an attempted violation
20 of subsection (b) of K.S.A. 21-36a06, and amendments thereto.
21 (e) This section does not preclude a person from conviction of attempted manufacture,
22 distribution, or possession of a controlled substance or a controlled substance analog based
23 upon overt acts other than those herein mentioned.
24

25 **Comment:** The Commission recommends adopting this statute in lieu of K.S.A. 21-36a09.
26 The relationship between the possession of paraphernalia and precursors offense and
27 the general possession, distribution, and manufacturing offenses has caused much
28 confusion and litigation in cases such as *State v. Campbell* and *State v. McAdam*. The
29 Commission determined that a method of clarifying the relationship between these
30 offenses is to eliminate the possession of paraphernalia and precursors as a separate
31 offense and define such possession as a sufficient overt act toward the attempted
32 violation of the possession, distribution and manufacturing offenses.
33

34 **Sec. 24.** K.S.A. 21-36a10 is hereby amended to read as follows: 21-36a10. **Unlawful**
35 **distribution of certain drug precursors and drug paraphernalia.** (a) It shall be unlawful for
36 any person to advertise, market, label, distribute or possess with the intent to distribute:
37 (1) Any product containing ephedrine, pseudoephedrine, red phosphorus, lithium metal,
38 sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine or
39 their salts, isomers or salts of isomers if the person knows or reasonably should know that the
40 purchaser will use the product to manufacture a controlled substance; or
41 (2) any product containing ephedrine, pseudoephedrine or phenylpropanolamine, or their
42 salts, isomers or salts of isomers for indication of stimulation, mental alertness, weight loss,
43 appetite control, energy or other indications not approved pursuant to the pertinent federal over-
44 the-counter drug final monograph or tentative final monograph or approved new drug
45 application.
46 (b) It shall be unlawful for any person to distribute, possess with the intent to distribute or
47 manufacture with intent to distribute any drug paraphernalia, knowing or under circumstances
48 where one reasonably should know that it will be used to manufacture or distribute a controlled
49 substance in violation of K.S.A. 2009 Supp. 21-36a01 through 21-36a17, and amendments
50 thereto.
51 (c) It shall be unlawful for any person to distribute, possess with intent to distribute or
52 manufacture with intent to distribute any drug paraphernalia, knowing or under circumstances
53 where one reasonably should know, that it will be used as such in violation of K.S.A. 2009
54 Supp. 21-36a01 through 21-36a17, and amendments thereto, except subsection (b) of K.S.A.
55 2009 Supp. 21-36a06, and amendments thereto.

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(d) It shall be unlawful for any person to distribute, possess with intent to distribute or manufacture with intent to distribute any drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used as such in violation of subsection (b) of K.S.A. 2009 Supp. 21-36a06, and amendments thereto.

(e) (1) Violation of subsection (a) is a drug severity level 2 felony;

(2) violation of subsection (b) is a drug severity level 4 felony, except that violation of subsection (b) is a drug severity level 3 felony if the trier of fact makes a finding that the offender is 18 or more years of age and the offender distributed or caused drug paraphernalia to be distributed to a minor on or within 1,000 feet of any school property;

(3) violation of subsection (c) is a severity level 9, nonperson felony, except that violation of subsection (c) is a drug severity level 4 felony if the trier of fact makes a finding that the offender is 18 or more years of age and the offender distributed or caused drug paraphernalia to be distributed to a minor on or within 1,000 feet of any school property;

(4) violation of subsection (d) is a class A nonperson misdemeanor, except that violation of subsection (d) is a severity level 9, nonperson felony if the trier of fact makes a finding that the offender is 18 or more years of age and the offender distributed or caused drug paraphernalia to be distributed to a minor on or within 1,000 feet of any school property.

(f) For persons arrested and charged under subsection (a), bail shall be at least \$50,000 cash or surety, unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.

(g) As used in this section, "or under circumstances where one reasonably should know" that an item will be used in violation of this section, shall include, but not be limited to, the following:

(1) Actual knowledge from prior experience or statements by customers;

(2) inappropriate or impractical design for alleged legitimate use;

(3) receipt of packaging material, advertising information or other manufacturer supplied information regarding the item's use as drug paraphernalia; or

(4) receipt of a written warning from a law enforcement or prosecutorial agency having jurisdiction that the item has been previously determined to have been designed specifically for use as drug paraphernalia.

Sec. 25. K.S.A. 21-36a13 is hereby amended to read as follows: 21-36a13. **Unlawful distribution or possession of a simulated controlled substance.** (a) It shall be unlawful for any person to distribute, possess with the intent to distribute, or manufacture with the intent to distribute any simulated controlled substance.

(b) It shall be unlawful for any person to use or possess with intent to use any simulated controlled substance.

(c) (1) Violation of subsection (a) is a nondrug severity level 9, nonperson felony, except that violation of subsection (a) is a nondrug severity level 7, nonperson felony if the trier of fact makes a finding that the offender is 18 or more years of age and the violation occurred on or within 1,000 feet of any school property; and

(2) violation of subsection (b) is a class A nonperson misdemeanor.

Comment to Sec 24 and Sec 25: After passage of the drug code recodification, the provisions of the 1,000 feet of school enhancement in K.S.A. 21-36a05, K.S.A. 21-36a09 and K.S.A. 21-36a10 were unintentionally changed. The previous version of the school property enhancement required the offender to be 18 or more years of age.

Legislation was submitted in 2010 to correct the error; however, the Commission has since discovered that several prosecutors are in favor of removing this offender age element and in retrospect; the Commission has determined that the purpose of the school property enhancement is meant to protect children from the dangers of controlled substances. In many cases, the offenders who bring controlled substances within such proximity to the schools are themselves under 18 years of age. Therefore, the

HB 2668 "Clean-Up" and Policy Recommendations
(Rev. 11/19/10)

1 Commission now recommends removing each of the 18 year offender age requirements
2 from the 1,000 feet of school property enhancements.
3

4 **Sec. 26.** K.S.A. 21-36a14 is hereby amended to read as follows: 21-36a14. **Unlawful**
5 **representation that noncontrolled substance is controlled substance.** (a) It shall be
6 unlawful for any person to distribute or possess with the intent to distribute any substance which
7 is not a controlled substance:

8 (1) Upon an express representation that the substance is a controlled substance or that
9 the substance is of such nature or appearance that the recipient will be able to distribute the
10 substance as a controlled substance; or

11 (2) under circumstances which would give a reasonable person reason to believe that the
12 substance is a controlled substance.

13 (b) Violation of subsection (a) is a class A nonperson misdemeanor, except that violation of
14 subsection (a) is a nondrug severity level 9, nonperson felony if the distributor is 18 or more
15 years of age, distributing to a person under 18 years of age and at least three years older than
16 the person under 18 years of age to whom the distribution is made.

17 (c) If any one of the following factors is established, there shall be a presumption that
18 distribution of a substance was under circumstances which would give a reasonable person
19 reason to believe that a substance is a controlled substance:

20 (1) The substance was packaged in a manner normally used for the illegal distribution of
21 controlled substances;

22 (2) the distribution of the substance included an exchange of or demand for money or
23 other consideration for distribution of the substance and the amount of the consideration was
24 substantially in excess of the reasonable value of the substance; or

25 (3) the physical appearance of the capsule or other material containing the substance is
26 substantially identical to a specific controlled substance.

