

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 a.m. on Tuesday, February 17, 2004, in Room 123-S of the Capitol.

All members were present except:
Senator Lana Oleen (E)

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of the Revisor Statutes
Helen Pedigo, Office of the Revisor Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Senator Phillip Journey
Richard Mauser, U.S. Testing Laboratory, Wichita

Others attending: See attached list.

SB 429 - Worthless checks; more than once within a seven-day period

Chairman Vratil opened the hearing on **SB 429**. Senator Phillip Journey testified as the sponsor and proponent of the proposed legislation. Senator Journey stated that **SB 429** mirrors modifications made in the last year or two to KSA 21-3729, which deals with the criminal use of a financial card. He said that statute was modified by the Kansas Legislature and Governor to allow the aggregate of financial transactions within a seven-day period to be made a felony. Senator Journey explained that **SB 429** accomplishes the same thing in dealing with worthless checks.

Senator Journey said there were two operative sections in the bill amending KSA 21-3707: (1) Adding Section (e)(1)(B) makes a level 7 nonperson felony out of giving multiple worthless checks, drafts, or orders in a seven-day period in an aggregate amount of \$25,000 or more; and (2) an amendment adding to KSA 21-3707 Section (e)(2) a new Section (B) which makes it a level 9 nonperson felony to give multiple worthless checks in a seven-day period if the combined total of those checks, drafts, or orders is at least \$500 but less than \$25,000. He said that the basic structure of the statute is not changed, but simply imposes a presumption of criminal intent. (Attachment 1)

Chairman Vratil called the Committee's attention to the distributed copies of the Fiscal Note for **SB 429** which noted that according to the Kansas Sentencing Commission, passage of this bill may require two to seven additional prison beds by the end of FY 2014. (Attachment 2)

Following brief Committee questions and discussion, the Chairman closed the hearing on **SB 429**.

SB 438 - Automated teller machine robbery; aggravated automated teller machine robbery

Chairman Vratil opened the hearing on **SB 438**. Senator Phillip Journey testified in support of the proposed legislation, and stated that it was important to the residents of Sedgwick County and the State of Kansas. He said that the bill supplements KSA 21-3426 and 21-3427 with two new classes of robbery. He explained that **SB 438** increases the criminal penalties imposed for the crimes of robbery and aggravated robbery at an automatic teller machine from a Level 5 Person Felony (PF) to a Level 4 PF and from a Level 3 PF to a Level 2PF, respectively. (Attachment 3)

Chairman Vratil called the Committee's attention to the distributed copies of the Fiscal Note for **SB 438** which showed that according to the Kansas Sentencing Commission, passage of the bill could result in the need for 6 to 35 additional prison beds by FY 2014. He said this bill had a greater bed space impact than the previous bill heard. (Attachment 4)

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Brief Committee discussion and questions followed. The Chairman closed the hearing on **SB 438**.

SB 431 - Criminal use of weapons; certain subsections not apply to laboratories certified by the U.S. department of justice

Chairman Vratil opened the hearing on **SB 431**. Richard Mauser, owner of United States Test Laboratory (USTL) in Wichita, testified in support of the proposed bill. He explained his company was a ballistic test laboratory that conducted tests on bullet resistant products, handguns, firearm locks, etc. He said they also perform ballistic tests for the manufacturers of armor, the United States Department of Defense and law enforcement agencies such as the United States Secret Service, Customs and Boarder Patrol, etc.

Mr Mauser stated that his was one of only two (2) laboratories in the world, certified by the U.S. Department of Justice, National Institution of Justice to perform the type of testing USTL is certified to perform. He explained that most of the testing is performed with a firearm type device that is bolted to the floor, but some testing requires the use of sub-machine guns carried by many law enforcement agencies. Mr. Mauser stated that state law prohibits anyone from owning or purchasing such a firearm to conduct the tests, which results in a lot of testing going to the other certified laboratory in Maryland. He requested the Committee to support a change in the state law so USTL could be more competitive in this field. He suggested that wording in the statute permit employees of a test laboratory certified by the National Institute of Justice to possess the necessary firearm equipment in performance of their employment. Mr. Mauser outlined in his written testimony the changes in the laws that would allow USTL to own or purchase the needed firearms. (Attachment 5)

Final Action:

Chairman Vratil announced that the Committee would work **SB 431** since Mr. Mauser was from out of town, and it was a fairly simple bill.

