Approved: 2-17-11
Date

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Pat Colloton at 1:30 p.m. on February 17, 2011 in Room 144-S of the Capitol.

All members were present except: Representative Kay Wolf

Committee staff present:
Sean Ostrow, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Lauren Douglass, Legislative Research
Robert Allison-Gallimore, Legislative Research
Jackie Lunn, Committee Assistant

Conferees appearing before the Committee:
Sarah Fertig, Executive Director, Kansas Sentencing Commission
Tom Stanton, KCDDA
Leslie Moore, Information Services Division, KBI
Others attending:
See attached.

Chairperson Colloton called the meeting to order and opened the floor for consideration of **HB 2151-Concerning crimes; criminal procedure and punishment; relating to breach of privacy and blackmail.** Sean Ostrow, Office of the Revisor of Statutes, explained the bill. **Representative Brookens moved HB 2151 favorably for passage. Representative Moxley seconded.** A discussion followed. **Representative Roth moved the bill out favorably for passage. Representative Kelly seconded. Motion carried.**

Next, the Chair moved the Committee's attention to **HB 2045-Amending the definitions and penalties for eavesdropping and blackmail,** for consideration. Sean Ostrow, Revisor of Statutes, explained the bill. **Representative McCray-Miller moved the bill out with technical cleanup amendments. Motion failed because of lack of a second.**

Chairperson Colloton opened the hearing on **HB 2318-Expanding crime of burglary to include entering to commit certain domestic crimes,** and introduced Sarah Fertig, Executive Director, Kansas Sentencing Commission, to review the bed impact of the bill. Director Fertig presented written copy of her testimony, which can be found in its entirety in the offices of Legislative Administrative Services. (Attachment 1) The following testified as proponents of the bill and furnished written copy of their testimony, which can be found in their entirety in the offices of Legislative Administrative Services:

Tom Stanton, KCDAA (Attachment 2)
The Judicial Council, "written only" (Attachment 3)

A question and answer session followed. With no others to testify or speak to the bill, Chairperson Colloton closed the hearing on **HB 2138** and opened the hearing on **HB 2329-Allowing the Kansas bureau of investigation to access expunged records under certain circumstances.** Leslie Moore, Information Services Division, KBI, testified as a proponent of the bill. She presented written copy of her testimony, which can be found in its entirety in the offices of Legislative Administrative Services. (Attachment 4)

A question and answer session followed. With no others to testify or speak to the bill, Chairperson Colloton closed the hearing on **HB 2138** and opened the floor for consideration of **HB 2152-Amending the provisions of the crime of operating a vessel under the influence.** Sean Ostrow, Office of the Revisor of Statutes, explained the bill. Director Fertig reviewed the bed impact. **Representative Kinzer moved the bill out favorably to the consent calendar for passage. Representative McCray-Miller seconded. Motion carried.**

Next the Chair moved the Committee's attention to **HB 2227-Allowing for the issuance of arrest warrants based on DNA profiles. Representative Pauls moved the bill out favorably to the consent calendar for passage. Representative Smith seconded. A discussion followed. Motion carried.**

The Chair then moved the Committee's attention to **HB 2032-County and district attorney monthly reporting of caseloads.** Sean Ostrow, Office of the Revisor of Statutes, explained the bill. **Representative Smith moved the bill out favorably for passage. Representative Goodman seconded.** A discussion followed. **Motion failed.**

The meeting was adjourned at 3:00 pm with the next scheduled meeting March 2, 2011 at 1:30 pm in room 144-S.

CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 2-17-11

NAME	REPRESENTING
Melissa Ward	Hein Law Firm
Chris Mechler	OJA
Natalie Gibson	Judicial Council
Prof. Thomas Stacy	" "
Judge John White	" "
Ed Klumpp	KAEP/ KCPOA / KSA

Kansas Sentencing Commission
700 SW Jackson, Suite 501
Topeka, Ks 66603-3757

phone: 785-296-0923
fax: 785-296-0927
www.kansas.gov/ksc

MEMORANDUM

To: Dennis Taylor, Secretary of Administration

Attn: Brendan Yorkey

From: Sarah Fertig, Executive Director

Date: February 15, 2011

Re: Prison Bed Space Impact, HB 2318, Drug Re-codification

House Corrections and Juvenile Justic
Committee
2011 Session
Date 2-17-11
Attachment # 1-1

SUMMARY OF THE BILL

HB 2318 would amend the penalties for violations of K.S.A. 2010 Supp. 21-36a05 and K.S.A. 2010 Supp. 21-36a09 as follows:

1. Cultivation, distribution or possession with the intent to distribute a substance listed in K.S.A. 2010 Supp. 21-36a05(a) would be a:
   A. Drug severity level 4 felony if the quantity of the material was less than 3.5 grams;
   B. Drug severity level 3 felony if the quantity of the material was at least 3.5 grams but less the 100 grams;
   C. Drug severity level 2 felony if the quantity of the material was at least 100 grams, but less than 1 kilogram; or
   D. Drug severity level 1 felony if the quantity of the material was 1 kilogram or more.