27 ~~(d) A person who commits the crime also may be prosecuted for, convicted of, and~~
28 ~~punished for theft by deception.~~
29

30 **Comment:** The Commission recommends adding subsection (d) in order to permit dual
31 prosecution for this offense and theft by deception.
32

33 **Sec. 27.** K.S.A. 21-4010 is hereby amended to read as follows: 21-4010. (a) ~~No person shall if~~
34 ~~shall be unlawful with no requirement of a culpable mental state, to~~ smoke in an enclosed area or
35 at a public meeting including, but not limited to:

36 (1) Public places;

37 (2) taxicabs and limousines;

38 (3) restrooms, lobbies, hallways and other common areas in public and private buildings,
39 condominiums and other multiple-residential facilities;

40 (4) restrooms, lobbies and other common areas in hotels and motels and in at least 80% of
41 the sleeping quarters within a hotel or motel that may be rented to guests;

42 (5) access points of all buildings and facilities not exempted pursuant to subsection (d); and

43 (6) any place of employment.

44 (b) Each employer having a place of employment that is an enclosed area shall provide a
45 smoke-free workplace for all employees. Such employer shall also adopt and maintain a written
46 smoking policy which shall prohibit smoking without exception in all areas of the place of
47 employment. Such policy shall be communicated to all current employees within one week of its
48 adoption and shall be communicated to all new employees upon hiring. Each employer shall
49 provide a written copy of the smoking policy upon request to any current or prospective
50 employee.

51 (c) Notwithstanding any other provision of this section, K.S.A. 21-4011 or 21-4012, and
52 amendments thereto, the proprietor or other person in charge of an adult care home, as defined
53 in K.S.A. 39-923, and amendments thereto, or a medical care facility, may designate a portion of
54 such adult care home, or the licensed long-term care unit of such medical care facility, as a
55 smoking area, and smoking may be permitted within such designated smoking area.

56 (d) The provisions of this section shall not apply to:

HB 2668 "Clean-Up" and Policy Recommendations
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- 1 (1) The outdoor areas of any building or facility beyond the access points of such building or
2 facility;
- 3 (2) private homes or residences, except when such home or residence is used as a day care
4 home, as defined in K.S.A. 65-530, and amendments thereto;
- 5 (3) a hotel or motel room rented to one or more guests if the total percentage of such hotel or
6 motel rooms in such hotel or motel does not exceed 20%;
- 7 (4) the gaming floor of a lottery gaming facility or racetrack gaming facility, as those terms are
8 defined in K.S.A. 74-8702, and amendments thereto;
- 9 (5) that portion of an adult care home, as defined in K.S.A. 39-923, and amendments thereto,
10 that is expressly designated as a smoking area by the proprietor or other person in charge of
11 such adult care home pursuant to subsection (c) and that is fully enclosed and ventilated;
- 12 (6) that portion of a licensed long-term care unit of a medical care facility that is expressly
13 designated as a smoking area by the proprietor or other person in charge of such medical care
14 facility pursuant to subsection (c) and that is fully enclosed and ventilated and to which access
15 is restricted to the residents and their guests;
- 16 (7) tobacco shops;
- 17 (8) a class A or class B club defined in K.S.A. 41-2601, and amendments thereto, which (A)
18 held a license pursuant to K.S.A. 41-2606 et seq., and amendments thereto, as of January 1,
19 2009; and (B) notifies the secretary of health and environment in writing, not later than 90 days
20 after the effective date of this act, that it wishes to continue to allow smoking on its premises; and
21 (9) a private club in designated areas where minors are prohibited.

22
23 **Comment: Respecting the infractions established in this statute, the recommendation is to**
24 **insert language indicating whether and what degree of culpability is required. Neither**
25 **K.S.A. 21-4010, which defines infractions, nor K.S.A. 21-4012, which specifies penalties,**
26 **addresses this matter. Under the recodification (section 13(d) & (e) of House Bill No.**
27 **2668), recklessness would be required because the definition of the crime does not**
28 **"plainly dispense with any mental element." Our judgment is that the Legislature**
29 **intended for the infractions established in K.S.A. 21-4010 to be strict liability. Whereas**
30 **K.S.A. 21-4010 does not say anything about culpability, K.S.A. 21-4012(b), which makes**
31 **those who own or run public places liable for smoking infractions committed by those on**
32 **the premises, does explicitly require culpability. This leads us to conclude that, in**
33 **contrast with K.S.A. 21-4012(b), the infractions defined in K.S.A. 21-4010 are not meant to**
34 **require culpability. When the Legislature has intended to establish a strict liability**
35 **offense, the recodification expressly provides that there is "no requirement of a culpable**
36 **mental state". See, e.g., House Bill No. 2668 §§ 184, 194. We recommend insertion of the**
37 **same language.**

38
39 **It is unclear whether this language should be inserted in K.S.A. 21-4010 or K.S.A. 21-4012.**
40 **The recodification defines offenses and prescribes the penalty in the same statute. The**
41 **provisions here depart from that arrangement and put the penalties in a different statute,**
42 **K.S.A. 21-4012. Ideally, the provisions would be revised to conform with the general**
43 **scheme of the recodification.**

44
45 **Sec. 28. K.S.A. 21-4012 is hereby amended to read as follows: 21-4012. (a) It shall be unlawful**
46 **for any person who owns, manages, operates or otherwise controls the use of any public place,**
47 **or other area where smoking is prohibited, to fail to comply with all or any of the provisions of**
48 **K.S.A. 21-4009 through 21-4014, and amendments thereto.**

49 **(b) It shall be unlawful for any person who owns, manages, operates or otherwise controls**
50 **the use of any public place, or other area where smoking is prohibited, to allow smoking to occur**
51 **where prohibited by law. Any such person shall be deemed to allow smoking to occur under this**
52 **subsection if such person: (1) Has knowledge that smoking is occurring; and (2) ~~acquiesces~~**
53 **~~recklessly permits~~ to the smoking under the totality of the circumstances.**

54 **(c) It shall be unlawful for any person, ~~with no requirement of a culpable mental state,~~ to**
55 **smoke in any area where smoking is prohibited by the provisions of K.S.A. 21-4010, and**
56 **amendments thereto.**

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(d) Any person who violates any provision of K.S.A. 21-4009 through 21-4014, and amendments thereto, shall be guilty of a cigarette or tobacco infraction punishable by a fine:

(1) Not exceeding \$100 for the first violation;

(2) not exceeding \$200 for a second violation within a one year period after the first violation;
or

(3) not exceeding \$500 for a third or subsequent violation within a one year period after the first violation.

For purposes of this subsection, the number of violations within a year shall be measured by the date the smoking violations occur.

(e) Each individual allowed to smoke by a person who owns, manages, operates or otherwise controls the use of any public place, or other area where smoking is prohibited, in violation of subsection (b) shall be considered a separate violation for purposes of determining the number of violations under subsection (d).

(f) No employer shall discharge, refuse to hire or ~~take any other adverse action in any manner retaliate~~ against an employee, applicant for employment or customer ~~with the intent to retaliate against because~~ that employee, applicant or customer ~~for reporting or attempting to~~ prosecute a violation of any of the provisions of K.S.A. 21-4009 through 21-4014, and amendments thereto.