Kyle Smith, Kansas Bureau of Investigation, suggested that the Committee may want to add an exception to KSA 21-4201 that would ensure that automatic weapons could be transported to or sold to the testing laboratory. Chairman Vratil asked Mr. Smith to provide appropriate language to the Revisor.

Senator Donovan made a motion to amend SB 431 to provide legislative authority for licensed testing labs such as USTL to purchase those objects which they would otherwise be prohibited from purchasing under the current law. The motion was seconded by Senator Goodwin, and the motion carried to amend.

Senator Donovan moved to recommend the bill favorably as amended, seconded by Senator Umbarger, and the motion carried.

Announcement:

Chairman Vratil communicated to Committee members his concern that several members have developed a habit of arriving 10 to 20 minutes late for scheduled Committee meetings, and he asked that they do their best to arrive on time. When Committee members arrive late it shows disrespect for the conferees who are present to testify, and it limits the ability of the Committee to work effectively. Chairman Vratil said he did not want to take any Committee action without everybody having an opportunity to be present, especially at this time of the session when we are facing turn-around.

Final Action:

SB 355 - Changes requirements for determining mental retardation for purposes of applying the death penalty

Chairman Vratil called for discussion and final action on **SB 355**. He explained that the bill concerned the death penalty and individuals with cognitive disability. A balloon amendment was distributed containing proposed technical amendments prepared by the Revisor clarifying the intent of the bill and correcting some drafting errors. (Attachment 6) He said he had reviewed the technical amendments and saw no problem with them. He stated that basically the bill amends Kansas Statutes to comply with the U.S. Supreme Court's decision in the *Atkins* case which dealt with mental retardation. The Chair explained further that under the definition of mental retardation there is a requirement that the state of mental retardation "occur before an individual reaches age 18", but the Judicial Council committee that dealt with this topic went beyond the limited requirement of *Atkins* and expanded the definition of

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cognitive disability to include, i.e. a traumatic head injury that occurs to an individual that is more than 18 years of age. The essence of the Judicial Council committee's recommendation is that whether a person is mentally retarded at birth, or whether a person suffers a traumatic injury after age 18 and has a cognitive disability, that person should not be subject to the death penalty for a capital murder conviction in Kansas. Chairman Vratil said their recommendation is supported by a study and recommendation of the Joint Committee on Corrections and Juvenile Justice Oversight which occurred this past summer. He noted that Committee members are aware there is an opposite point of view expressed by Kevin O'Connor from the Sedgwick County's District Attorney's Office and supported by a number of County Attorneys and District Attorneys around the state. That point of view holds that the law should be changed only as necessary to comply with *Atkins*.

Senator Schmidt offered a proposed balloon amendment, and distributed copies to the Committee members. (Attachment 7) He explained his proposed amendment, and shared the contents of an email from the Chief Deputy District Attorney of Sedgwick County, who also was the Prosecuting Attorney on three of the seven convictions that sent individuals to death row in Kansas. (Attachment 8) Ms. Parker is familiar with the current death penalty law, and has an even more critical opinion of the process that occurred in the Judicial Council's Criminal Law Committee. He quoted two passages from her email: "A Deputy District Attorney from the her office, Deborah Peterson, serves on the Judicial Council's Criminal Law Committee. Her protests were basically ignored in the development of this bill, yet I imagine that a claim was also made to the committee that the development bill was comprised by both prosecutors and defense attorneys. The truth is that one prosecutor was ignored, and the other never attended the meetings." It goes on at a later point in the email: "I am hopeful that this email will prompt your Committee to scrutinize this bill. It would make more sense to eliminate the death penalty entirely then to pass this bill."

Senator Schmidt said he did not know if that were an accurate assessment of what happened. He had discussed some of these concerns with Randy Hearrell of the Kansas Judicial Council. Mr. Hearrell's assessment of what happened within the committee was somewhat different, and Senator Schmidt did not know who to believe, and that was why he was offering the amendment. Senator Schmidt explained that the proposed bill does two things: (1) it makes changes in Kansas' current statute that are necessary to conform Kansas law with the *Atkins* decision; (2) it proposes to expand Kansas law by creating the new definition of cognitive disability. He noted in the report from the Judicial Council that Professor Ellis, whose expertise was relied on and who has argued a case before the Supreme Court, stated that "removing the causation clause from our current definition of mental retardation would be sufficient to cure the Constitutional infirmity in Kansas law." Professor Ellis then he goes on to recommend doing what the Council did and expanding it.

