

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:30 A.M. on February 18, 2011, in Room 548-S of the Capitol.

All members were present, except Senator Donovan, who was excused

Committee staff present:

Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Jason Thompson, Office of Revisor of Statutes
Tamera Lawrence, Office of Revisor of Statutes
Theresa Kiernan, Committee Assistant

Conferees appearing before the committee:

Ray Roberts, Secretary of the Kansas Department of Corrections
Patricia (Patti) Biggs, Vice-Chairperson, Kansas Parole Board

Others attending:

See attached list.

The Chairman opened the hearings on **ERO 34 -- Abolishing Parole Board and Establishing the Prisoner Review Board within the Department of Corrections.**

The Chairman recognized Ray Roberts, Secretary of the Kansas Department of Corrections (KDOC) who provided information requested by members of the committee at the February 4, 2011, hearings on **ERO 34**, as follows:

- Currently the Kansas Parole Board and KDOC are covered under the Kansas Tort Claims Act (KTCA) and the proposed Prisoner Review Board also would be covered by the KTCA.
- There are between 8 and 15 inmates who have been approved for parole, but their re-entry plans have not yet been approved.
- The Victim's Services Division of KDOC and the various county victim services agencies are responsible to provide notice of an inmate's parole hearing to the victims of the inmate.
- In order to continue to receive notice of parole hearings, victims have a duty to notify KDOC and county victim service agency of changes of address.

Patti Biggs presented testimony as a neutral party to **ERO 34 (Attachment 1)**. She stated the Parole Board holds a position of neutrality regarding the ERO recognizing it as a policy issue. Her main concerns are the following:

- Violation of the Due Process Constitutional requirements in the process of post-incarceration supervision revocation. The Supreme Court has held that the due process requires a neutral and detached hearing body
- Cost of implementation exceeds any savings
- Differences in the mission of KDOC and the mission of the Parole Board

Senator Schodorf asked Ms. Biggs to describe briefly the work or caseload of the Parole Board.

Ms. Biggs responded, "Members of the board easily spend more than 40 hours a week fulfilling their duties, which include: Attending at least one monthly meeting at each of the 9 correctional facilities; reviewing each of the offender's file (which may take up to six hours each); conducting parole hearings and revocation of parole hearings; reviewing approximately 3,350 re-entry plans annually; and reviewing applications for clemency submitted to the governor. She expressed concern that due to reduction in staff in the KDOC, that the department will be able to handle the work and caseload.

Senator Haley asked how other states handle parole decisions.

Ms. Biggs stated that all states, except Minnesota, have an independent parole board. She will provide information on how Minnesota meets the *Morrissey* requirement relating to a neutral and detached hearing.

CONTINUATION SHEET

The minutes of the Judiciary Committee at 10:30 a.m. on February 18, 2011, in Room 548-S of the Capitol.

Senator Pilcher-Cook asked that Ms. Biggs provide the committee information relating to the *Gilmore* case.

Robert Allison-Gallimore, Research Staff, at the request of Senator Bruce, prepared and distributed copies of a memorandum relating to the neutral and detached due process requirement for a hearing body considering parole revocations (Attachment 2).

The Chairman asked how there could be a cost-savings under the ERO if the current Parole Board is replaced with a Prison Review Board.

The Chairman closed the hearings on ERO 34.

Committee Action:

The Chairman called the committee's attention to an amendment proposed by the Office of the Attorney General for **SB 73 -- Amending criminal discovery statute to prohibit release of child pornography evidence to the defense** (Attachment 3).

The Chairman announced he would take action on the bill after receipt of information requested from the State Board of Indigents Defense Services.

The Chairman turned the committee's attention to **SB 74 -- Civil procedure; forfeiture; electronic solicitation; sexual exploitation**.

The committee discussed an amendment requested by the Office of the Securities Commissioner to add violations of the Kansas Securities Act to the list of offenses giving rise to the forfeiture of assets. No action was taken on the request.

Senator Vratil moved, Senator Pilcher-Cook seconded, that SB 74 be amended by adding to the list of offenses giving rise to the forfeiture of assets the eight offenses suggested in the testimony submitted by the Kansas County and District Attorneys Association (Attachment 4). The motion was adopted.