Comment: We recommend changing some language in K.S.A. 21-4012(b) to make it consistent with the recodification's culpability provisions. K.S.A. 21-4012(b) makes one who, e.g., owns or controls a public place liable for allowing smoking to occur if that person knows of and acquiesces in the smoking. The recodification does use and define "knowledge" as a culpability term. See House Bill No. 2668 § 13. However, the recodification neither uses nor defines the term "acquiesce". We recommend that the term "acquiesce" be replaced with the phrase "recklessly permits". The recodification does define recklessness. In our judgment, recklessness captures the Legislature's intent regarding the culpability required by K.S.A. 21-4012(b).

We also recommend changing language in K.S.A. 21-4012(f) to make it consistent with the recodification's culpability provisions. This provision makes it an infraction for an employer to take adverse action against an employee, applicant, or customer "because" the employee, applicant, or customer has reported or attempted to prosecute a smoking violation. The infraction will be committed only when the employer's subjective purpose is to retaliate. As defined in the recodification, "intent" is the applicable culpability term. We recommend wording K.S.A. 21-4012(f) accordingly.

Overview of Kansas Parole Board

Patricia Biggs, Member

Presentation to
House Corrections &
Juvenile Justice Committee

January 12, 2011

Kansas Parole Board

- Separate Agency
- Housed with KDOC
- Support Staffed by KDOC
- Separate Vision, Mission, Practices and Statutes

Agency of Kansas Parole Board

- Agency comprised of 3 members
- Appointed by Governor, Confirmed by Senate – no more than simple majority from any single political party
- 4 year appointment terms – staggered in begin dates
- Present Board:
 - Robert Sanders, Chairperson – 2nd term
 - Patricia Biggs, Member – 2nd term
 - Tom Sawyer, Member – 1st term

Kansas Parole Board Vision

The Kansas Parole Board contributes to protecting the safety of citizens of Kansas by the exercise of sound, rational decision making consistent with evidence based principles.

Evidence Based Practice is...

...using accumulated body of research results to make decisions where:

- there is a definable outcome
- it is measurable
- it is defined according to practical realities

(Brad Bogue, President of J-Stat as presented in Comprehensive Framework for Paroling Authorities, NIC/Campbell, Feb. 2008)

- revictimization is minimized,
- rehabilitation is maximized,
- successful offender reentry is maximized.

(*) PBO: Inclusion of EBP

Kansas Parole Board Mission

Parole privilege is extended to those offenders who demonstrate suitability by having served incarceration time set forth by the courts and who have demonstrated a reduction in risk to reoffend such that

revictimization is minimized and rehabilitation and successful reentry are maximized;

Similarly, parole privilege shall be rescinded in cases where an offender demonstrates increasing risk in the community.

Authority: K.S.A. 22-3717

Primary Work Areas

1. Parole Suitability Hearings
 - Case Review, Preparation
 - Full Board Reviews
 - Public Comment Sessions (input)
2. Final Violation Hearings
3. Special Hearings
4. Special Conditions of Post-Incarceration Supervision
5. Other File Reviews
6. Criminal Justice & Corrections partner
7. Set Special Conditions of Post-Incarceration Supervision
8. Other File Reviews
9. Criminal Justice & Corrections partner

Area 1 Parole Suitability Hearings

Parole Suitability Hearings

- Traditionally conceived role.
- Determining release from confinement portion of prison sentence.
 - Standard (K.S.A. 22-3717 – reasonable probability offender can be released without harm to community or self)
- Kansas Sentencing Guidelines:
 - “OFF GRID” - most serious and heinous

Sentencing Applications

	Pre-Guidelines Sentences	Guidelines Sentences	
	Based on <u>Felony Class</u> , <u>Judge</u> Imposed Range of Time to Serve for Total Sentence	ON GRID <u>Criminal History and Offense Severity</u> Intersection on grid yields sentence	
O L D L A W	Minimum to Maximum sentence term (includes inside & outside prison)	J 2 Pronounced Sentence Portions Prison term "Parole"/PRS term	N E W L A W
	<u>Goodtime Earnings</u> : up to Day for Day	<u>Goodtime</u> at 15% or 20% for inside prison portion; up to day for day for community	
	<u>Released</u> when Parole Board determines suitability	1 <u>Released</u> when "clock runs" regardless of community suitability	
	<u>Community Supervision</u> ("Parole") for balance of maximum term	9 on <u>Community Supervision</u> for "lacked" prison goodtime earnings plus (pronounced PRS term less applicable PRS Goodtime earnings) 8 OFF GRID 3 "Mandatory Minimum" ... L15, H25, H40, H50 No <u>Goodtime</u> Available Released when Parole Board determines suitability on <u>Community Supervision</u> for Life	

Prison Population June 30, 2009 & 2010

	Pre-Guidelines Offense Severity Level Equivalent		Guidelines Offense Severity Level	
	2009	2010	2009	2010
Drug Levels 1-4	0	0	1511	1553
Non-drug 1	139	130	772	827
Non-drug 2	88	86	310	293
Non-drug 3	62	62	1224	1260
Non-drug 4	6	4	281	299
Non-drug 5-10	11	12	2454	2646
Off-Grid	244	235	395	470
Post-incarceration Violators	317	240	409	362
Combination Sentences	375	382	---	---

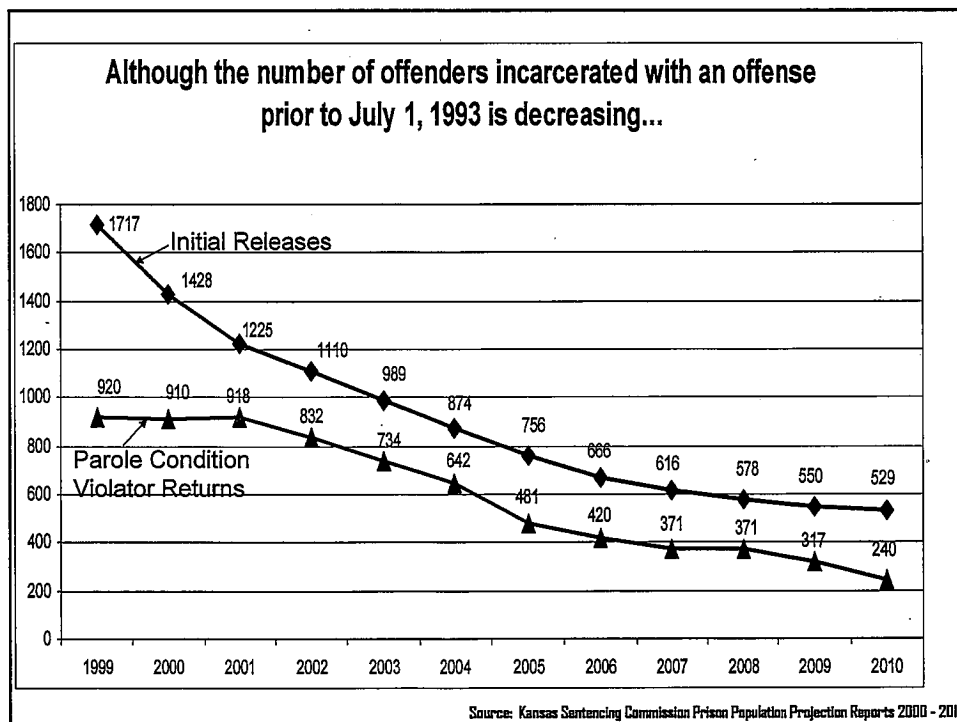
Source: KSC Prison Population Report / KDOC prison population file

Who are the offenders subject to KPB finding of Suitability?

