Approved: August 25, 2011
(Date)

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:35 A.M. on March 9, 2011, in Room 548-S of the Capitol.

All members were present, except Senators Donovan and Vratil, 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:
Steve Howe, District Attorney, Johnson County
Stephen Tatum, Judge 10th Judicial District
Steven J. Obermeier, Senior Deputy District Attorney, Johnson County
Alice Adams, Clerk of Geary County District Court
Jerry Younger, State Transportation Engineer, KDOT
Leslie Moore, Information Services Division Manager, KBI

Others attending:
See attached list.

The Chairman opened the hearings on **HB 2010 -- Offenses and conduct giving rise to forfeiture**.

Jason Thompson, Staff Revisor, reviewed the bill.

Steve Howe testified in support of **HB 2010** (Attachment 1). He stated the bill would add several crimes to the list of conduct and offenses giving rise to civil forfeiture pursuant to the Kansas Asset Seizure and Forfeiture Act. He added that if money or property (derived from the unlawful act) remains after restitution is made to the victims of the crime, the Forfeiture Act would authorize the money or property to be seized and used for the benefit of law enforcement agencies and county and district attorney's offices.

No testimony in opposition to **HB 2010** was offered.

The Chairman called the committee's attention to the fiscal note for **HB 2010**.

The Chairman closed the hearings on **HB 2010**.

The Chairman opened the hearings on **HB 2118 -- Amending the requirements of offender appearance bonds and supervision costs**.

Jason Thompson, Staff Revisor, reviewed the bill.

Stephen Tatum testified in support of **HB 2118** (Attachment 2). He stated the bill was introduced in response to a recent Kansas Court of Appeals decision, *Kansas v. Gardner,* in which the Court held that the total of all bond supervision costs could not exceed $15 per week. Judge Tatum suggested a clarifying amendment in his testimony.

Steven J. Obermeier testified in support of **HB 2118** (Attachment 3). He stated the bill would require a probationer, as a condition of probation, to reimburse the county or the state for all of the costs associated with their bond supervision.

No testimony in opposition to **HB 2118** was offered.

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on March 9, 2011, in Room 548-S of the Capitol.

The Chairman called the committee's attention to the fiscal note for **HB 2118**.

The Chairman closed the hearings on **HB 2118**.

The Chairman opened the hearings on **HB 2070 -- Requiring plaintiff or plaintiff's attorney to notify defendants of payment of appraisers' award within 15 days**.

Jason Thompson, Staff Revisor, reviewed the bill.

Alice Adams testified in support of **HB 2070** (Attachment 4). She stated that the district court clerk and the plaintiff's attorneys are sending out duplicate notice of the appraisers awards. There is no need for the duplication. She requested the committee to delete the amendment added by the House Committee of the Whole, which would prevent KDOT from appealing an appraiser's award.

Jerry Younger testified in opposition to the provision of **HB 2070** which would prevent KDOT from appealing an appraiser's award (Attachment 5). He stated that the provision would leave KDOT without the tools necessary to be a good steward of public funds with respect to the acquisition of rights-of-way. He noted the provision was retroactive to January 1, 2009. Since that time KDOT has appealed 19 cases from which the state saved $1,288,200 all of which would have to be refunded.

Senator King requested that a revised fiscal note be prepared.

Senator Umbarger noted that the restriction applies only to condemnation appeals by KDOT.

The Chairman expressed concern with the precedent set by the bill and stated the bill would not be advanced to the full Senate unless the provision relating to KDOT is deleted.

The Chairman closed the hearings on **HB 2070**.

The Chairman opened the hearings on **HB 2329 -- Allowing the Kansas bureau of investigation to access expunged records under certain circumstances**.

Jason Thompson, Staff Revisor, reviewed the bill.

Leslie Moore testified in support of **HB 2329** (Attachment 6). She stated that the bill clarifies the duties of district and municipal courts to provide the KBI access to expunged arrests, dispositions and confinement information. The information would be provided at no charge to the KBI. She stated the portion of the bill relating to relief of disabilities for the purpose of firearm prohibitions is necessary to qualify for a grant from Bureau of Alcohol, Tobacco and Firearms. Ms. Moore distributed copies of proposed amendments to the bill (Attachment 7).

Senator Pilcher-Cook, in regard to the proposed amendment on page 1, in line 25, asked, "How would a court determine there is clear and convincing evidence that something is not going to happen?"
Ms. Moore responded, "The language was approved by the ATF."

Senator Bruce asked, "What is the name of the federal law cited in the balloon amendment at the top of page 1 of the balloon? Shouldn't the citation include a reference to the year enacted?"
Ms. Moore responded, "National Background Check Improvement Act of 2008."

No testimony in opposition to **HB 2329** was offered.

The Chairman called the committee's attention to the fiscal note for **HB 2329**.