Senator Vratil moved, Senator Schodorf seconded, that SB 74 be passed as amended. The motion was adopted.

Meeting adjourned at 10:29 A.M. The next meeting is scheduled for February 21, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Fri, Feb. 18, 2011

NAME	REPRESENTING
Patti Biggy	Boole BQ
Ray Pabst	KDOC
Marie Monreal	KDOC
Robert Sanders	KPB
Brendan Yorkley	Division of Budget
Kelly Nannskywenzl	Keeney & Assoc.
Patrick Vogelsburg	KCDAA
TED HEWLEY	CS-
Bruce Tannell	AFL-CIO
Derek Heim	HEIM LAW FIRM
Peter Northcott	Office of the Governor
Megan Pinegar	AG
Justin Stone	Post Audit
Sarah Fertig	KSC
Jennie Marsh	KDOC
JEREMY BARCLAY	KDOC
JOHNNIE GODDARD	KDOC
RAY ROBERTS	KDOC

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb. 18, 2011

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Robert Sanders, Chairperson
Patricia Biggs, Member
Tom Sawyer, Member

Parole Board

Sam Brownback, Governor

*** REVISED ***
MEMORANDUM

To: Members of Senate Judiciary Committee
Senator Tim Owens, Chair; Senator Jeff King, Vice Chair

From: Kansas Parole Board, Patricia Biggs, Member 

Date: February 18, 2011

Re: ERO 34 abolishing the Kansas Parole Board

Definition: Executive Reorganization Order Number 34 abolishes the Kansas Parole Board and moves all Parole Board powers, duties and functions to the prison review board. The prison review board shall consist of three existing employees of the Department of Corrections as appointed by the Secretary of Corrections. This ERO is effective July 1, 2011.

Position: The Parole Board holds a position of neutrality regarding this reorganization recognizing it as a policy issue.

The members of the Parole Board are committed to facilitating any and all action necessary to accomplish the transition of its powers, duties and functions to the prison review board under the ERO in a manner that is as seamless as possible. Discussions with the Secretary have occurred; all job duties and functions are being examined. Assistance will be provided in a manner and fashion directed by the Secretary or his designee.

Primary Information for Consideration: Due Process Constitutional issues in the process of post-incarceration supervision revocation.

Explanation: The U.S. Supreme Court decision of *Morrissey v. Brewer* (1972) guides the processes of revocation of post-incarceration supervision. Held by the Justices in this decision is, in relevant part, the following:

3. At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); **(e) a "neutral and detached" hearing body** such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. Pp. [408 U. S. 487-490](#). (*emphasis added*).

When an offender is sentenced to prison, s/he is sentenced to the custody of the Secretary of Corrections for a term of incarceration and a term of post release supervision. Thus, it appears that members of the Department of Corrections cannot be both custodial and neutral and detached.

U.S. Supreme Court, ruling on this Constitutional issue, appears to demand another body be charged with final hearings related to the withdrawal of the right to community-based liberty.

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Attachment 1

Secondary Information for Consideration:

The Parole Board generates savings well in excess of state dollars spent on it; it is a high-yield investment for state dollars.

- **Return on Investment:**
 - ❖ Each \$1.00 of State General Fund allocated to the Parole Board returns in excess of \$1.92 in FY 2010
 - ❖ Each \$1.00 of State General Fund allocated to the Parole Board returns in excess of \$2.43 (estimated) in FY 2011.
- **Cost to the State:**
 - ❖ Elimination of the Parole Board will cost \$1 Million to \$1.25 Million annually. The total annual budget for the Parole Board is approximately \$0.5 Million - netting additional costs to the state of \$500,000 to \$750,000 annually.