2. Cultivation, distribution or possession with the intent to distribute material containing any quantity of marijuana would be a:
   A. Drug severity level 4 felony if the quantity of the material was less than 25 grams;
   B. Drug severity level 3 felony if the quantity of the material was at least 25 grams but less than 450 grams;
   C. Drug severity level 2 felony if the quantity of the material was at least 450 grams but less than 30 kilograms; or
   D. Drug severity level 1 felony if the quantity of the material was 100 grams or more.

3. Cultivation, distribution or possession with the intent to distribute a schedule I, II, III or IV controlled substance that is distributed by dosage unit would be a:
   A. Drug severity level 4 felony if the number of dosage units was fewer than 10;
   B. Drug severity level 3 felony if the number of dosage units was at least 10 but less than 100;
   C. Drug severity level 2 felony if the number of dosage units was at least 100 but less than 1,000; or
   D. Drug severity level 1 felony if the number of dosage units was 1,000 or more.

4. Cultivation, distribution or possession with the intent to distribute material containing any quantity of heroin or methamphetamine, or an analog thereof, would be a:
   A. Drug severity level 4 felony if the quantity of the material was less than 1 gram;
   B. Drug severity level 3 felony if the quantity of the material was at least 1 gram but less than 3.5 grams;
   C. Drug severity level 2 felony if the quantity of the material was at least 3.5 grams but less than 100 grams; or

House Corrections & Juv. Justice
2-17-11
Attachment 1

D. Drug severity level 1 felony if the quantity of the material was 100 grams or more.

5. Any of the above offenses would be increased by one severity level if the controlled substance was distributed or possessed with intention to distribute on or within 1,000 feet of any school property.

6. Distribution or possession with intent to distribute a controlled substance or a controlled substance analog designated in K.S.A. 65-4113, and amendments thereto would be a class A person misdemeanor except that it would be a severity level 7, person felony if the substance was distributed to or possessed with the intent to distribute to a minor under 19 years of age.

7. Cultivation of any controlled substance or controlled substance analog listed in K.S.A. 2010 Supp. 21-36a05(a) would be a:
   A. Drug severity level 3 felony if the number of plants cultivated was more than 4 but fewer than 50;
   B. Drug severity level 2 felony if the number of plants cultivated was at least 50 but fewer than 100;
   C. Drug severity level 1 felony if the number of plants cultivated was 100 or more.

8. Possession of meth precursors, or possession of drug paraphernalia with the intent to manufacture a controlled substance or controlled substance analog, would be an attempted violation of subsection (a) of K.S.A. 21-36a03, and amendments thereto.

9. Possession of drug paraphernalia with the intent to distribute or cultivate a controlled substance designated in K.S.A. 2010 Supp. 21-36a05(a) and amendments thereto would be an attempted violation of K.S.A. 21-36a05(a).

10. Possession of drug paraphernalia with the intent to distribute a controlled substance or controlled substance analog designated in K.S.A. 65-4113, and amendments thereto, would be an attempted violation of K.S.A. 21-36a05(b), and amendments thereto.

11. Possession of any drug paraphernalia with the intent to possess or have under one's control:
    A. Any controlled substance designated in subsection (a) of K.S.A. 21-36a06, and amendments thereto, or a controlled substance analog thereof, would be an attempted violation of subsection (a) of K.S.A. 21-36a06, and amendments thereto.
    B. Any controlled substance designated in subsection (b) of K.S.A. 21-36a06, and amendments thereto, or a controlled substance analog thereof, would be an attempted violation of subsection (b) of K.S.A. 21-36a06, and amendments thereto.

HB 2318 would create a rebuttable presumption of an intent to distribute if any person possessed certain quantities of controlled substances. The bill would also amend K.S.A. 2010 Supp. 21-36a10(e) to allow offenders under the age of 18 to be subject to increased penalties for distribution, possession with intent to distribute or manufacturing with intent to distribute any drug paraphernalia.