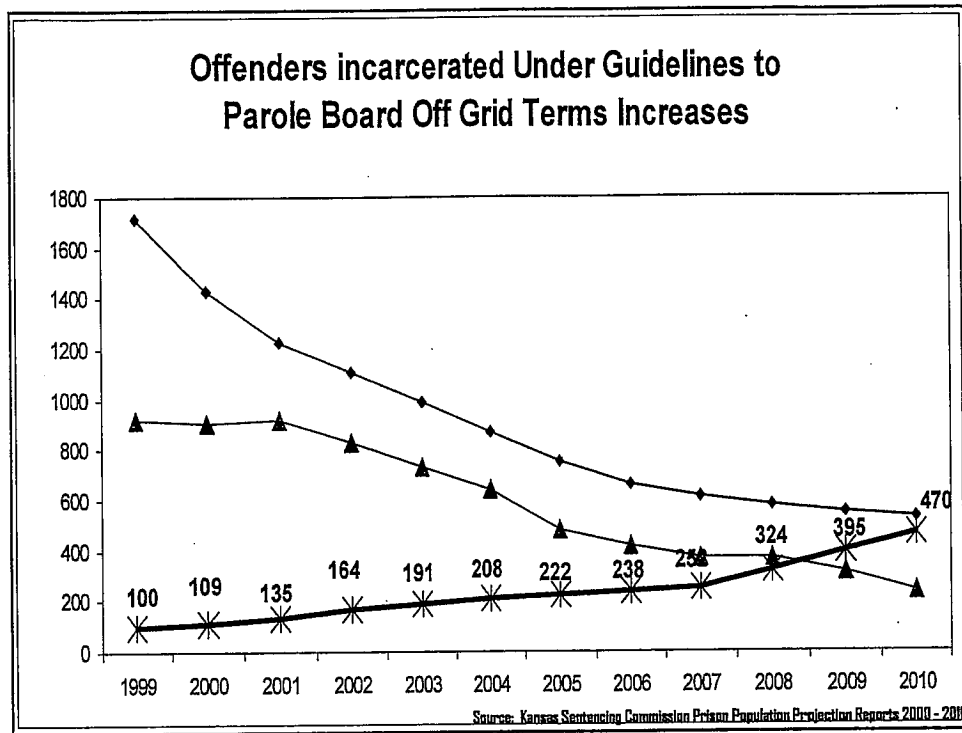
- “Old Law” – offenders with offenses prior to July 1, 1993 who were not eligible for retroactive conversion
- New Law – offenders sentenced under Sentencing Guidelines to an “off grid” term.
 - The Most Serious and Violent Offenders
- BOTH groups constitute Indeterminate Sentences

Parole Board: Myth & Fact

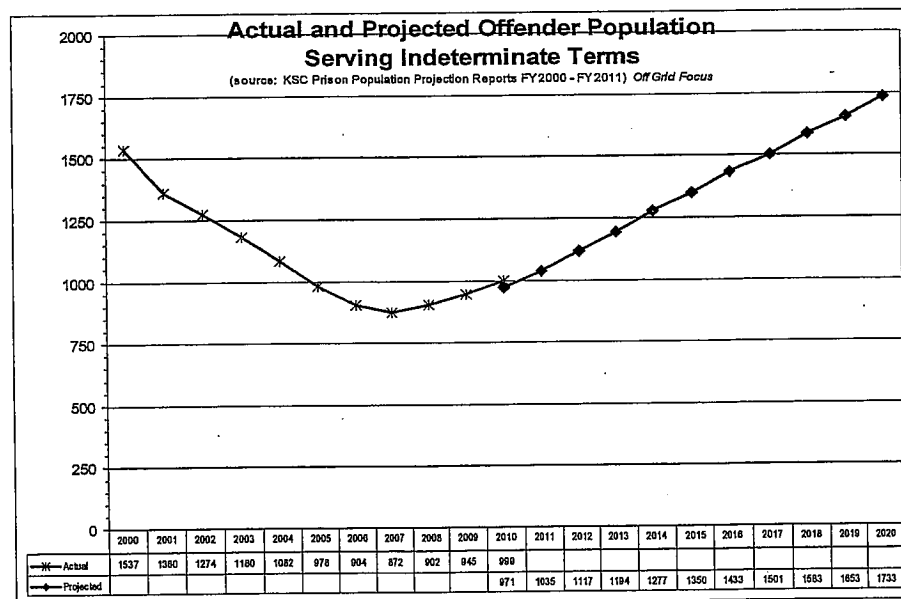
- MYTH: Eventually, we will not need a Parole Board – they will run out of work.
- FACT: Under Sentencing Guidelines, the Parole Board will Never run out of work under current sentencing laws.



Overview of Kansas Parole Board
Presentation to House Corrections & Juvenile Justice Committee
 January 12, 2011 Patricia Biggs, Member, Kansas Parole Board

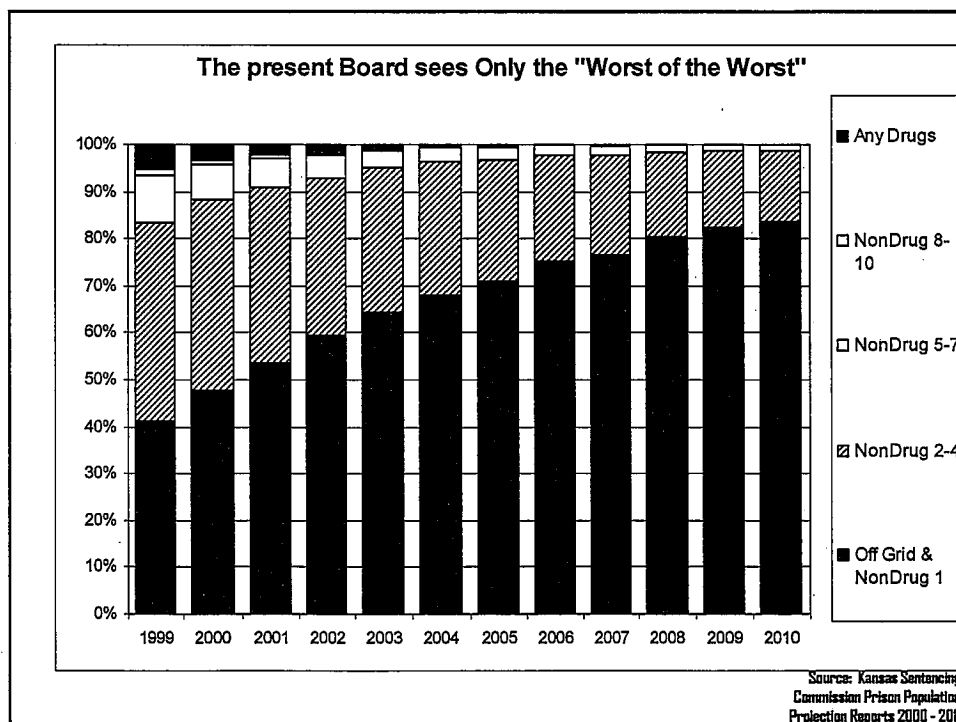


...and offenders projected to be sentenced to off-grid terms will increase substantially in future years.