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on March 9, 2011, in Room 548-S of the Capitol.

The Chairman closed the hearings on **HB 2329**.

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

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: WED MARCH 9, 2011

NAME	REPRESENTING
AARON JOHNSON	JOHNSON COUNTY COURTS
Ed Klumpp	KACP/KSA/KPOA
T.J. Cahill	Senator Pyle
David Clark	Intern - Vratil
Claire Crawford	Intern - Sen. Kelly
Kevin Barone	KPBBA
Leslie Moore	KBI
DAVID HUTCHINGS	KBI
Tayler Miles	southern leavenworth county leadership
Owen Lewis	" "
[illegible]	"
Sumlee Hollon	" "
Steve Wassom	Securities Comm.
Michael Baugh	KDCA
John P. Arnold	KDCA
Nathan Lindsey	Kearney & Associates
Tim Strodtman	KS Pork Association
Justin McFarland	KDOL

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: WED MARCH 9, 2011

NAME	REPRESENTING
Sarah Fertig	KSC
Steve C. Obermeier	Johnson County DA's Office
Stephen Howe	Johnson County D.A.
Howe Stephen Tatum	Tenth Judicial District
Tera Mays	KDOT
Lindsey Douglas	KDOT
Jessica Farris	Leavenworth County Leadership development
Tonya Barnes	" " "
Cindy Dunn	" "
Amber Mcmullough	" "
Georgia Brown	" "
Ashley Crane	" "
Mandy Schlagete	" "
Kyle Smith	Atty General
Alice Adams	KABCCA
Lisa Wilson	OJA
Chris Mechler	OJA
	SCt.
Whitney Jones	KS Bar Assn.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 9, 2011

NAME	REPRESENTING
Mary Jane Stankiewicz	KARA
Leslie Kaufman	KS Coop Council
Ruth Glover	KS Human Rights Commission
Jackie Martin Paz	KCC
Luke Bell	KS Association of REALTORS
Judy Bowman	ST. BK. Dept
Julie Pennington	LPA
Nancy L Humphreys	ASPCA
Dawn Palmberg	KWO
Tracy Streeter	KWO
Mike Beam	KS Lvstk Assn

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

STEPHEN M. HOWE, DISTRICT ATTORNEY

February 28, 2011

Senate Judiciary Committee
Attention: Tim Owens, Chairman
300 SW 10th St., Room 536N
Topeka, Kansas 66612

Re: House Bill 2010

Dear Chairman Owens,

Thank you for the opportunity to submit our written response in support of HB 2010.

Over the last several years, our office has prosecuted numerous fraud cases where we were unable to seize assets that were used to facilitate the crime and/or were derived directly from the crime due to the lack of an asset forfeiture statute to cover these types of cases. Perpetrators use computers, printers, check or credit card software, scanners, cameras, shredders, skimmers and electronic storage devices to obtain and use victim's personal information and or financial information to steal from them. Many times these perpetrators use these monies to purchase personal property or deposit them into their shell companies' bank accounts.

During many of these large scale embezzlement cases, we are able to freeze bank accounts with cash obtained from the defendant's illegal acts. However, we are unable to identify all of the victims of the crime due to a variety of factors. Thus, funds remain in the account after the restitution has been paid out. The forfeiture statute would allow us to seize the cash or property obtained from their illegal acts. This would prevent the perpetrator from profiting from their criminal conduct. The forfeiture statute could be used for the benefit of the law enforcement agencies and county and district attorney's offices.

A good example of the potential benefits of this amendment to the current forfeiture statute is our prosecution of the company ASP in 2009. This company legally obtained bank routing information, primarily from senior citizens, for the purpose of providing health discount cards. They would then repeatedly transfer money from the victim's account without their permission. We were able to seize approximately $270,000 worth of assets from a multi-million dollar fraud scam. Approximately $76,000 could be directly traced to victims. We have been able to secure the remaining $194,000 through an inter-agency agreement with the United States Secret Service by utilizing the federal forfeiture process.

PHONE NUMBER: (913) 715-3000
JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051
FAX NUMI

This bill would allow us to do what the federal law enforcement officers already have authority to do, while keeping the proceeds at the state and local level. This would allow us to quickly reimburse victims and also move forward with a state forfeiture action.

There are numerous cases throughout the year that law enforcement and prosecutors could benefit from this amendment. It would have little, if any, negative impact financially on the State or local governments. In fact, it could insure that victims are paid in full, result in a windfall to those same law enforcement agencies, and eliminate the perpetrators ability to profit from their illegal activity.

We would ask this committee to support this bill as drafted. I thank you for your time and would be happy to answer any questions you may have regarding the proposed legislation.