KEY ASSUMPTIONS

- The target population of the bill includes any offenders who commit the crimes of controlled substances under K.S.A. 21-36a05 and 21-36a09.
- The projected prison admission growth rate is assumed to be 2.75% in 2012 and after 2012, it is assumed to increase by an annual average of 2%, which is the same percentage used in relation to the baseline prison population forecast produced in August 2010 by the Kansas Sentencing Commission.
- The percentage of sentence served in prison is assumed to be 85% for offenders at drug severity level 1 to 3 and 80% for offenders at nondrug severity levels 4 and 5.
- The new policy effective date is assumed to be on July 1, 2011.
- Sentences under this bill would be in accordance with a new 5-level drug sentencing grid, which the Commission was informed would be part of this bill but was not actually included in the bill.
- Current practice with regard to the actual length of sentences imposed for drug crimes and the percentage of drug offenders sentenced to prison would continue under the new policy. For example, the average length of prison sentence imposed for current D1 offenders is 95.5 months, which is considerably shorter than the drug offenses sentencing grid range of 138 months to 204 months for D1 offenses.

- Based upon KBI's FY 2010 data[1] pertaining to drug distribution arrest and conviction by quantity, it is assumed that:
    - **3.6%** of the offenders will be convicted of the drug crimes of distribution or intent to distribute the controlled substances at new drug severity level 1 and 83% of them will be sentenced to prison with an average sentence of 95.5 months;
    - **11.6%** of the offenders will be convicted of the drug crimes of distribution or intent to distribute the controlled substances at new drug severity level 2 and 89% of them will be sentenced to prison with an average sentence of 46.8 months;
    - **32.4%** of the offenders will be convicted of the drug crimes of distribution or intent to distribute the controlled substances at new drug severity level 3 and 23% of them will be sentenced to prison with an average sentence of 27.7 months; and,
    - **52.4%** of the offenders will be convicted of the drug crimes of distribution or intent to distribute the controlled substances at new drug severity level 4 and 13% of them will be sentenced to prison with an average sentence of 24 months.

FINDINGS

- In FY 2010, the Commission received **3,121** felony drug sentences. Of this number,
    - 75 (2.4%) were at drug severity level 1, of which:
        - 69 were unlawful manufacture of controlled substance, 1st offense and
        - 6 were sale or possession with intent to sell, 3rd offense.
    - 82 (2.6%) were at drug severity level 2, of which 37 were convictions of precursor drugs;
    - 873 (28.0%) were at drug severity level 3; and,
    - 2,091 (67.0%) at drug severity level 4.
    - The average length of sentences of D1 was 95.5 months.
    - The average length of sentences of D2 was 46.8 months.
    - The average length of sentences of D3 was 27.7 months and
    - The average length of sentences of D4 was 24.0 months.

IMPACT ASSESSMENT

- **Current Policy:** If the current policy remain unchanged,
    - by FY 2012, 562 prison beds would be needed and
    - by FY 2021, 1,585 prison beds would be needed.

- **Impact:** If the drug sentencing grids are changed to five levels and the penalties for distribution or intent to distribute controlled substances is defined by the quantities in HB 2318,
    - by FY 2012, 565 prison beds would be needed and
    - by FY 2021, 1,585 prison beds would be needed.

IMPACT SUMMARY

- **Impact on Prison Admissions:** This bill would result in 14 additional prison admissions in FY 2012 and 16 additional prison admissions in FY 2021.
- **Impact on Prison Beds:** This bill would result in 3 additional prison beds needed in FY 2012 and no additional prison beds needed in FY 2021.

[1] The KBI provided this data with several caveats: (1) there are a large number of cases where the quantity of drugs is not reported to the KBI; (2) the data is based only on reports submitted to the Incident Based Section of the KBI; (3) the data does not include agencies submitting summary data such as Topeka, Kansas City, Kansas, Overland Park and Olathe; (4) there are a large number of reports in which trace amounts of marijuana (.001 grams) are included in conviction data for sale or distribution, which suggests that some data may be flawed.

HB 2318 Impact Assessment

Fiscal Year	Prison Admission			Prison Beds Needed		
	Current Policy Remain Unchanged	New Drug Levels by Quantity	Additional Prison Admissions	Current Policy Remain Unchanged	New Drug Levels by Quantity	Additional Prison Beds Needed
2012	605	619	14	562	565	3
2013	617	631	14	879	926	47
2014	630	644	14	1125	1185	60
2015	642	656	14	1248	1310	62
2016	655	670	15	1311	1381	70
2017	668	683	15	1392	1443	51
2018	682	697	15	1423	1499	76
2019	695	711	16	1500	1517	17
2020	709	725	16	1536	1570	34
2021	723	739	16	1585	1585	0

- **Impact on workload of the Commission:** The amendments of this bill would result in no additional journal entries for the Commission.