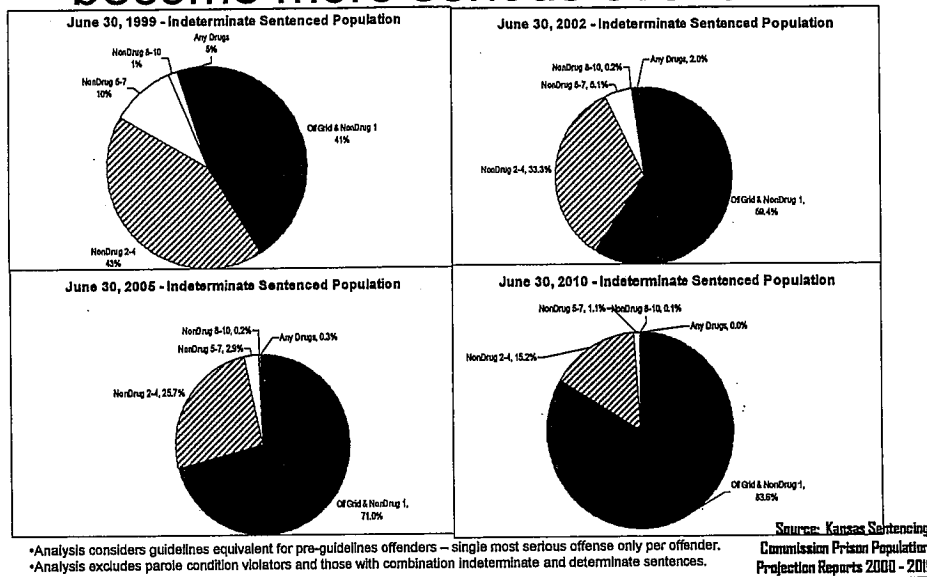


Parole Board: Myth & Fact

- MYTH: There are still many low level offenders under Board decision processes that have not been released.
- FACT: The present Board sees only "the worst of the worst."
 - This is consistent with Sentencing Guidelines, ***incarceration is reserved for the most serious and violent offenders.***



The Parole Board Group has become more serious over time.



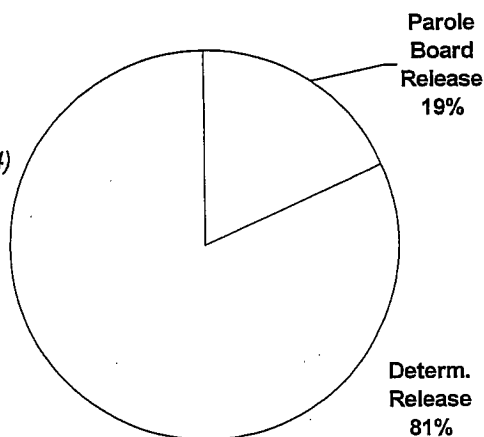
Prison Population June 30, 2010

Fewer than 1 in 5 prisoners incarcerated on June 30, 2010 is subject to release by upon determination of parole suitability.

(1621 out of 8864)

This Includes:

- 529 Pre-Guidelines
- 240 old-law violators
- 382 with combination sentences
- 470 Off Grid Guidelines Sentences



Parole Board: Myth and Fact

- MYTH: Parole release is a right – liberty interest/constitutional right is attached.
- FACT: Parole release is a grace – there is no liberty interest or constitutional right in parole prior to completion of full sentence.

Parole is a Grace: Court Ruling - Gilmore Case

- Parole is a matter of grace, and is granted as a privilege, not as a matter of fundamental right. *Gilmore*, 243 Kan. at 180.
- The Kansas parole statute does not give rise to a liberty interest in the granting or denial of parole to one in custody. *Gilmore v. Kansas Parole Board*, 243 Kan. 173, 180, 756 P.2d 410 (1988).

Parole is a Grace: Court Ruling - Swisher Case

- Parole from confinement prior to serving all of an imposed sentence does not involve a constitutional right. *Swisher v. Hamilton*, 12 Kan. App. 2d 183, 185, 740 P.2d 95 (1987).
- Because there is no liberty interest in the grant or denial of parole to one in custody, a district court's inquiry of the Parole Board's action is limited to whether the Parole Board complied with the applicable statutes and whether the action was arbitrary and capricious. *Swisher*, 12 Kan. App. 2d at 185.

What is Parole Suitability ?

- KSA 22-3717(g) provides ...

When certain conditions are fulfilled and the parole board is "... ***of the opinion that there is reasonable probability that the inmate can be released without detriment to the community or to the inmate.***" (sub-sctn (1) and (2))

Parole Suitability Factors

K.S.A. 22-3717

1. Circumstances of the offense
2. Previous criminal record and social history of the inmate
3. Programs and program participation
4. Conduct, employment, attitude, disciplinary history during incarceration
5. Reports of physical/mental examinations, including but not limited to risk factors revealed by any risk assessment
6. Comments from public officials, victims or their family, offender family or friends, or any other interested member of the general public
7. Capacity of the state correctional institutions
8. Input from staff where offender is housed
- 9. Proportionality to [current] KSGI (PBO)**
- 10. Presentence report (availability for off-grid? PBO)**

... now is problem is overcrowding

Off Grid & Pre-Guidelines	"On the Grid"
1. Circumstances of the offense	Severity Level
2. Previous criminal record and social history of the inmate	Criminal History
3. Programs and program participation	No Impact on Sentence Imposed May attain 15-20% sentence reduction for participation <u>* NEGLECTS what was learned</u>
4. Conduct, employment, attitude, disciplinary history during incarceration	Disciplinary Reports impact goodtime earnings only – at the margin
5. Reports of physical/mental examinations, including but not limited to risk factors revealed by any risk assessment	Risk of reoffending does not impact release date

Off Grid & Pre-Guidelines	"On the Grid"
6. Comments from public officials, victims or their family, offender family or friends, or any other interested member of the general public	Victim has no voice.
7. Capacity of the state correctional institutions	Capacity not considered
8. Input from staff where offender is housed	Staff input does not impact sentence
9. <i>Proportionality to [current] KSGL (PBO)</i>	* Same *
10. <i>Presentence report (availability for off-grid? PBO)</i>	PSI doesn't impact sentence (beyond criminal history as in #2 above)

In Their Voice

"I only feel in control when I am having oral sex
with a 7 year old girl"

– by offender to KPB

[Victim] was a well adjusted young lady with a
bright future ... all this ended when [offender]
attacked [victim] ... "resistance is pretty much
non-existent when you have a large caliber
handgun held against your head"

– told by victim family to KPB

In Their Voice

"He was supposed to uphold the law, not violate it"

Offender was babysitting for girlfriend's 18 month old daughter. Baby was crying. Offender hit baby. Offender bit through baby's arm. Baby's internal organs were smashed against her back. Baby cried. Offender put baby in dryer and turned it on. Offender took baby out, held her by her heels and pounded her head against the sidewalk. Offender then sodomized baby in every cavity of her broken body.