Sincerely,

Stephen M. Howe
Johnson County District Attorney
P.O. Box 728
Olathe, KS 66051

JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051
PHONE NUMBER: (913) 715-3000
FAX NUMBER: (913) 715-3050

STATE OF KANSAS
TENTH JUDICIAL DISTRICT

STEPHEN R. TATUM
DISTRICT JUDGE, DIVISION 5
COURTHOUSE
OLATHE, KANSAS 66061

KRISTIE HUDSON
ADMINISTRATIVE ASSISTANT DIVISION 5
COURTHOUSE
OLATHE, KANSAS 66061

March 9, 2011
Honorable Tim Owens, Chair
Senate Judiciary Committee
Kansas Statehouse

Re: HB 2118

Members of the Committee:

In 2001, the Kansas Legislature passed legislation (KSA 22-2802 sub. 12) specifically allowing the Court to order a defendant to pay $5 per week for the cost of bond supervision. Since that time, the Kansas Legislature has approved subsequent increases with the current rate of up to $15 per week approved in 2009.

HB 2118 was introduced as result of the recent Kansas Court of Appeals ruling Kansas v. Gardner, in which the court ruled that the total of all bond supervision costs could not exceed $15.00 per week. Clearly, this was not the intention of the legislation as it was proposed in 2001 through the efforts of Johnson County justice officials. Most defendants on pretrial release are required to complete many conditions to be allowed released on bond. These conditions may include drug testing at a rate of $18 per screen, house arrest at a rate of $14 to $16 per day, SCRAM (24 alcohol detection at the rate of $11 per day, and/or completion of evaluations and related treatment recommendations. Knowing all these costs could be incurred, it is unrealistic to implement a pretrial program limited to a total of $15 dollars per week in costs. It was the original intention of the legislation for the bond supervision fees to be applied to the direct cost of the supervision personnel.

At this time the following is suggested as a language clarification to the bill that passed out of the House.

Under line #34 on page one please insert the following language:
(e) place the person under the supervision of a court services officer responsible for monitoring the person's compliance with any conditions of release ordered by the magistrate.
The magistrate may order the person to pay for the cost of the supervision provided by the court services department not to exceed $15 per week. All other costs associated with conditions for compliance are at the additional expense to the defendant.

This is the only language change seen as necessary to clarify the statute. Your support of this change in the language is needed to allow for Judicial Districts across Kansas who provide pretrial services to continue in their efforts.

Thank you for your consideration.

Stephen R. Tatum
District Court Judge
10th Judicial District

Senate Judiciary
3-9-11
Attachment 2

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

STEPHEN M. HOWE, DISTRICT ATTORNEY
Steven J. Obermeier, Senior Deputy District Attorney

March 9, 2011

Honorable Tim Owens, Chair
Senate Judiciary Committee
Kansas Statehouse, Topeka, Kansas

Re: House Bill 2118

Dear Chairman Owen and Members of the Committee:

The Kansas Court of Appeals recently ruled that, notwithstanding a sentencing judge's broad discretion in ordering conditions of probation, "the exercise of that discretion cannot thwart the clear intent of the Legislature expressed in a specific statute." *State v. Gardner*, 44 Kan.App.2d __, 244 P.3d 1292 (2011). The "thwarted" statute at issue, K.S.A. 2009 Supp. 22-2802, permits a judge to order a person released on bond to "to pay for any costs associated with the supervision of the conditions of release of the appearance bond in an amount not to exceed $15 per week of such supervision." But the Court of Appeals ruled that "the district court does not have discretion to ignore the [$15 per week] limit on costs imposed by the Legislature" and may not order the entire payment of costs associated with pre-trial bond supervision as a condition of probation. This, even though K.S.A. 21-4610(c)(7) authorizes a judge to order a probationer to "pay a fine or costs, applicable to the offense."

The Court of Appeals interpreted K.S.A. 22-2802 to mean that Gardner could not be ordered, as a condition of probation, to pay the costs of an alcohol monitor that he was required to wear as a condition of bond. Under the Court of Appeals' interpretation, the government would have to absorb the bond supervision costs exceeding $15 per week. This will result in more criminal defendants remaining in jail during the pendency of their cases. The holding of *State v. Gardner* is not what the legislature intended to occur. However, the current attitude of the appellate courts, as the Kansas Supreme Court recently stated in *State v. Horn*, 291 Kan. 1, 12, 238 P.3d 238 (2010), is:

> We recognize that the result we reach today is unlikely to be what the legislature would have intended to occur. However, " '[n]o matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct."

House Bill 2118 will accomplish this legislative intent by requiring probationers, as a condition of probation, to reimburse the county or State for **all** of the costs associated with their bond supervision. Thank you for considering its passage.

Respectfully,

Steven J. Obermeier

Senate Judiciary
3-9-11
Attachment 3

JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051-0728
PHONE NUMBER: (913) 715-3057
FAX NUMBER: (913) 715-3050

Kathleen Collins, President
Wyandotte County
710 N 7th St. Mezzanine
Kansas City, KS 66101
913-573-2946

K.A.D.C.C.A.