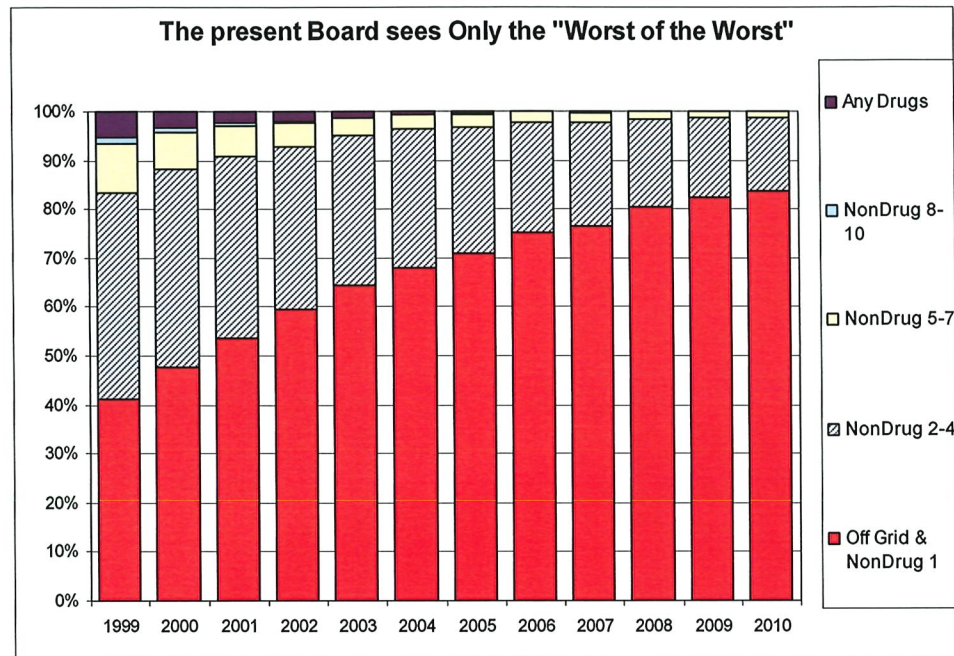
Facts:

- In FY 2010, there were 92 instances where the Parole Board denied revocation as recommended by the KDOC parole officer.
- Costs for incarceration that same year neared \$25,000 (actual \$24,953 source: KDOC Annual Report).
- The actual average length of stay for this group in FY 2010 was 158 days (Kansas Sentencing Commission, FY 2011 Adult Inmate Prison Population Projections p. 7).
 - Elimination of Parole Board will result in revocation to prison for each of these cases – as recommended by KDOC staff – and will generate incarceration costs totaling \$993,745. This is \$497,287 greater than the cost of having a Parole Board.
- Through the first half of Fiscal Year 2011, 58 cases where the KDOC parole officer moved for revocation were sent back to the community by the Board. At this rate, 116 cases are anticipated in FY 2011.
- Cost for incarceration for FY 2011 are \$24,970 (KDOC Annual Report).
- Assuming the same average length of stay from FY 2010 (158 days) per Sentencing Commission reports (Kansas Sentencing Commission, FY 2011 Adult Inmate Prison Population Projections p. 7).
 - Elimination of Parole Board will result in revocation to prison for each of these cases – as recommended by KDOC staff – and will generate incarceration costs totaling \$1,253,836. This is \$758,836 greater than the cost of having a Parole Board.

* A Department of Corrections Prison Review Board can use the release of the most serious and violent person felons as a mechanism to control prison population and budgets. This is inconsistent with the legislature's sentencing policy of reserving incarceration for the most serious and violent offenders – consistent with proportionality.

Parole Board sees only "the worst of the worst"

- 83.6% are Off Grid and Non-Drug Level 1: Murder 1, Rape, Aggravated Kidnapping
- 15.2% Non-Drug Level 2-4 : Murder 2, Voluntary Manslaughter, Kidnapping, Aggravated Robbery, Involuntary Manslaughter, Aggravated Battery of Law Enforcement with Great Bodily Harm.



