

Approved: August 25, 2011
(Date)

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:38 A.M. on March 4, 2011, in Room 548-S of the Capitol.

All members were present, except Senators Donovan and King, who were 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:

Sarah Fertig, Executive Director, Kansas Sentencing Commission
Mark Bennett, Deputy District Attorney Sedgwick County

Others attending:

See attached list.

The Chairman opened the hearings on **HB 2038 -- Amending the procedure regarding jury trials for upward departure sentences.**

Jason Thompson, Staff Revisor, reviewed the bill.

Sarah Fertig testified in support of **HB 2038 (Attachment 1)**. She stated the bill is necessary to comply with the holding in *State v. Horn* (2010), in which the Kansas Supreme Court held that a waiver of a jury trial does not constitute a waiver of a jury for an upward durational departure sentence proceeding.

Senator Bruce asked, "Did the Supreme Court hold the entire scheme unconstitutional?"

Ms. Fertig responded, "The Court's holding was limited to that portion of subsection (b)(4) of K.S.A. 21-4718 requiring upward durational departure sentence proceedings for defendants who have waived a jury trial. The Court held that.

Written testimony in support of **HB 2038** was submitted by Patrick Vogelsberg, Kansas County and District Attorneys Association (**Attachment 2**).

No testimony in opposition to **HB 2038** was offered.

The Chairman called the committee's attention to the fiscal note for **HB 2038**.

The Chairman closed the hearings on **HB 2038**.

The Chairman opened the hearings on **HB 2057 -- Adding Johnson County sheriff's laboratory and Sedgwick County regional forensic science center as admissible forensic examination centers.**

Jason Thompson, Staff Revisor, reviewed the bill.

Marc Bennett testified, on behalf of the Kansas County and District Attorneys Association, in support of **HB 2057 (Attachment 3)**. He stated the bill would authorize the reports and certificates concerning forensic examination of criminalists or other employees of the Johnson County Sheriff's Laboratory and the Sedgwick County Regional Forensic Science Center to be considered admissible in evidence in any hearing or trial. The bill includes procedural safeguards to insure that an offender's constitutional rights are protected. He added that the bill would result in a savings of time and money for Johnson and Sedgwick counties.

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:38 A.M. on March 4, 2011, in Room 548-S of the Capitol.

Senator Kelly asked, "Who is covered by the current statute?"

Mr. Bennett replied, "Forensic scientists and employees of the KBI, Kansas Highway Patrol and certain federal agencies."

No testimony in opposition to **HB 2057** was offered.

The Chairman called the committee's attention to the fiscal note for **HB 2057**.

The Chairman closed the hearings on **HB 2057**.

The Chairman opened the hearings on **HB 2151 -- Concerning crimes; criminal procedure and punishment; relating to breach of privacy and blackmail.**

Jason Thompson, Staff Revisor, reviewed the bill.

Marc Bennett testified, on behalf of the Sedgwick County District Attorney and the Kansas County and District Attorneys Association, in support of **HB 2151** (Attachment 4). He stated that the bill would expand the crime of breach of privacy and would include the dissemination of, or permitting the dissemination of, any videotape, photograph, film, or image obtained in violation of the restriction explained above on installing or using a concealed device. The bill also increases the penalties for some of the acts that constitute breach of privacy.

Senator Bruce asked, "Does this affect cameras in a dressing room?"

Mr. Bennett responded, "That situation is covered in current law and there is no change in the law relating to cameras in dressing rooms."

Senator Kelly asked, "Is a person who is convicted of violating the statute placed on the sex offender list?"

Mr. Bennett responded, "Yes, if the prosecutor can prove that the violation was committed for sexually motivated purposes."

No testimony in opposition to **HB 2151** was offered.

The Chairman called the committee's attention to the fiscal note and prison bed impact statement for **HB 2151**.

The Chairman closed the hearings on **HB 2151**.