Tiffany Gillespie, President Elect
Trego County
216 North Main
WaKeeney, Ks 67672
785-743-2148

SENATE JUDICIARY COMMITTEE
Senator Tim Owens, Chair

TESTIMONY IN SUPPORT OF HOUSE BILL 2070
Notice of Payment of Appraisers' Award in Condemnation Procedures
March 9, 2011
Alice Adams, Clerk of the District Court
Geary County District Court
Eighth Judicial District

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of the Kansas Association of District Court Clerks and Administrators regarding House Bill 2070.

In condemnation cases filed under K.S.A. Chapter 26, Article 5, after the petition is filed, the court appoints appraisers to value the property in question. The appraisers file their report in the office of the clerk of the district court with their finding, pursuant to K.S.A. 26-505. The condemner pays the amount stated in the report to the clerk of the district court as set out in K.S.A. 26-507(a). The condemner sends notice of the report to all parties as required by statute.

Clerks comply with the statute, but we are finding that the plaintiff's attorneys are generally sending the notice as well. All parties are aware of the statutory time lines. We believe that there is no need for duplication, and that the responsibility should lie with the attorneys, as does the rest of the process.

The House Judiciary Committee recommended the bill favorably, but a House floor amendment was added that strikes the Kansas Department of Transportation's right to appeal from an appraiser's award. The House vote on the amended bill was 82 – 38. We would ask that this committee strike the House floor amendment, except that Section 2 be retained, and amended to include language consistent with Section 1 of the bill.

Thank you for your time and consideration.

Senate Judiciary
3-9-11
Attachment 4

Cecil Aska, Secretary
Geary County
P O Box 1147
Junction City, KS 66441
785-762-5221 x 1435

Teresa Lueth, Treasurer
Saline County
300 W. Ash, PO Box 1760
Salina, KS 67402-1760
785-309-5831

Ann Mcnett, Past President
Barber County
118 E Washington
Medicine Lodge, KS 67104
620-886-5639

Kansas Association of District Court Clerks and
Court Administrators (KADCCA)
Proposed Amendment
Senate Judiciary Committee
March 9, 2011

[As Amended by House Committee of the Whole]

Session of 2011

HOUSE BILL No. 2070

By Committee on Judiciary

1-24

AN ACT concerning eminent domain; relating to ~~notification of payment of~~ appraisers' award~~;~~**[, notification and restrictions]**; amending K.S.A. 2010 Supp. **[**26-507~~, 26-508~~ **and]** 26-510 and repealing the existing ~~section~~ **[sections]**.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2010 Supp. 26-510 is hereby amended to read as follows: 26-510. (a) The ~~clerk of the district court~~ *plaintiff or the plaintiff's attorney* shall notify the defendants within 14 days that the plaintiff has paid the amount of the appraisers' award pursuant to K.S.A. 26-507, and amendments thereto.

(b) The defendants may by order of the judge and without prejudice to the defendants' right of appeal withdraw the amount paid to the clerk of the court as the defendants' interests are determined by the appraisers' report.

[Sec. 2. K.S.A. 2010 Supp. 26-507 is hereby amended to read as follows: 26-507. (a) Payment of award; vesting of rights. If the plaintiff desires to continue with the proceeding as to particular tracts the plaintiff, within 30 days from the time the appraisers' report is filed, shall pay to the clerk of the district court the amount of the appraisers' award as to those particular tracts and court costs accrued to date, including appraisers' fees. [*~~Except as provided in subsection (c) of K.S.A. 26-508, and amendments thereto,~~*** ~~such~~]** Such

payment shall be without prejudice to plaintiff's right to appeal from the appraisers' award. Except as provided further, upon such payment being made, the title, easement or interest appropriated in the land condemned shall thereupon immediately vest in the plaintiff, and it shall be entitled to the immediate possession of the land to the extent necessary for the purpose for which taken and consistent with the title, easement or interest condemned. If such property contains a defendant's personal property, a defendant shall have 14 days from the date such payment is made to the clerk of the district court to remove such personal property from the premises. The plaintiff shall be entitled to all the remedies provided by law for the securing of such possession. The [~~clerk of the district~~

court.] **shall notify the interested parties that the appraisers' award has been paid and that the defendant shall have 14 days from the payment date to remove personal property from the premises.**

(b) Abandonment. If the plaintiff does not make the payment prescribed in subsection (a) for any of the tracts described in the petition, within 30 days, from the time the appraisers' report is filed, the condemnation is abandoned as to those tracts, and judgment for costs, including the appraisers' fees together with judgment in favor of the defendant for the reasonable expenses incurred in defense of the action, shall be entered against the plaintiff. After such payment is made by the plaintiff to the clerk of the court, as provided in subsection (a), the proceedings as to those tracts for which payment has been made can only be abandoned by the mutual consent of the plaintiff and the parties interested in the award.]