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

TO: The Honorable Representatives of the Committee on Corrections and Juvenile Justice

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

RE: House Bill 2318

DATE: February 17, 2011

Madam Chair Colloton and Members of the Committee:

Thank you for allowing me to submit testimony regarding House Bill 2318. This bill creates a new sentencing structure for drug distribution crimes based on the quantities of controlled substances possessed for sale or sold in Kansas.

The bill was drafted by the Recodification Committee, and established four levels of liability for drug distribution crimes. The KCDAA backs the bill in principal.

There is one huge issue that must addressed before the bill goes forward. The current drug grid only contains four levels. Currently, drug distribution and manufacturing crimes are designated in levels one through three of the grid, while crimes involving the simple possession of certain drugs are designated as level four crimes. House Bill 2318 requires a five-level grid to be workable.

As the bill currently stands, possession of small amounts of controlled substances for sale, or sale of those substances, would be level four drug crimes, the same level as simple possession for personal use. It makes no sense to punish those convicted of possession for personal use at the same level as those convicted of possessing drugs for sale.

The proposed amendment to the bill would modify the law to encompass the five-level grid as I have proposed. The new grid creates a level of sentencing which falls precisely between the current first and second levels of the drug grid. This would alleviate the internal inconsistency which currently exists in HB 2318.

The five-level grid has an additional benefit. There has been concern expressed by some over the years that a level one designation for manufacture of methamphetamine is too harsh. My proposal would make the first-time conviction for manufacture of methamphetamine a level two drug felony, which is the level that falls between the current levels one and two of the grid. This deals with the proportionality issue that has been raised regarding this crime. A second-time conviction for manufacture of methamphetamine would then be sentenced as a level one drug felony.

I urge you to adopt the amendment to HB 2318, and then support the passage of the amended bill.

Respectfully submitted,

Thomas R. Stanton

Recommended 5 Level Drug Grid

	A	B	C	D	E	F	G	H	I
	3 + person felonies	2 person felonies	1 person & 1 nonperson felony	1 person felony	3 + nonperson felonies	2 nonperson felonies	1 nonperson felony	2 + misds	1 misd or no record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
V	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

Levels	**Meth, cocaine, heroin**	**Marijuana**	**Manufacture**	**21-36a09(a)**
	Sale	Sale		
1	> 1,000 grams	> 30 kg	2nd	3rd or subsequent
2	100 to 1,000 grams	450 g - 30 kg	1st	2nd
3	3.5 g - 100 g	25 g - 450 g		1st
4	< 3.5 grams	< 25 grams		
5	Simple possession	2nd offense - Simple poss.		21-36a09(b)(1)

SENTENCING RANGE – DRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misd.	1 Misd. No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

Probation Terms are:

36 months recommended for felonies classified in Severity Levels 1-2

18 months (up to) for felonies classified in Severity Level 3
and, on and after July 1, 2009, felony cases sentenced pursuant to K.S.A. 2010 Supp. 21-4729 (SB 123)

12 months (up to) for felonies classified in Severity Level 4

Postrelease Supervision Terms are:

36 months for felonies classified in Severity Levels 1-2

24 months for felonies classified in Severity Level 3

12 months for felonies classified in Severity Level 4 except for some K.S.A. 2010 Supp 21-36a06 (K.S.A. 65-4160 and 65-4162) offenses on and after 11/01/03.

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

24 months for felonies classified in Severity Levels 1-3

12 months for felonies classified in Severity Level 4

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

TO: Representative Pat Colloton, Chair, House Corrections and Juvenile Justice Committee

From: Criminal Law Advisory Committee, Kansas Judicial Council

Re: Testimony in support of 2011 House Bill 2318

Date: February 16, 2011

TESTIMONY OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE ON 2011 HOUSE BILL 2318

In June, 2010, the Criminal Law Advisory Committee (Committee) was asked to study comments received regarding 2010 House Bill 2668. The comments included some concerns that the Recodification Commission had already addressed but also pointed out some apparent errors or omissions in the bill. The Committee also reviewed the policy recommendations included in Vol. II of the Recodification Commission's report. The Committee considered and discussed the Commission's recommendations and subsequently agreed with many of them. House Bill 2318 would implement the Commission's recommendations pertaining to the drug code as follows:

House Corrections and Juvenile Justic
Committee
2011 Session
Date 2-17-11
Attachment # 3-1

- **Section 1.** The definition of "manufacture" in the drug code should be revised. The proposed language would exclude the actions of packaging, repackaging and cutting controlled substances. Packaging, repackaging and cutting are not properly part of criminal drug manufacturing, but rather, they are acts more closely associated with drug distribution.
- **Section 2.** The severity of drug distribution should be determined by the quantity of the drug. The idea for using quantity originated at the Kansas Sentencing Commission Proportionality Subcommittee and was supported by the Recodification Commission. These two groups agreed to let the Commission determine the proper quantity levels and the Criminal Law Advisory Committee agrees with their proposals.