KDOC Mission and KPB Mission differ in fundamental perspective

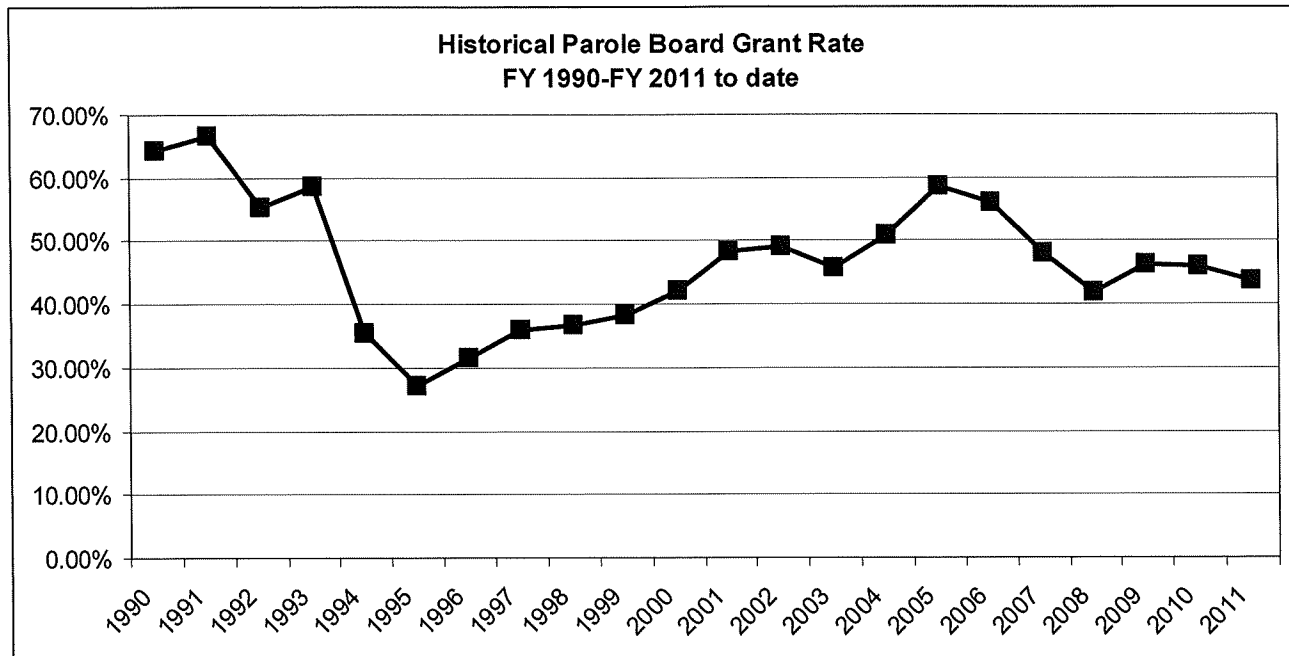
- **KDOC Mission focuses on custody, control and management.**
The Department of Corrections, as part of the criminal justice system, contributes to the public safety and supports victims of crime by exercising safe and effective containment and supervision of inmates, by managing offenders in the community, and by actively encouraging and assisting offenders to become law-abiding citizens.
- **KPB Mission focuses on accurate assessment of risk.** *to community*
Consistent with the principles of evidence based practices, parole privilege shall be 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 re-offend such that re-victimization is minimized and rehabilitation and successful reentry are maximized; similarly, parole privilege shall be rescinded in cases where an offender demonstrates increasing risk to community.

* The KPB is not a "board of 'no' ".

Facts:

Nearly 1 in 2 offenders who come before the Kansas Parole Board are released.

The Board's release rate is about 45% - and is a rate higher than the rate in the seven years from 1994 through 2000. (*rate of release = (parole+cr+max)/total decisions less continued*).



KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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February 16, 2011

To: Senator Terry Bruce

From: Robert Allison-Gallimore, Research Analyst

Re: "Neutral and Detached" Hearing Body for Parole Revocations

You requested more information regarding the "neutral and detached" due process requirement for a hearing body considering parole revocation, as highlighted by Kansas Parole Board member Patricia Biggs in her memorandum for the Senate Corrections Budget Subcommittee. Ms. Biggs suggests the state could be subject to legal action for due process violations if Parole Board responsibilities are transferred to personnel within the Department of Corrections.

The language quoted by Ms. Biggs is drawn from the United States Supreme Court's decision in *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). In this decision, the Supreme Court established the "minimum requirements of due process" for probation revocation final hearings. The requirements are: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." Kansas and federal courts continue to apply these minimum requirements in the parole context. See, e.g., *Brull v. State*, 31 Kan. App. 2d 584, 587, 69 P.3d 201 (2003); *United States v. Bennett*, 561 F.3d 799, 801-02 (8th Cir. 2009).