plaintiff or the plaintiff's attorney

~~[Sec. 3. K.S.A. 2010 Supp. 26-508 is hereby amended to read as follows: 26-508. (a) *Except as provided in subsection (c),* if the plaintiff, or any defendant, is dissatisfied with the award of the appraisers, such party, within 30 days after the filing of the appraisers' report, may appeal from the award by filing a written notice of appeal with the clerk of the district court. The appeal shall be deemed perfected upon the filing of the notice of appeal. In the event any parties shall perfect an appeal, copies of such notice of appeal shall be mailed to all parties affected by such appeal, within seven days after the date of the perfection thereof. An appeal by the plaintiff or any defendant shall bring the issue of damages to all interests in the tract before the court for trial *de novo.* The appeal shall be docketed as a new civil action, the docket fee of a new court action shall be collected and the appeal shall be tried as any other civil action. The only issue to be determined therein shall be the compensation required by K.S.A. 26-513, and amendments thereto.~~

~~(b) This section, as amended by this act, shall be construed and applied prospectively, as well as retroactively to July 1, 2003, and shall apply to all eminent domain proceedings pending on or commenced after July 1, 2003.~~

~~*(c) (1) The department of transportation through the secretary of transportation, as plaintiff, shall not have the right to appeal from the appraiser's award.*~~

~~*(2) This subsection shall be construed and applied prospectively, as well as retroactively to January 1, 2009, and shall apply to all eminent domain proceedings pending on or commenced after January 1, 2009.*~~]

Sec. ~~2.~~ **[4.]** K.S.A. 2010 Supp. **[26-507, ~~26-508~~ and]** 26-510 ~~is~~ **[are]** hereby repealed.

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

Office of the Secretary of Transportation
Dwight D. Eisenhower State Office Building
700 S.W. Harrison Street
Topeka, KS 66603-3745

Kansas

Phone: 785-296-3451
Fax: 785-296-1095
Hearing Impaired - 711
publicinfo@ksdot.org
http://www.ksdot.org

Deb Miller, Secretary | Kansas Department of Transportation | Sam Brownback, Governor

TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE

REGARDING HOUSE BILL 2070
RELATING TO EMINENT DOMAIN PROCEDURE

March 9, 2011

Mr. Chairman and Committee Members:

I am Jerry Younger, Deputy Secretary for Engineering and State Transportation Engineer at the Kansas Department of Transportation. HB 2070 would amend current eminent domain law to prohibit the Department of Transportation through the Secretary of Transportation, hereinafter referred to as KDOT, from appealing appraisers' awards to the district court. The exclusion would be applied retroactively and apply to all eminent domain proceedings pending on or commenced after January 1, 2009. An identical prohibition was proposed last legislative session but failed to make it out of the House.

Many governmental entities and utilities have the power of eminent domain under Kansas law including state agencies, cities, airport authorities, etc. All condemning authorities follow the procedures set out in K.S.A. 26-501 et seq. This process is used when governmental agencies are unable to reach an acquisition agreement with the owner of property needed for public purposes.

Prior to engaging in the eminent domain procedures KDOT is required to first have the property to be acquired appraised pursuant to Uniform Standards of Professional Appraisal Practice (USPAP) and Federal Highway Administration (FHWA) standards and good faith negotiations to reach a negotiated purchase must take place. It is only when that process fails that eminent domain actions are commenced. The focus of that process is to determine the difference between the fair market value of the landowner's property before the taking by the governmental entity, and the fair market value of the portion of the property remaining, if any, in the hands of the landowner after the taking. This difference is the just compensation to be paid by the governmental entity to the landowner.

During the first hearing in the statutory process, the court appoints three disinterested residents of the county in which the eminent domain proceeding is pending to serve as court appointed appraisers. Only two of the three appointed "appraisers" must have "experience in the valuation of real estate" and that experience does not have to be appraisal experience. It can be experience as a real estate agent, banker, insurance agent, auctioneer, or just experience privately buying and selling real estate, etc. The court provides the appraisers with a set of instructions and the appraisers hold a hearing which is informal and not subject to the rules of evidence. Property owners are allowed at that hearing to give whatever assessment of value they desire.

Senate Judiciary
3-9-11
Attachment 5

No judge or jury reviews or consents to the award given by the appraisers. The only check on the work of these appraisers is that any landowner or condemning authority may appeal, pursuant to K.S.A. 26-508, the award and have just compensation for the taking determined by a jury. At the conclusion of this administrative process, and before any appeal is decided, the condemning authority must pay the awards to the Clerk of the District Court for distribution to the landowners in order to take possession of the property and begin construction.