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

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

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

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

- **Section 3.** The proposed language is recommended in lieu of K.S.A. 21-36a09. The relationship between the possession of paraphernalia and precursors offense and the general possession, distribution, and manufacturing offenses has caused much confusion and litigation in cases such as *State v. Campbell* and *State v. McAdam*. A method of clarifying the relationship between these offenses is to eliminate the possession of paraphernalia and precursors as a separate offense and define such possession as a sufficient overt act toward the attempted violation of the possession, distribution and manufacturing offenses.
- **Sections 4 and 5.** 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 Recodification Commission has since discovered that several prosecutors are in favor of removing this offender age element and in retrospect; the Commission 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 recommendation is to remove the 18 year offender age requirements from the 1,000 feet of school property enhancements.

- **Section 6.** The recommendation is to add subsection (d) in order to permit dual prosecution for this offense and theft by deception. The remaining amendments are technical in nature.

Kansas Bureau of Investigation

Robert E. Blecha
Director

Derek Schmidt
Attorney General

TESTIMONY
Before the Committee on Corrections and Juvenile Justice
HB 2329
Leslie Moore
Information Services Division Manager
Kansas Bureau of Investigation
February 16, 2011

Madam Chair Colloton and Members of the Committee,

Access to Expunged Records

This bill will clarify the duties of the courts to provide to the Kansas Bureau of Investigation (KBI) Criminal Records Central Repository access to expunged arrests, dispositions and confinement information. Often, the central repository never receives the original documents pertaining to an expungement. Once the expungement is received and the record is reviewed then the central repository contacts the agencies to request the missing fingerprint card, court disposition and/or confinement information to update and complete a criminal history record. Some agencies have refused to provide the Central Repository the underlying records pertaining to an expungement order the KBI has received, because the expungement statutes did not specifically list the KBI as an agency entitled to expunged records (notwithstanding that the underlying events should have been reported to the central repository previously, but apparently were not). The Office of Judicial Administration (OJA) has requested the KBI to update the statute to make it clear that the KBI is an entitled agency.

Fees Charged to the Central Repository

There is also an issue with some agencies attempting to charge a fee for the requested documents. The central repository tries to explain to agencies that per K.S.A. 22-4701, *et seq.*, agencies are required to transmit information to the central repository when the reportable events occur, so there should not be a fee charged to the KBI when it requests records to complete criminal history due to agencies' failure to comply with the law to begin with. Often, the central repository must track down the information needed from other sources (such as county and district attorney offices) that do not charge, so it can update and ensure its records are complete.

There should be no fiscal effect to local agencies. This bill would require criminal history record information that already should have been reported to the central repository, pursuant to K.S.A. 22-4701, *et seq.*, be provided to the KBI without charge The KBI only requests records when it discovers a void in criminal history record information and is striving to update and complete the central repository's records

The KBI believes the original intent of the legislature was to require agencies to provide criminal history to the central repository free of charge. The KBI in turn offers criminal history records to law enforcement and criminal justice agencies free of charge.

The OJA has also requested the KBI to update the statute(s) to make it clear that the KBI is not to be charged a fee when a request has been made for criminal history records.

1620 SW Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

Relief from Disabilities/Restoration of Rights

The portion of the bill regarding relief of disabilities/restoration of rights is a requirement by the Bureau of Alcohol, Tobacco and Firearms (ATF) to receive certain grant funds. I submitted to the ATF legal counsel current statute regarding the restoration of rights, K.S.A. 75-7c26, and was told these statutes did not meet the minimum criteria to satisfy the requirements under the National Instant Background Check System (NICS) Improvement Act of 2008, public law 110-180. The Act requires that states have laws to provide persons who were involuntarily mentally committed due process to restore their rights to possess a firearm. I have included with my testimony a copy of the minimum criteria, the ATF check list when reviewing state laws, and the letter from the ATF representative that reviewed K.S.A 75-7c26.

Currently the NICS Act Record Improvement Program (NARIP) for States and State Court Systems Grant requires that states have pass this legislation before it can be eligible for this grant. Kansas has been ineligible for the grant for 3 years because it does not have this legislation. The NARIP grant could bring in up to $250,000 to improve criminal history records. There is also the possibility that the National Criminal History Improvement Program (NCHIP) grant may require this legislation in the future. The Information Services Division at the KBI is currently receiving $327,435 from the NCHIP grant to fund 8 positions. If the NCHIP grant makes this a requirement and we do not have this legislation, we will lose funding for those positions.