There is little guidance available as to what may constitute a "neutral and detached" hearing body, other than a "traditional parole board." The lack of case law in this area likely is due to the fact that the vast majority of states have in place what could be characterized as a "traditional parole board": a panel of individuals, appointed by the governor, who make parole decisions. These panels are usually independent agencies or else affiliated with the state department of corrections (or its equivalent) for administrative purposes only. Thus, there has not been much opportunity for parolees to challenge non-traditional parole bodies to determine whether such bodies meet the "neutral and detached" requirement.

In those few states where the parole board function is incorporated in the department of corrections or equivalent agency, it appears the members of the decision making panel are usually still appointed by the governor, such as in Michigan. In Maryland, the Parole Commission is within the Department of Public Safety and Correctional Services, and its members are appointed by the Secretary of that department, with the approval of the governor and the state senate. In Minnesota, the commissioner of corrections is given the authority to

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Attachment 2

make "supervised release" (parole) decisions. The department of corrections has a "Hearings and Release Unit" responsible for supervised release decisions.

The only court decisions found regarding the "neutral and detached" requirement from these jurisdictions are a few (mostly unpublished) cases from Michigan federal courts. In these cases, the courts consistently rejected the argument that the previous Michigan parole board structure, in which members were appointed by the corrections director, did not constitute a "neutral and detached" body. See, e.g., *Crowley v. Renico*, 81 Fed. Appx. 36 (6th Cir. 2003); *Young v. Trombly*, No. 00-CV-10488-BC, 2002 WL 1461755 (E.D. Mich. 2002).

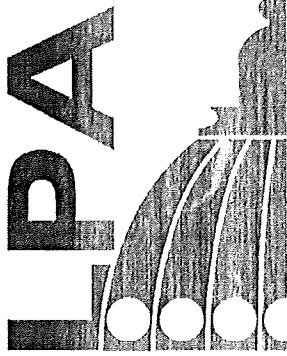
I found one other decision discussing the "neutral and detached" requirement in a parole context. In *State v. Turnbull*, 114 Ariz. 289, 291-92, 560 P.2d 807 (1977), the Arizona Court of Appeals stated: "Morrissey, supra, mandates as yet another factor of 'minimum due process' the requirement of a 'neutral and detached hearing body' to determine if reasonable grounds for revocation existed. [Citation omitted.] Essentially, Morrissey's 'neutral and detached hearing body' requires simply an independent decision maker, one other than the correctional official who has made the initial report of violation or who has recommended revocation."

The Kansas Legislative Division of Post Audit briefly discussed related issues in its October 2009 report, "Adult Correctional Agencies: Determining Whether Functions Could Be Combined To Gain Cost Efficiencies." The report concluded there might be safeguards that could be implemented to address Parole Board concerns. A copy of the relevant portion of that report is attached.

The Office of the Revisor of Statutes staff also could assess possible legal action under various parole board structures. Please let me know if you would like more detail regarding anything in this memorandum, have any further questions, or would like this memorandum distributed to any additional parties.

RAG/kal

Enclosure



PERFORMANCE AUDIT REPORT

Adult Correctional Agencies: Determining Whether Functions Could Be Combined To Gain Cost Efficiencies

A Report to the Legislative Post Audit Committee
By the Legislative Division of Post Audit
State of Kansas
October 2009

House Bill 2340, which was introduced but not passed during the 2009 legislative session, would have moved the parole function under the Department of Corrections. The fiscal note prepared for that bill estimated a cost savings of \$158,000 by lowering Board members' compensation to be commensurate with other Department staff who had a generally equal level of responsibility and knowledge.

According to the Secretary, the role and duties of the Board members would not have changed, only their compensation amounts. Although this action would reduce the cost of the Board, it would be achieved as the result of a policy decision, not through improved efficiency.

***Parole Board Members
Raised a Number of
Concerns About Merging
The Board's Function
Into the Department of
Corrections***

We asked Parole Board members and others to identify any issues or concerns about moving the Board into the Department of Corrections. They cited the following concerns:

- **The merger might alter the current role of the Board.** Currently, the Board acts as a quasi-judicial body conducting hearings and making final decisions concerning an inmate's release or re-admittance into prison. If the Board were merged with the Department, it potentially could be used as a means to help control prison populations, which could adversely affect its judicial role.
- **Having the Department perform both preliminary parole hearings and final parole hearings could be perceived as denying an inmate a neutral hearing.** Parole Board members in both Kansas and Indiana mentioned this to us as a risk area. In Kansas, the Department currently conducts preliminary parole hearings for inmates, and the Board conducts final parole hearings. The concern is that having the Department do both could violate an inmate's right to due process.