Under existing law, if a governmental entity files an appeal of the appraisers' award and the jury finds the amount owed to the landowner to be greater than or equal to the amount determined by the court appointed appraisers, then the governmental entity is required to pay all of the landowner's costs of the appeal including their attorney's fees. This provision increases the risk to governmental entities of taking an appeal and, as a result significantly limits the appeals taken by governmental entities.

KDOT very carefully analyzes the cases where court appointed appraisers' awards exceed the KDOT appraisal amount on the tract of land before making the decision to appeal those awards. In addition to the potential exposure to an attorney's fees and costs award, KDOT looks at the dollar difference between the award and the agency's appraisal; the percentage of the increase; legal issues presented by the situation including whether adverse travel, severance, or police power issues are raised by the situation; whether there are related issues outstanding with the landowner such as relocation assistance payments; the jury appeal of KDOT's position; cost of prosecuting an appeal; and the potential for bad case law to be created if the legal issues on appeal are decided adversely to KDOT.

HB 2070 would continue to allow all condemning authorities, except KDOT, and all landowners to appeal appraisers' awards. If enacted the result would be a situation where whether a landowner may be subjected to an appeal by the condemning authority is dependent on the identity of the condemning authority. Landowner "X" who is condemned by KDOT will not be subject to an appeal and landowner "Y" who is condemned by any other condemnor is subject to a possibility of having the appraisers' award for their property be appealed by the condemnor. KDOT administers many local projects and often handles the property acquisition for those projects. If enacted, this bill will result in local units of government having to do that work, in order to enjoy the benefit of having appeal rights. Many local units of government are ill equipped to handle these property acquisition matters.

If enacted, this bill would leave KDOT with no tools necessary to be a good steward of public funds with respect to right of way acquisition. KDOT would have no recourse but to pay the award or abandon the project in cases where the court appointed appraisers award landowners more than the property is worth or where the appraisers misinterpret or disregard the instructions of the court. Further, the bill will effectively remove KDOT's ability to challenge the instructions given by the Court to the appointed appraisers as well since the only avenue for doing so under existing law is through the appeal of the court appointed appraisers' award. This leaves trial judges free to instruct in ways not in conformity with statutory requirements or case law applicable to governmental takings in general when KDOT is the condemnor and there will be no recourse to appeal within the context of the condemnation action.

The dollar effect of this legislation on KDOT is difficult to determine due to the many variables that would have an impact on that calculation. The variables that would impact the figure would include, among others:

- How much land is needed in any given year to construct projects;
- How many of the needed tracts can be acquired through negotiation;
- The extent to which the awards given by the court appointed appraisers follow the instructions given to them by the court;
- The extent to which the trial court judge instructs the appraisers according to established law; and
- The extent to which the appraisers appointed by the court understand and apply the instructions given by the court.

During calendar years 2008, 2009, and 2010, KDOT filed appeals on only 19 tracts of land, resulting in 17 litigation cases, out of the hundreds of tracts which were acquired during that time period for KDOT projects[1]. The amounts awarded by the court appointed appraisers on those 19 tracts were 436% of, or over 4 times the amounts supported by the KDOT appraisals on the tracts. The difference in dollars between the court awards and the KDOT appraisals was just under $10,000,000. This increase in compensation on those tracts would have increased the project costs by the nearly $10,000,000 difference, reducing the funds available for other projects.

The impact would not end there, however. There are a number of other likely impacts if this legislation were passed. First, KDOT, recognizing that it will have no recourse from excessive appraisers awards, will be placed in a position where it will have to hedge its bets and be willing to negotiate higher settlements overall to avoid having to go through a process where the values are taken completely out of its control without recourse. Landowner lawyers will understand immediately that they can hold out for more in negotiations knowing KDOT will not want to "roll the dice" with the court appointed appraisers. This will increase all negotiated settlements (on all tracts, not just the ones that would have gone to appeal under the current system) by some unknown amount. Alternatively, if the demands are just too high, this will make reaching negotiated settlements more difficult and more tracts will go to condemnation, increasing the cost of those proceedings.

A second, and perhaps more concerning impact resulting from passage of this legislation will be that in KDOT condemnations, the court appointed appraisers will be operating completely unchecked by any review on the awards they give to landowners. There is no review of these awards by the court so the three court appointed appraisers will be the final determiner of value to be paid.

Finally, the language of this bill makes it retroactive to cases that were pending or commenced after January 1, 2009. Of the 19 cases appealed by KDOT during 2008, 2009, and 2010, all were pending as of that date or filed after that date. Of those cases two have been tried to a jury, one was disposed of at the trial court level by stipulated verdict, and eleven have been settled. The combined return to KDOT on these fourteen cases is approximately $1,288,200. It appears that KDOT would have to return those sums to the landowners from whom they were collected after trials or negotiated settlements. One of those settlements also resolved a companion relocation assistance appeal which would be reinstated if the settlement is voided and additional relocation benefits could be paid to that owner as well.