Committee Action:

The Chairman called the committee's attention to **HB 2038 -- Amending the procedure regarding jury trials for upward departure sentences.**

Senator Bruce moved, Senator Haley seconded, that **HB 2038** be passed. The motion was adopted.

The Chairman called the committee's attention to **HB 2057 -- Adding Johnson County sheriff's laboratory and Sedgwick County regional forensic science center as admissible forensic examination centers.**

Senator Lynn moved, Senator Pilcher-Cook seconded, that **HB 2057** be passed. The motion was adopted.

The Chairman called the committee's attention to **HB 2151 -- Concerning crimes; criminal procedure and punishment; relating to breach of privacy and blackmail.**

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:38 A.M. on March 4, 2011, in Room 548-S of the Capitol.

Senator Bruce moved, Senator Haley seconded, that **HB 2151** be passed. The motion was adopted.

Meeting adjourned at 10:29 A.M. The next meeting is scheduled for March 7, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb March 7, 2011

[illegible]

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Honorable Ernest L. Johnson, Chair
Honorable Richard M. Smith, Vice Chair
Sarah E. Fertig, Executive Director

Sam Brownback, Governor

March 4, 2011

**Testimony in support of HB 2038
Senate Judiciary Committee**

Mr. Chairman and members of the Committee, thank you for the opportunity to speak in support of HB 2038 on behalf of the Kansas Sentencing Commission. This bill would amend current sentencing law to comply with a recent Kansas Supreme Court holding.

In August 2010, the Kansas Supreme Court in *State v. Horn*, Kansas Supreme Court No. 97,872 (8/20/2010), held that a portion of the current statutory procedure for upward durational departure sentence proceedings is unconstitutional. Under Kansas law, the sentencing guidelines grid in K.S.A. 21-4704 must be applied for crimes falling within the grid, unless the judge finds substantial and compelling reasons to impose a departure. Any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be proved to a jury beyond a reasonable doubt.

In *Horn*, the Supreme Court objected to current language in K.S.A. 21-4718(b)(4) requiring upward durational departure sentence proceedings for defendants who have waived a jury trial, i.e. by pleading guilty, to be heard by the court, not by a jury. The Court held that waiver of a jury trial does not equate to a waiver of a jury for an upward durational departure sentencing proceeding.

This bill would amend K.S.A. 21-4718(b)(4) by removing language requiring the court to conduct an upward durational departure sentence proceeding when the defendant has waived a jury trial. The effect of this bill would be to protect a defendant's constitutional right while allowing for effective administration of justice.

Thank you for your consideration of this bill. I am happy to stand for questions the Committee may have.

Sarah Fertig
Executive Director
Kansas Sentencing Commission

Senate Judiciary
3-4-11
Attachment 1



Kansas County & District Attorneys Association

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www.kcdaa.org

March 4, 2011

**Testimony Regarding HB 2038
Submitted by Patrick Vogelsberg
On Behalf of the Kansas County and District Attorneys Association**

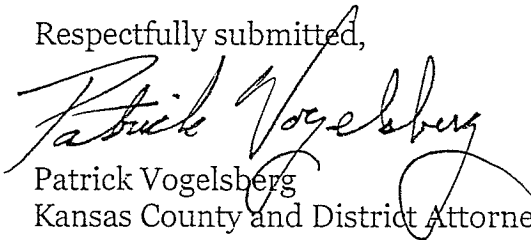
Honorable Chairman Owens and Members of the Senate Judiciary Committee:

This testimony is submitted on behalf of the Kansas County and District Attorney Association (KCDAA) and is in support of HB 2038. It is the KCDAA's position that this is the statutory fix that is necessary due the recent *State v. Horn* holding which stated that unless a defendant has validly waived his or her right to a jury for an upward durational departure sentence proceeding, a court-conducted departure proceeding is unconstitutional.

The bill accomplishes this by striking the unconstitutional language and thus, allows that only after the jury at the upward durational departure sentence proceeding has been waived may the proceeding be conducted by the court.