In Their Voice

Offender returned to the one-room apartment he shared with he brother who, as offender entered, he observed was having sex with victim. Victim asks brother who is offender? Offender responds by stabbing victim in chest with a steak knife. He then proceeded to push the knife completely into her chest with his weight against the palm of his hand. After several minutes and consultation with his brother, offender tied victim's belt around her neck and, bracing his feet on her shoulders, pulled the belt until her face purpled. Offender and brother then put victim into a closet and go out to eat breakfast.

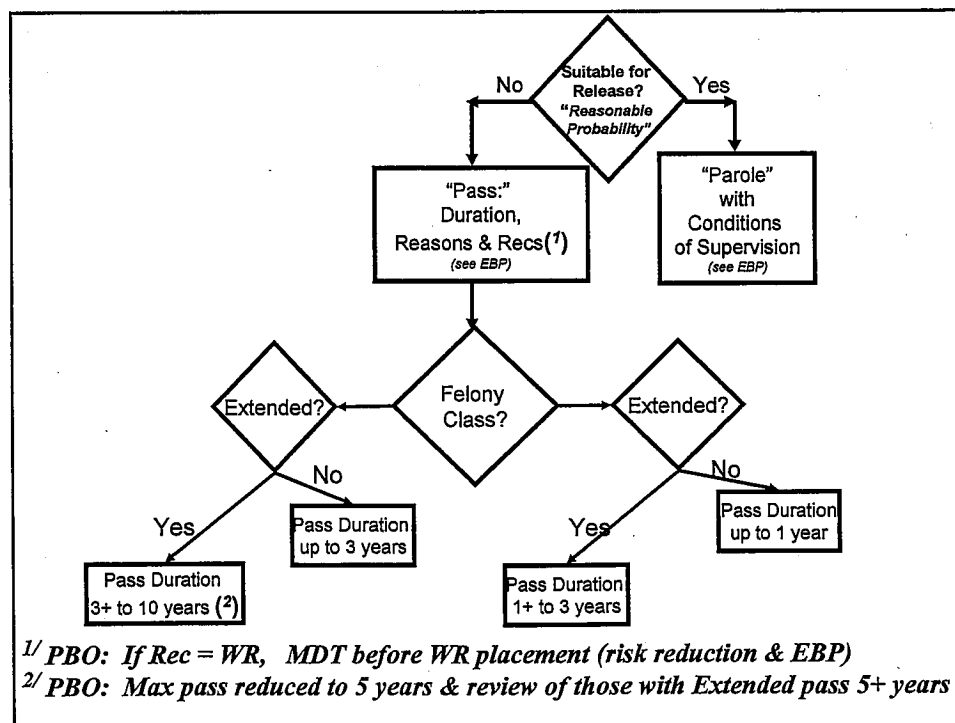
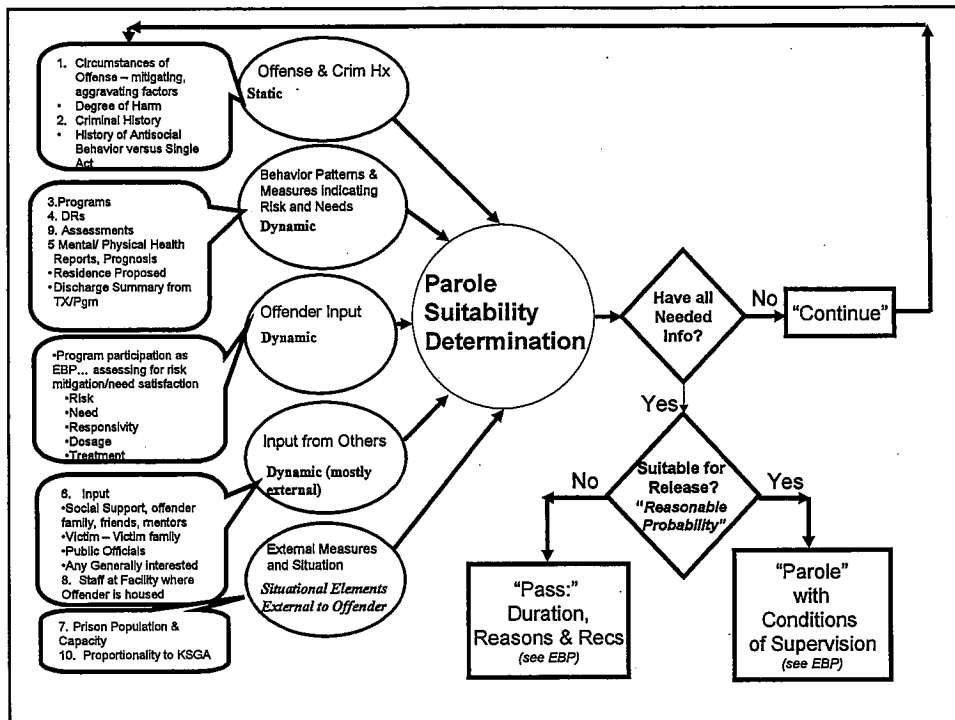
After returning to the apartment, both brothers sleep. Upon waking, they cut Victim's legs off. They transport her – minus lower legs - in a grocery cart to the railroad tracks and dump her nude body.

In Their Voice

- I thought I was shooting bears [not police officers]!
- KPB Question: What ever made you think about having sex with a six month old baby?
 - Offender Answer: Giggles, shrugs shoulders and states "I don't really know."

Process of Decision Making – an overview of elements

Overview of Kansas Parole Board
Presentation to House Corrections & Juvenile Justice Committee
 January 12, 2011 Patricia Biggs, Member, Kansas Parole Board



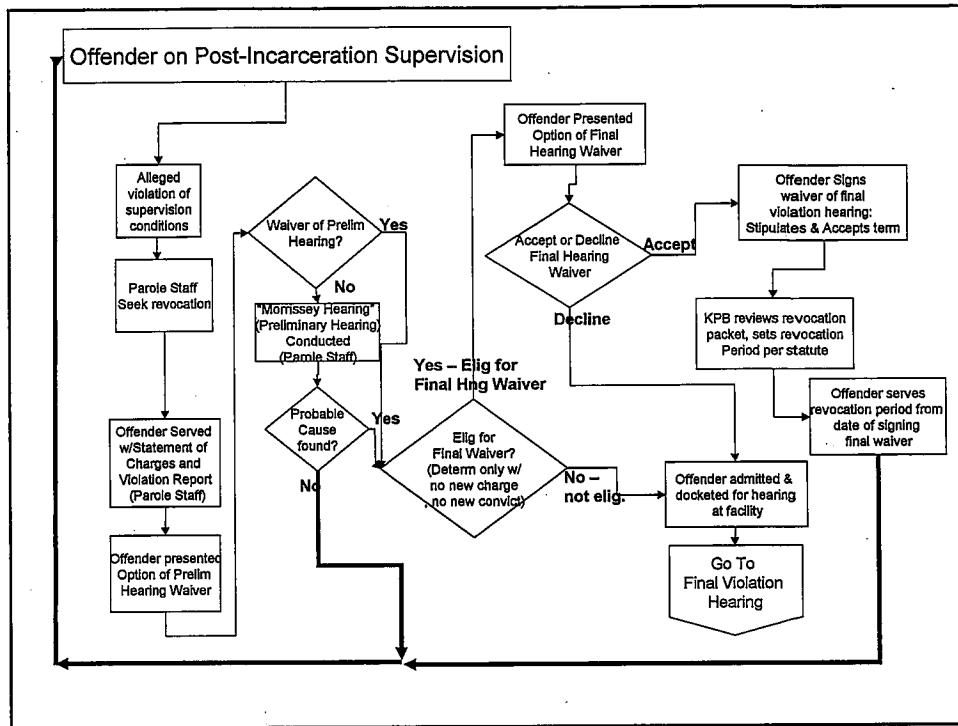
Final Violation Hearings: Offender Rights & Standard of Proof