[1] Of those 19 tracts of land, five tracts were consolidated in to two KDOT appeals.

It is worth noting that KDOT is currently litigating twelve condemnation appeals. Of those appeals, KDOT initiated three; the nine other appeals were initiated by interested landowner(s). KDOT has not filed a condemnation appeal since January of 2009 when it initiated eleven appeals in the District Court of Finney County, Kansas. Of the three appeals KDOT filed and is currently litigating two of them are in the District Court of Finney County, Kansas. The pertinent details of the three appeals filed by KDOT are:

- Finney County: Commenced after January 1, 2009.
    1. 2009-CV-09:
        - KDOT Offer: $482,535
        - Court-Appointed Appraisers' Award: $5,048,785
        - Difference:$4,566,250
    2. 2009-CV-13:
        - KDOT Offer: $342,835
        - Court-Appointed Appraisers' Award: $1,720,810
        - Difference: $1,377,975
- Pratt County: Filed in 2008, Pending as of January 1, 2009.
    1. 2008-CV-08:
        - KDOT Offer: $500.00
        - Court-Appointed Appraisers' Award: $120,000
        - Difference: $119,500

Over time as the chilling effect of this legislation on right of way negotiations plays out, and depending on the amount of right of way acquisition needed for projects, there may be the need for additional right of way staff to deal with the more protracted negotiations that are an inevitable result of removing one of the checks and balances in the system to the benefit of one side of the negotiations and not the other. The cost of this additional staff will be above and beyond the increased payments to landowners.

KDOT strongly opposes this legislation. If this were to pass, Kansas would be the only state in the United States to prohibit a transportation department from appealing a condemnation order or award. The current system has a good set of checks and balances in it already which protect the landowners from overreaching by governmental entities in the eminent domain process. It has been in place for a very long time and has served both sides in the process very well. If landowners are aggrieved in the process and their position turns out to be correct on the value of their property, the process makes them whole by affirming or increasing the award of damages as well as requiring the condemning authority to pay their costs.

Thank you for allowing me to testify on HB 2070. I will gladly stand for questions at the appropriate time.

Kansas Bureau of Investigation

Robert E. Blecha
Director

Derek Schmidt
Attorney General

TESTIMONY
Before the Senate Judiciary Committee
HB 2329
Leslie Moore
Information Services Division Manager
David Hutchings
Special Agent in Charge
Kansas Bureau of Investigation
March 9, 2011

Senator Tim Owens, Chair 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.

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.

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

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 (0 3)

U.S. D ment 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

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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@atf.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

Or who is prohibited from shipping, transporting, possessing or receiving firearms or ammunition by 18 USC § 922 (d)(4) or (g)(4).

Session of 2011

HOUSE BILL No. 2329

By Committee on Corrections and Juvenile Justice

2-11

AN ACT concerning courts; relating to expunged records; relating to petitions for relief; amending K.S.A. 22-4701 and 22-4705 and K.S.A. 2010 Supp. 12-4516a, 22-2410 and 38-2312 and section 254 of chapter 136 or the 2010 Session Laws of Kansas repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) An individual who has been adjudicated as a mentally ill person subject to involuntary commitment for care and treatment, may petition for relief of disabilities for the purpose of firearm prohibitions imposed under state and federal laws.

(b) A petitioner shall submit such petition to a court of competent jurisdiction within this state.

(c) The court may only consider petitions for relief due to mental health adjudications or commitments that occurred within the state.

(d) The court shall consider the petition for relief, in accordance with the principles of due process. Such petitioner shall submit, and such court shall receive and consider:

(1) The circumstances regarding the firearm disability imposed by federal law;

(2) such petitioner's mental health records;

(3) such petitioner's criminal history records; and

(4) such petitioner's reputation, developed through character witness statements, testimony or other character evidence.

(e) The court shall grant relief only if such court determines that:

(1) The petitioner will not be likely to act in a manner dangerous to public safety; and

(2) granting such relief would not be contrary to the public interest.

(f) ~~(1)~~ If the court denies the petition for relief, the petitioner may petition a court of proper jurisdiction for a de novo judicial review of the court's decision to deny such petition.

~~(2) The reviewing court may give deference to the decision of the court denying such relief.~~

(g) Documentation of a granted petition shall be submitted to the Kansas bureau of investigation. The Kansas bureau of investigation shall immediately cause such order to be entered into the appropriate state and federal databases.

(h) As used in this section:

there is clear and convincing evidence

Senate Judiciary
3-9-11
Attachment 7

(c) There shall be no expungement of records or files of a person who is required to register pursuant to the Kansas offender registration act, K.S.A. 22-4902, *et seq.*, and amendments thereto.

of the offenses specified in this subsection.