Because the Parole Board in Michigan is placed within that state's Department of Corrections, we talked to Michigan Board officials about any problems they've had with that organizational structure. They acknowledged that the Board sometimes is used as a means of reducing prison populations. In addition, they said at one time the Michigan Parole Board performed both the preliminary and final hearing through Department of Correction staff, and that arrangement didn't create any problems.

Both of the issues identified above likely could be addressed through other safeguards, if necessary. For example, Board members could still be appointed by the Governor or outside hearing officers could be used to make final decisions when necessary. However, because we didn't identify the potential for achieving additional efficiency-related cost savings, and because other states typically don't structure their parole board functions and duties this way, we didn't pursue this area further.

sb73_balloon.pdf
RS - JThompson - 02/15/11

enters an order granting relief following such a private showing, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(f) Discovery under this section must be completed no later than 20 days after arraignment or at such reasonable later time as the court may permit.

(g) If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, the party shall promptly notify the other party or the party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) For crimes committed on or after July 1, 1993, the prosecuting attorney shall provide all prior convictions of the defendant known to the prosecuting attorney that would affect the determination of the defendant's criminal history for purposes of sentencing under a presumptive sentencing guidelines system as provided in K.S.A. 21-4701 et seq., and amendments thereto.

(i) The prosecuting attorney and defendant shall be permitted to inspect and copy any juvenile files and records of the defendant for the purpose of discovering and verifying the criminal history of the defendant.

(j) (1) *In any criminal proceeding, any property or material that constitutes a visual depiction, as defined in subsection (a)(2) of section 74 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, shall remain in the care, custody and control of either the prosecution, law enforcement or the court.*

(2) *Notwithstanding subsection (b), if the state makes property or material described in this subsection reasonably available to the defendant, the court shall deny any request by the defendant to copy, photograph, duplicate or otherwise reproduce any such property or material submitted as evidence.*

(3) *For the purpose of this subsection, property or material described in this subsection shall be deemed to be reasonably available to the defendant if the prosecution provides ample opportunity for inspection, viewing and examination of such property or material at a*

an appropriately secured

1 *law enforcement facility by the defendant, the defendant's attorney and*
2 *any individual the defendant may seek to qualify to furnish expert*
3 *testimony at trial.*

4 Sec. 2. K.S.A. 2010 Supp. 22-3212 is hereby repealed.

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

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Kansas County & District Attorneys Association

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February 14, 2011

**Testimony Regarding SB 74
Submitted by Patrick Vogelsberg
On Behalf of the Kansas County and District Attorneys Association**

Mr. Chair and members of the Senate Judiciary committee:

The Kansas County and District Attorney Association (KCDAA) is in support of SB 74, initiated by the Attorney General's Office. Adding electronic solicitation and sexual exploitation of a child to the offenses that give rise to forfeiture are appropriate additions to the statute.

The KCDAA respectfully request that when the committee works this bill that it considers adding the following offenses by amendment:

1. Rape, K.S.A. 21-3502;
2. Indecent liberties with a child, K.S.A. 21-3503;
3. Aggravated indecent liberties with a child, K.S.A. 21-3504;
4. Criminal sodomy as defined in K.S.A. 21-3505(a)(2) and (a)(3);
5. Aggravated criminal sodomy, K.S.A. 21-3506;
6. Indecent solicitation of a child, K.S.A. 21-3510;
7. Aggravated indecent liberties with a child, K.S.A. 21-3511;
8. Unlawful voluntary sexual relations, K.S.A. 21-3522.

Again, the KCDAA supports the underlying bill, but request that these additional offenses be added. These crimes may also be facilitated through the use of vehicles, computers, video cameras, other electronic equipment or devices that should properly be forfeited because of their use in committing the crimes.

Respectfully submitted,


Patrick Vogelsberg
KCDAA

Senate Judiciary

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Attachment 4