The relief from disabilities/restoration of rights portion will allow the state to be eligible for future federal grants. The NARIP grant for 2011 has not yet been announced so the amount the KBI potentially could miss out on is not known; but based on grant amounts from past years, the KBI could stand to lose up to $250,000 in grant money this year without this bill being passed.

The long-term fiscal impact if the relief from disabilities/restoration of rights portion of the bill is not passed could be significant, based on the potential ineligibility of the KBI in the future for federal grant money the KBI relies on to fund 8 positions.

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

STATE RELIEF FROM DISABILITIES PROGRAMS UNDER THE NICS IMPROVEMENT AMENDMENTS ACT OF 2007

The following *minimum* criteria must be satisfied for a State to establish a qualifying mental health relief from firearms disabilities program under the NICS Improvement Amendments Act of 2007 (NIAA), Public Law 110-180, Section 105 (enacted January 8, 2008):

1. State Law [NIAA § 105(a)(2)]: The relief program must be established by State statute, or administrative regulation or order pursuant to State law.

2. Application [NIAA § 105(a)(1)]: The relief program must allow a person who has been formally adjudicated as a mental defective[1] or committed involuntarily to a mental institution[2] to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).

3. Lawful Authority [NIAA § 105(a)(2)]: A State court, board, commission, or other lawful authority must consider the applicant's petition for relief. The lawful authority may only consider applications for relief due to mental health adjudications or commitments that occurred in the same State.

4. Due Process [NIAA § 105(a)(2)]: The petition for relief must be considered by the lawful authority in accordance with principles of due process, as follows:

    a. The applicant must have the opportunity to submit his or her own evidence to the lawful authority considering the relief application.
    b. An independent decision maker—someone other than the individual who gathered the evidence for the lawful authority acting on the application—shall review the evidence.
    c. A record of the matter must be created and maintained for review.

5. Proper Record [NIAA § 105(a)(2)]: In determining whether to grant relief, the lawful authority must receive and consider evidence concerning the following:

    a. the *circumstances* regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);
    b. the applicant's *record*, which must include, *at a minimum*, the applicant's mental health *and* criminal history records; and
    c. the applicant's *reputation*, developed, *at a minimum*, through character witness statements, testimony, or other character evidence.

---

[1] Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include—(1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

[2] Federal regulations at 27 C.F.R. § 478.11 define the term "committed to a mental institution" as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

6. Proper Findings [NIAA § 105(a)(2)]: In granting relief, the authority must issue findings that:

    a. the applicant will not be likely to act in a manner dangerous to **public safety**; and
    b. granting the relief will not be contrary to the **public interest**.

7. De Novo Judicial Review of a Denial [NIAA § 105(a)(3)]: The State must also provide for *de novo* judicial review of relief application denials consistent with the following principles:

    a. The applicant may petition a court of appropriate jurisdiction to review the denial, including the record of the State court, board, commission, or other lawful authority that rendered the decision.
    b. The reviewing court may, but is not required to, give deference to the decision of the lawful authority to deny the application for relief.
    c. In cases of denial by a lawful authority other than a State court, the reviewing court must have discretion to receive additional evidence necessary to conduct an adequate review.

Note: In addition to the above-mentioned requirements, NIAA § 102(c)(1)(B) requires a State, on being made aware that the basis under which the record was made available does not apply, or no longer applies, shall, as soon as practicable—

    a. update, correct, modify, or remove the record from any database that the Federal or State government maintains and makes available to NICS, consistent with the rules pertaining to the database; and
    b. notify the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.
    c. It is recommended that the State have a written procedure (*e.g.* State law, regulation, or administrative order) to provide for these NIAA requirements.

OMB No. 1140-0094 (01/31

Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Certification of Qualifying State Relief from Disabilities Program

This form is to be used by a State to certify to the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that it has established a qualifying mental health relief from firearms disabilities program that satisfies certain *minimum* criteria (identified below) under the NICS Improvement Admendments Act of 2007, Public Law 110-180, Section 105, enacted January 8, 2008 (NIAA). This certification is required for States to be eligible for the grants authorized by the NIAA.[1] The certifying State should attach all relevant materials demonstrating compliance with its certification and criteria, which may include statutes, administrative regulations, executive orders, written policies and/or procedures, program brochures, or other items pertinent to the certification.