Senator Schmidt stated that his amendment would do exactly what Professor Ellis says is sufficient to cure the Constitutional deficiency in Kansas statute. It would strike the new definition of cognitive disability and replace it with the existing definition of mental illness minus that portion of the definition which is Constitutionally affirmed. The rationale is that if he was not certain what he was doing, and if he did not have full and complete confidence in the process that lead to the language in the bill; then he would prefer to do the minimum amount that is necessary to conform the law with the Constitution, particularly in an area as sensitive and emotional as this is. He concluded that this was what his amendment is suppose to do.

Senator O'Connor questioned the redundant wording in the definition on line 19. Senator Schmidt agreed, and said in the drafting of the balloon lines 18 through 20 on Page 1 of the bill should have been deleted. Discussion continued about the standard of deviation in the wording regarding IQ's.

Senator Goodwin commented that she had no objection to an amendment coming into the Committee for consideration, but was concerned that the bill had been in the Judiciary Committee since January 29, 2004. She agreed that the technical cleanup amendments were needed. Senator Goodwin stated she was not in favor of bringing in amendments of substantive nature at this point in the game, especially when members have not heard why and how the bill needed to be changed. She added that the Committee had heard from a lot of experts, and trusted the Judicial Council explicitly in their studies and had seen their work. She said she would object to the amendment. If someone wants testify against or ask for changes

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next year, then she conceded it would be appropriate in letting hearings be held on everything that is trying to be changed by prosecutors or attorneys involved.

Additional discussion followed with questions regarding mental retardation and that in Kansas law a proven mentally retarded individual cannot get the death penalty. Chairman Vratil clarified that if the members wanted to limit the bill to the *Atkins*' fix they should vote for Senator Schmidt's amendment. However, if members don't want to limit it to the *Atkins*' problem and wanted to expand it to traumatic head injury after age 18, then members should vote against traumatic head injury after age 18, the they should vote against Senator Schmidt's amendment.

Senator Schmidt said he would add one component to the explanation. He had a concern that when he read the proposed definition of cognitive disability that it was significantly different then the definition of mental retardation in current law. It does more than take the current definition and say in appropriate legal words "and we mean that to apply if the cause of the disability is something that occurred after the time of birth". It creates a new definition. Senator Schmidt stated that when the Legislature is dealing with something as carefully scrutinized by the courts as the death penalty, every word matters. He said it would ordinarily be his practice to defer to the good judgment of the Judicial Council. In this case, however, he was not sufficiently comfortable to give the Council complete trust on the wording. He felt the Committee should go slow.

Senator Umbarger pointed out that the proposed amendment should also include the deletion of lines 32 and 33 on Page 3, and the Chairman agreed.

Discussion continued. Chairman Vratil called for the motion and Committee vote. Senator Schmidt made the motion to adopt his proposed balloon amendment with the addition of deletions on Page 1, lines 18-20 and on Page 3, lines 32 and 33. The motion was seconded by Senator Umbarger. The vote was 5 to 5, and the motion failed for a lack of majority with Senator Oleen not being in attendance.

Motion was made by Senator Goodwin to adopt the technical amendments offered in balloon form by the Revisor, seconded by Senator Betts, and the motion carried.

Chairman Vratil called for a motion on the amended bill. Senator Haley made a motion to pass **SB 355** out favorably as amended, and seconded by Senator Betts. Discussion on the motion followed. The Chair called for the Committee vote, and the motion carried.

SB 460 - Taxpayer identification numbers not to be used in obtaining drivers' licenses and other identification cards

Chairman Vratil called for discussion and final action on **SB 460**. The Chairman explained the bill. Senator Schmidt made a motion to recommend the bill favorably for passage, seconded by Senator Allen, and the motion carried. Senators Haley and Betts requested they be recorded as abstaining on the vote.

The meeting was adjourned at 10:30 a.m. The next scheduled meeting is February 18, 2004.