The House passed HB 2038 118-0-0-7. The KCDAA stands in support of the Sentencing Commission proposal and request that the committee pass HB 2038 favorably. Thank you for your time and consideration of HB 2038.

Respectfully submitted,



Patrick Vogelsberg
Kansas County and District Attorney Association



Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

March 4, 2011

Testimony Regarding HB 2057
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of the Kansas County and District Attorneys Association

Honorable Chairman Owens and Members of the Senate Judiciary Committee:

Thank you for the opportunity to address you regarding House Bill 2057. On behalf of the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to K.S.A. 22-3437, Forensic Examinations; admissibility; certification; notices of proffer and objection to admission.

K.S.A. 22-3437 allows the use of forensic reports from certain delineated laboratories at "any hearing" when a certificate has been prepared by the analyst, supported by written declaration or sworn to before a notary and notice has been provided to the opposing party 20 days prior to the hearing. As necessary, an objection may be lodged by the opposing counsel. In this fashion, these procedural safeguards alleviate issues regarding hearsay and confrontation raised in Melendez-Dias v. Massachusetts.

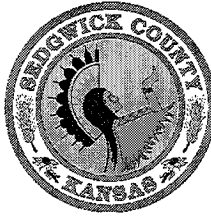
The proposal of the KCDA is to simply add the Johnson County sheriff's laboratory and the Sedgwick County regional forensic science center to the list of laboratories already in the statute. Time and expense to the many counties that utilize these facilities can be saved by this addition, while still ensuring the protection of due process rights of the accused.

The House passed HB 2057 121-0-0-4. Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District

Senate Judiciary
3-4-11
Attachment 3



Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

March 4, 2010

**Testimony Regarding HB 2151
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of Nola Tedesco Foulston, District Attorney
Eighteenth Judicial District
And the Kansas County and District Attorneys Association**

Honorable Chairman Owens and Members of the House Senate Judiciary Committee:

Thank you for the opportunity to address you regarding House Bill 2151. On behalf of the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to the new Breach of Privacy statute (formerly Eavesdropping & Blackmail) now found at sections 64 and 171 of chapter 136 of the 2010 Session Laws of the State of Kansas.

The proposal contained in HB 2151 adds "disseminating or permitting the dissemination of any video tape, photograph, film or image obtained in violation of subsection(a)(6)" (page 2 lines 1-2) to the portion of the law formerly known as Eavesdropping and adding the same basic language to the portion containing the former Blackmail statute (page 2, lines 31-33). Additionally, felonies are suggested at various severity levels for violations of the statute.

The proposed legislation addresses a shortcoming in current law if the state were to encounter a situation akin to the Rutgers University case, wherein one student surreptitiously recorded his 18 yr old roommate engaged in a consensual sexual encounter then disseminated the recoding onto the internet. Currently, we could only charge the recording as a class A misdemeanor under Eavesdropping while no crime specifically exists to address the dissemination of the recoding onto the internet.

The proposal would make the acts already set forth in (a)(6) -- surreptitiously using devises to "videotape, film, photograph or record" someone (no matter the victim's age) "in a state of undress" -- severity level 8 person

felonies. The proposal also suggests that the act of disseminating said material would be a severity level 5 person felony.

Additionally, there are situations – unrelated to the Rutgers University case – where Defendants surreptitiously record themselves in a sexual act with a victim then threaten to show the recording to others unless the victim agrees to engage in additional sexual acts, submit to additional photos, et cetera. In such a circumstance, current Kansas law would only criminalize such conduct as a class A misdemeanor under Blackmail (or the amended Breach of Privacy under subsection [b]). We propose this behavior be set as a severity level 4 person felony.

There is always the concern that a statute like this could criminalize “sexting” engaged in by age-mate teens. The language in the current statute, “. . . with the intent to invade the privacy of that other person,” has protected against this potentiality in the past and would continue to do so under the proposed revision(s).

One final note – HB 2151 passed the House 115-6-0-4. Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District