Certification

As the authorized State official, I hereby certify that my State has satisfied each of the following minimum criteria to establish a Relief From Disabilities Program under the NIAA:	Check Appropriate Box	
	Met	Not Met
1. **State Law:** The relief program has been established by State statute, or administrative regulation or order pursuant to State law.		
2. **Application:** The relief program allows a person who has been formally adjudicated as a mental defective[2] or committed involuntarily to a mental institution[3] to *apply or petition* for relief from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. §§ 922(d)(4) and (g)(4).		
3. **Lawful Authority:** A State court, board, commission or other lawful authority (per State law) considers the applicant's petition for relief. The lawful authority may only consider applications for relief due to mental health adjudications or commitments that occurred in the applicant State.		
4. **Due Process:** The petition for relief is considered by the lawful authority in accordance with principles of due process, as follows:		
a. The applicant has the opportunity to submit his or her own evidence to the lawful authority considering the relief application.		
b. An independent decision maker — someone other than the individual who gathered the evidence for the lawful authority acting on the application — reviews the evidence.		
c. A record of the matter is created and maintained for review.		
5. **Proper Record:** In determining whether to grant relief, the lawful authority receives evidence concerning and considers the:		
a. Circumstances regarding the firearms disabilities imposed by 18 U.S.C. § 922(g)(4);		
b. Applicant's record, which must include, *at a minimum*, the applicant's mental health *and* criminal history records; and		
c. Applicant's reputation, developed, at a minimum, through character witness statements, testimony, or other character evidence.		
6. **Proper Findings:** In granting relief, the lawful authority issues findings that:		
a. The applicant will not be likely to act in a manner dangerous to *public safety*; and		
b. Granting the relief will not be contrary to the *public interest*.		
7. **De Novo Judicial Review of a Denial:** The State provides for *de novo* judicial review of relief application denials that includes the following principles:		
a. If relief is denied, the applicant may petition the State court of appropriate jurisdiction to *review the denial*, including the record of the denying court, board, commission or other lawful authority.		
b. In cases of denial by a lawful authority other than a State court, the reviewing court has discretion to receive additional evidence necessary to conduct an adequate review.		
c. Judicial review is *de novo* in that the reviewing court may, but is not required to, give deference to the decision of the lawful authority that denied the application for relief.		
8. **Required Updates to State and Federal Records:** Pursuant to Section 102(c) of the NIAA, the State, on being made aware that the basis under which the record was made available does not apply, or no longer applies:		
a. Updates, corrects, modifies, or removes the record from any database that the Federal or State government maintains and makes available to the NICS, consistent with the rules pertaining to the database; and		
b. Notifies the Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.		
9. **Recommended Procedure:** It is recommended (not required) that the State have a written procedure *(e.g., State law, regulation, or administrative order)* to address the update requirements.		

[1] For information regarding the availability of funding for such grants see: http://www.ojp.usdoj.gov/bjs/funding.htm

[2] Federal regulations at 27 C.F.R. § 478.11 define the term "adjudicated as a mental defective" as: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs. The term shall include — (1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

[3] Federal regulations at 27 C.F.R § 478.11 define the term "committed to a mental institution" as: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Authorized State Official's Signature	State and Office	Certification Date

Printed Name and Title	Phone	E-mail Address

(For ATF Use Only)

The Relief Program Application Is:

☐ APPROVED

☐ DENIED, for the reasons stated below.

ATF Official's Signature	ATF Office	Decision Date

Printed Name and Title	Phone	E-mail Address

Reasons for disapproval, or additional comments:

Please Mail The Form To:

Bureau of Alcohol, Tobacco, Firearms and Explosives
Firearms Programs Division
Mailstop 6N.672
99 New York Avenue, NE
Washington, DC 20226
Contact Number: (202) 648-7090

Important Notice

Approval of a relief from disabilities program is valid only if the certifying official above has authority under State law to execute this certification, and only to the extent there have been no amendments or changes to the State's relief from disabilities program laws, regulations, directives, or procedures that were submitted in support of an initial certification. If there have been any changes to applicable State laws or procedures, a new certification form must be submitted to ATF for approval.

Privacy Act Information: Solicitation of this information is authorized by the NICS Improvement Amendments Act of 2007, Public Law 110-180.

Paperwork Reduction Act Notice

The information required on this form is in accordance with the Paperwork Reduction Act of 1995. The purpose of the information is to determine whether a State has certified, to the satisfaction of the Attorney General, that it has established a relief from disabilities program in accordance with the requirements of the NICS Improvement Amendments Act of 2007, Public Law 110-180.

The estimated average burden associated with this collection is 15 minutes per certification, depending on individual circumstances. Comments about the accuracy of this burden estimate and suggestions for reducing it should be directed to the Reports Management Officer, Document Services Section, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, DC 20226.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Confidentially is not assured.