- After offender is released to community s/he has liberty interest.
- Withdrawal of liberty is guided by due process requirements
 - *Morrissey v. Brewer*, US Supreme Court (408 U.S. 471 (1972)) sets the standards
 - *PBO Discussion Representation*
- Preliminary Hearing – KDOC Parole
 - Standard of Proof = Probable Cause
- Final Hearing – KPB
 - Standard of Proof = Preponderance of Evidence

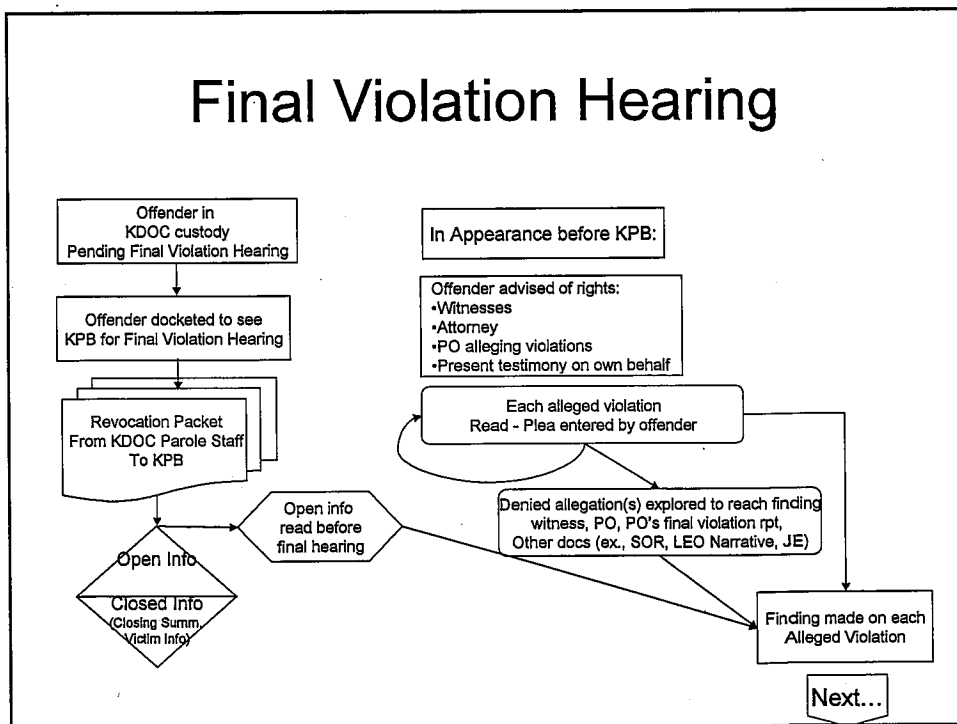
Overview of Elements

- Allegations made by Parole Officer/Parole Supervision Staff
- In Final Violation Hearing, each allegation of condition violation
 - Offender enters plea (admit/deny/refuse)
 - KPB makes finding (guilty/not guilty/dismissed)
- Informal portion of hearing: risk management/mitigation
 - Additional info consulted
 - Motivational Interviewing with offender (EBP)
- Revocation Standard:
 - The "...reasonable probability that the inmate can be released without detriment to the community or to the inmate" has eroded thereby placing community and/or inmate in jeopardy.
- Risk / Needs areas – recommendations and/or special conditions

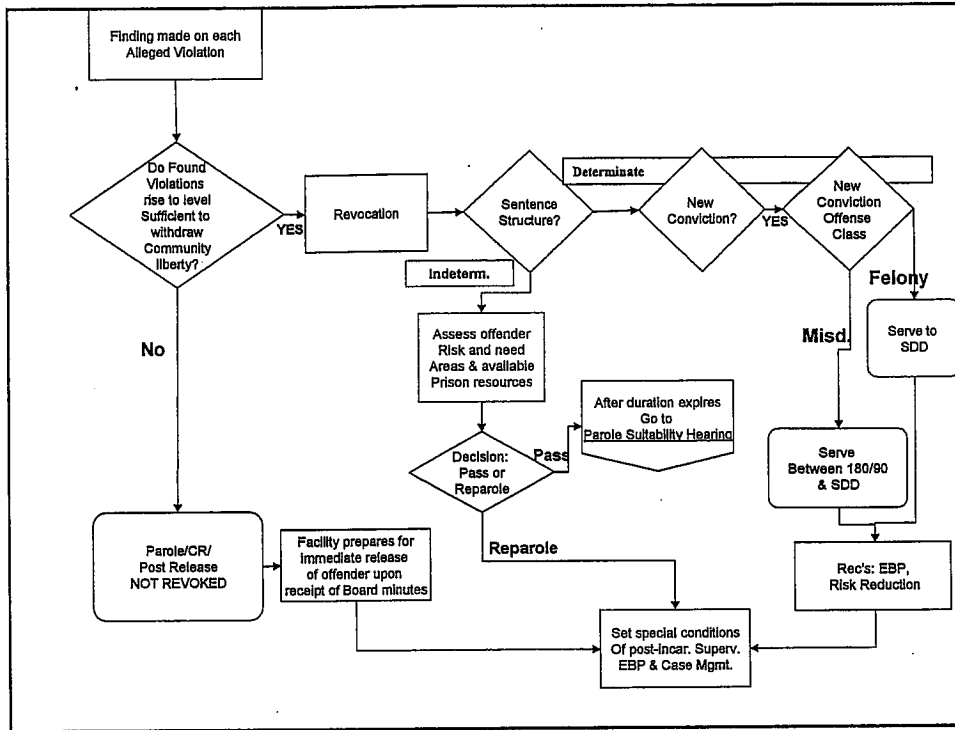
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Final Violation Hearing



Overview of Kansas Parole Board
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Sentencing Applications

	Pre-Guidelines Sentences		Guidelines Sentences	
O L D L A W	Based on <u>Felony Class</u> , <u>Judge</u> Imposed Range of Time to Serve for Total Sentence		ON GRID	N E W L A W
	Minimum to Maximum sentence term (includes inside & outside prison)	J u l y	<u>Criminal History and Offense Severity</u> intersection on grid yields sentence	
	<u>Goodtime Earnings</u> : up to Day for Day		2 Pronounced Sentence Portions Prison term "Parole"/PRS term	
	<u>Released</u> when Parole Board determines suitability	1	<u>Goodtime</u> at 15% or 20% for inside prison portion; up to day for day for community <u>Released</u> when "clock runs" regardless of community suitability	
	<u>Community Supervision</u> ("Parole") for balance of maximum term	9	on <u>Community Supervision</u> for "tacked" prison goodtime earnings plus (pronounced PRS term less applicable PRS Goodtime earnings)	
		9	OFF-GRID	
		3	"Mandatory Minimum" ... L15, H25, H40, H50 No <u>Goodtime</u> Available	
			<u>Released</u> when Parole Board determines suitability on <u>Community Supervision</u> for Life	

Mission Statement:

The KBI is dedicated to providing professional investigative and laboratory services to Kansas criminal justice agencies and the collection and dissemination of criminal justice information for the purpose of promoting public safety and the prevention of crime in Kansas.