~~(c)~~*(d)* When a petition for expungement is filed, the court shall set a date for a hearing on the petition and shall give notice thereof to the county or district attorney. The petition shall state: (1) The juvenile's full name; (2) the full name of the juvenile as reflected in the court record, if different than (1); (3) the juvenile's sex and date of birth; (4) the offense for which the juvenile was adjudicated; (5) the date of the trial; and (6) the identity of the trial court. Except as otherwise provided by law, a petition for expungement shall be accompanied by a docket fee in the amount of $100. On and after the effective date of this act through June 30, 2011, the supreme court may impose a charge, not to exceed $15 per case, to fund the costs of non-judicial personnel. All petitions for expungement shall be docketed in the original action. Any person who may have relevant information about the petitioner may testify at the hearing. The court may inquire into the background of the petitioner.

~~(d)~~*(e)* (1) After hearing, the court shall order the expungement of the records and files if the court finds that:

(A) The juvenile has reached 23 years of age or that two years have elapsed since the final discharge;

(B) since the final discharge of the juvenile, the juvenile has not been convicted of a felony or of a misdemeanor other than a traffic offense or adjudicated as a juvenile offender under the revised Kansas juvenile justice code and no proceedings are pending seeking such a conviction or adjudication; and

(C) the circumstances and behavior of the petitioner warrant expungement.

(2) The court may require that all court costs, fees and restitution shall be paid.

~~(e)~~*(f)* Upon entry of an order expunging records or files, the offense which the records or files concern shall be treated as if it never occurred, except that upon conviction of a crime or adjudication in a subsequent action under this code the offense may be considered in determining the sentence to be imposed. The petitioner, the court and all law enforcement officers and other public offices and agencies shall properly reply on inquiry that no record or file exists with respect to the juvenile. Inspection of the expunged files or records thereafter may be permitted by order of the court upon petition by the person who is the subject thereof. The inspection shall be limited to inspection by the person who is the subject of the files or records and the person's designees.

~~(f)~~*(g)* *A certified* ~~Copies~~*copy* of any order made pursuant to subsection (a) or ~~(c)~~*(d)* shall be sent to ~~each public officer and agency in the county having possession of any~~*the Kansas bureau of investigation, which shall notify every juvenile or criminal justice agency which may possess* records or files ordered to be expunged. If the ~~officer or~~ agency fails to comply with the order within a reasonable time after its receipt, ~~the officer or~~*such* agency may be adjudged in contempt of court and

amendments thereto;

(11) murder in the first degree as defined in *K.S.A. 21-3401, prior to its repeal, or* section 37 *of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto;

(12) murder in the second degree as defined in *K.S.A. 21-3402, prior to its repeal, or* section 38 *of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto;

(13) voluntary manslaughter as defined in *K.S.A. 21-3403, prior to its repeal, or* section 39 *of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto;

(14) involuntary manslaughter as defined in *K.S.A. 21-3404, prior to its repeal, or* section 40 *of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto;

(15) sexual battery as defined in *K.S.A. 21-3517, prior to its repeal, or* section 69 *of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto, when the victim was less than 18 years of age at the time the crime was committed;

(16) aggravated sexual battery as defined in *K.S.A. 21-3518, prior to its repeal, or* section 69 *of chapter 136 of the 2010 Session Laws of Kansas*, and amendments thereto;

(17) a violation of K.S.A. 8-1567, and amendments thereto, including any diversion for such violation;

(18) a violation of K.S.A. 8-2,144, and amendments thereto, including any diversion for such violation; or

(19) any conviction for any offense in effect at any time prior to ~~the effective date of this act~~*July 1, 2011*, that is comparable to any offense as provided in this subsection.

~~(d)~~*(e)* (1) When a petition for expungement is filed, the court shall set a date for a hearing of such petition and shall cause notice of such hearing to be given to the prosecutor and the arresting law enforcement agency. The petition shall state the:

(A) Defendant's full name;

(B) full name of the defendant at the time of arrest, conviction or diversion, if different than the defendant's current name;

(C) defendant's sex, race and date of birth;

(D) crime for which the defendant was arrested, convicted or diverted;

(E) date of the defendant's arrest, conviction or diversion; and

(F) identity of the convicting court, arresting law enforcement authority or diverting authority.

(2) Except as *otherwise* provided ~~further, there shall be no docket fee for filing a petition pursuant to this section~~*by law, a petition for expungement shall be accompanied by a docket fee in the amount of $100*. On and after ~~July 1, 2009 through June 30, 2010~~*April 15, 2010 through June 30, 2011*, the supreme court may impose a charge, not to exceed ~~$10~~*$15* per case, to fund the costs of non-judicial personnel. The

(d) There shall be no expungement of any conviction or other criminal history of a person who is required to register pursuant to the Kansas offender registration act, K.S.A. 22-4902, *et seq.*, and amendments thereto.