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Washington, DC 20226

www.atf.gov

201200:JAB
FE-108006

JUL 22 2009

Leslie Moore
Public Services Administrator
Records Management Division
Kansas Bureau of Investigation
Topeka, Kansas 66612

Re: Kansas' Relief from (Firearms) Disabilities Program

Dear Ms. Moore:

This letter responds to your request to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") regarding the Kansas State Statutes on restoration of rights for persons involuntarily committed for mental illness. You have asked ATF to review the legislation you provided and comment on whether Kansas' relief from firearms disabilities program is in compliance with the NICS Improvement Amendments Act of 2007, Public Law 110-180 ("NIAA"). We appreciate the opportunity to provide our comments. However, for the reasons discussed below, the relief from disabilities program established in the Kansas code does not satisfy all of the requirements of the NIAA.

By way of background, the NIAA authorizes grant programs to support states in their efforts to improve the quality and completeness of criminal record information available to the National Instant Criminal Background Check System. To become eligible for grant funding, states must satisfy certain conditions including the requirement that the state certify, to the satisfaction of the Attorney General, that it has implemented a qualifying program permitting persons who were adjudicated as a "mental defective" or "committed to a mental institution" to apply for relief from the Federal firearms disabilities imposed as a result of the adjudication or commitment. *See* 18 U.S.C. §§ 922(d)(4) and (g)(4); 27 C.F.R. § 478.11. Specifically, to qualify under the NIAA (section 105), a relief from disabilities program must:

(1) Permit a person who, pursuant to State law, has been adjudicated as described in 18 U.S.C. section 922(g)(4), or has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by 18 U.S.C. §§ 922(d)(4) and (g)(4), by reason of the adjudication or commitment;

(2) Provide that a State court, board, commission, or other lawful authority shall grant the above mentioned relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities, and the person's record and

reputation, are such that the person will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest; and

(3) Permit a person whose application for relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.

The Attorney General has delegated to ATF the authority to administer and enforce the relief from disabilities provisions of the NIAA. Pursuant to that authority, ATF has established *minimum* criteria that a relief program must meet to qualify under the NIAA. These minimum criteria may be met by statute, administrative regulation, or executive order. On November 21, 2008, these criteria were mailed to your State. Evaluating your State's statutory scheme for a relief from disabilities program according to the minimum criteria, we conclude that the program is deficient for the following reasons:

- [Criteria #5] The relief program must require the reviewing authority to receive and consider evidence concerning (a) the circumstances regarding the petitioner's firearms disability imposed by 18 U.S.C. §922(g)(4), (b) the petitioner's record, and (c) the petitioner's reputation. Pursuant to K.S.A. 59-2966 and 59-29b66, the lawful authority is required to make a determination based on "the evidence" but it is not expressly required to consider all of the elements of the proper record established under NIAA § 105(a)(2). In addition to the circumstances surrounding the imposition of a Federal firearms disability, the reviewing authority must consider the petitioner's record (which must include, at a minimum, the petitioner's mental health and criminal history records) and the petitioner's reputation (which must be developed, at a minimum, through character witness statements, testimony, or other character evidence). Without clearly establishing the particular types and forms of evidence to be considered in reviewing a petition for restoration of firearms rights, the Kansas relief program is insufficient to develop a proper record under the NIAA.

- [Criteria #6] The NIAA requires a finding by the lawful authority, based on the petitioner's record and reputation, that the petitioner is (a) not likely to act in a manner dangerous to public safety, and (b) that the granting of relief will not be contrary to the public interest. While K.S.A. 75-7c26 provides that the reviewing authority shall issue a certificate of restoration if it finds that a petitioner "is no longer likely to cause harm to such person's self or others," there is no requirement to make an additional determination that granting the relief will not be contrary to the public interest. Because a reviewing authority is not required under Kansas State law to make such a finding , the basis for issuing a certificate of restoration is insufficient to make a proper finding under NIAA §105(a)(2).

Leslie Moore
Public Service Administrator II

- [Criteria #7] The NIAA mandates that the applicant whose relief is denied be allowed to petition for *de novo* judicial review in a State court of appropriate jurisdiction. However, K.S.A. 75-7c26 and the other provisions of Kansas State law provided to ATF do not establish a right for a petitioner to seek review of a denial. Consequently, the Kansas State relief from disabilities program does not comply with the requirements of the NIAA.

Unfortunately, for the above reasons, Kansas' relief program does not presently qualify under the NIAA. We look forward to working with your office to ensure that Kansas' relief program can meet the minimum criteria for compliance under the NIAA. Please contact Sterling Nixon, Program Manager, Brady Operations Branch, at (304) 616-4174 or by email at Sterling.Nixon@aft.gov, and let us know if you would like us to review any amendments to Kansas law, or if we can provide any other assistance.

Sincerely Yours,

Gary L. Bangs
Acting Division Chief
Firearms Programs Division