About the KBI

The KBI has three primary divisions:

1. Investigations
2. Forensic Science
3. Information Services

Approximately 270 employees are assigned at headquarters, regional offices and across the state. KBI headquarters and the main KBI forensic laboratory are located in Topeka.

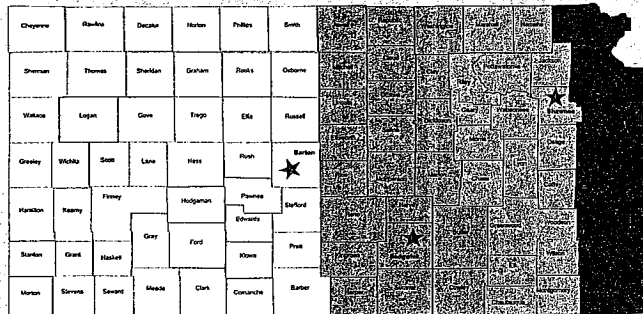
History of the KBI

In 1939, the KBI was created by the Kansas Legislature and placed under the Attorney General. The KBI was formed in response to requests from the Kansas Bankers' Association, the Kansas Livestock Association and the Kansas Peace Officers' Association, to create a statewide criminal investigative agency.



KBI Regional Map

The KBI has four regional offices located in Great Bend, Wichita, Overland Park and the Topeka Headquarters. Regional laboratories are also located in Great Bend, Kansas City and Pittsburg.



GREAT BEND REGION:
625 Washington
Great Bend, KS
67530
Ph: (620) 792-4354

TOPEKA REGION:
1620 S.W. Tyler
Topeka, KS 66612
Ph: (785) 296-8200

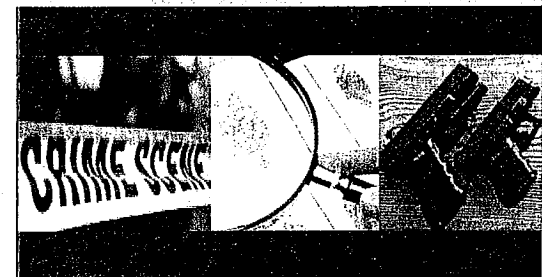
WICHITA REGION:
130 South Market
Wichita, KS 67202
Ph: (316) 337-6100

KANSAS CITY REGION:
2700 Grand Suite 12
Overland Park, KS
66202
Ph: (913) 671-2040

KBI Topeka Headquarters:



www.kansas.gov/kbi



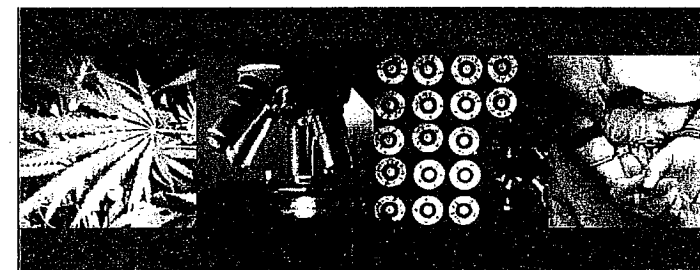
KANSAS BUREAU OF INVESTIGATION



Derek Schmidt, Attorney General

Robert E. Blecha, KBI Director

www.kansas.gov/kbi



Information Services Division

The ISD supports criminal justice activities at every level through the collection, release and automated exchange of information needed by courts, law enforcement, prosecutors and corrections. Specific functions and services of the ISD:



- ◆ Operates the Kansas Central Repository of criminal history records.
- ◆ Manages the state database of ten-print fingerprint records.
- ◆ Maintains the Kansas Offender Registration, including details on registered offenders, a Web site and matching records with the national offender database.
- ◆ Operates the Kansas Incident-Based Reporting System for offenses and arrests.
- ◆ Oversees the Missing Persons Program.
- ◆ Licensure of Private Investigators.
- ◆ Supports the Kansas Criminal Justice Information System (KCJIS).

KBI Investigations Division: Special Operations

This division is the narcotics enforcement arm of the KBI. In addition to traditional drug investigations, this division coordinates the state's marijuana suppression/eradication program, the Clandestine Laboratory Response Team, the Asset Forfeiture Program and the High Intensity Drug Trafficking Area Program.



Special Operations Unit also operates the state's aircraft program and participates in various federal drug task forces.

KBI Field Investigations

KBI Field Investigations provide expert criminal investigative services to local law enforcement agencies. This includes computer crimes, crimes against persons, crimes against property, economic/financial crimes, public corruption and specialized law enforcement situations. All agents process crime scenes, assisted by the forensic laboratory as needed.

The **Training Unit** trains law enforcement officers and promotes safety and awareness programs for citizens throughout the state, including Kansas' Most Wanted.

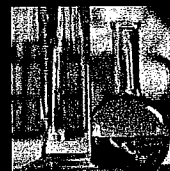
The **High Technology Crime Unit** is a team of specially-trained agents focused on the criminal use of computers and technology. This unit provides forensic computer examination services, training and technical support to local agencies and prosecutors.

The **High Risk Warrant Team (HRWT)** is a group of specially-selected, trained and equipped agents who provide tactical support in the service of high-risk search warrants, arrest warrants and in other potentially dangerous law enforcement operations throughout the state.

KBI Forensic Laboratory Division

The KBI is a nationally-accredited laboratory through the American Society of Crime Laboratory Directors, Laboratory Accreditation Board and has laboratories located in:

- ◆ Topeka
- ◆ Great Bend
- ◆ Kansas City
- ◆ Pittsburg



Forensic Laboratory Services

Chemistry Section: Analyzes controlled substances, clandestine laboratories, arson and paint evidence.

Biology Section: Examines evidence for body fluids and determines the source through DNA analysis, also maintains the DNA databank for forensic and arrestee samples.

Questioned Document Section: Compares handwriting samples from suspects to a questioned document to determine the identity and signature authenticity. Examines documents for alterations and sequence which may have been forged or altered.

Toxicology Section: Tests biological samples for the presence and levels of alcohol and/or drugs, assists the medical examiner in death investigations by identifying drugs, alcohol or poisons, such as carbon monoxide.

Latent Print Section: Assists in most crime scene investigations by comparing and identifying latent fingerprints, footwear and tire tracks, and taking photographs.

Firearm and Tool Mark Section: Examines, compares and identifies firearm and ammunition parts to weapons. Examines evidence for toolmarks, clothing and other objects for muzzle distance and restores obliterated serial numbers. Maintains the Integrated Ballistic Identification System to link firearms to shootings.

