No. 00-85898-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

MATTHEW R. LIMON
Defendant-Appellant

BRIEF OF *AMICUS CURIAE* THE DKT LIBERTY PROJECT

Appeal from the District Court
of Miami County, Kansas
Honorable Richard M. Smith, Judge
District Court Case No. 00-CR36

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THE DKT LIBERTY PROJECT IN SUPPORT OF APPELLANT

INTEREST OF AMICUS

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The organization espouses vigilance over regulation of all kinds, as well as restriction of individual civil liberties which threaten the reservation of power to the citizenry that underlies our constitutional system.

This case implicates the right to equal protection of the laws that rests at the very heart of our constitutional guarantees. The DKT Liberty Project's strong interest in and experience with the protection of civil liberties for all citizens will allow it to provide this Court with additional insight into the constitutional values at stake in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a constitutional challenge to the Kansas Unlawful Voluntary Sexual Relations statute. K.S.A. § 21-3522. That statute, colloquially referred to as the "Romeo and Juliet" law, carves out an exception to the more general Kansas Criminal Sodomy law, K.S.A. § 21-3505(a)(2), which makes it a crime for any person to have oral or anal sex with an adolescent who is older than 14 but younger than 16 years of age, regardless of whether the sex was consensual. Under the exception, an adolescent who is less than 19 years old who engages in *consensual* oral or anal sex with a 14 to 16 year old adolescent is subject to dramatically lighter punishment, if the difference in their ages is less than 4 years. But that exception only applies when the two consenting adolescents "are members of the opposite sex." K.S.A. § 21-3522(a).

This limiting provision violates the Equal Protection clauses of the United States and Kansas Constitutions. By its terms, the same behavior – consensual sodomy between adolescents who are less than four years apart in age where one adolescent is less than 19 years old and the other is over 14 years old – is subject to a greater punishment when performed by members of the same sex, than when performed by members of opposite sex.

The facts in this case vividly demonstrate the harsh consequences of this gender-based distinction. If appellant Matthew Limon had been a female engaging in consensual sexual activity with an adolescent boy in the group home, he would have received a maximum sentence of only 15 months in prison. Instead, simply because he is male, Mr. Limon was sentenced to over 17 years in prison, with 5 years post-release supervision. As such, K.S.A. § 21-3522(a) discriminates between the conduct of individuals on the basis of their gender.[1]

Where a statute discriminates on the basis of gender, well-established federal and state equal-protection analysis requires the statute to be subject to heightened scrutiny. Under both state and federal law, the sex-based classification must be "substantially related" to achieving an "exceedingly persuasive" justification. *United States v. Virginia*, 518 U.S. 515, 553 (1996); *see also Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1062-63 (1987) Moreover, the state carries the burden of justifying the discrimination. *Virginia,* 518 U.S. at 553.

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[1] Amicus curiae DKT Liberty Project agrees with, and incorporates by reference herein, Matthew Limon's argument that K.S.A. § 21-3522 also discriminates on the basis of sexual orientation, but writes separately to draw the Court's attention to the gender-based discrimination inherent in this provision.

The State cannot – and does not even argue that it can -- meet this demanding burden. The sex-based classification here is not substantially related to the State's proffered justification of protecting children's safety because children's safety is not advanced by punishing homosexual teenage indiscretion thirteen times more harshly than heterosexual teenage indiscretion. Furthermore, as Justice O'Connor recently reiterated in her concurring opinion in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) mere moral disapproval of private consensual conduct cannot form a legitimate basis, much less an exceedingly persuasive justification, for a gender-based classification. For these reasons, this Court should declare the limiting provision of the Kansas Unlawful Voluntary Sexual Relations statute unconstitutional.

This constitutionally infirm limiting provision can be readily severed from the remaining language of the statute. Thus, the unconstitutional language must be stricken and the constitutional portion can stand. But for the limiting provision, the State could have prosecuted Mr. Limon only under the more narrow and specific Unlawful Voluntary Sexual Relations statute, and not under the more broad and general Criminal Sodomy statute. Thus, the Court should vacate his conviction and sentence.

SUMMARY OF UNCONTESTED FACTS

At the time of the events that led to the allegations in this case, appellant Matthew Limon was a developmentally disabled adolescent living in a home for developmentally disabled children. In mid-February 2000, he was alleged to have engaged in consensual oral sex with another developmentally disabled adolescent, M.A.R, who was also a resident of the home. Police officers, who had been called to the school, interviewed the boys and both admitted to having engaged in mutual and consensual oral sex with one another in one of the boy's rooms. Matthew Limon and M.A.R. were just over three

years and one month apart in age. Mr. Limon had just had his 18th birthday seven days earlier, and M.A.R. was to turn 15 in one month. Thus, their ages and the consensual nature of the conduct would have made Mr. Limon eligible for the less harsh Romeo & Juliet statute.

Instead, Matthew Limon was charged with violating the Kansas Criminal Sodomy statute, K.S.A. § 21-3505(a)(2). In the trial court, Mr. Limon raised constitutional challenges to the charge against him. He argued, among other things, that by limiting the statutory carve-out to the Criminal Sodomy statute by gender and sexual orientation, the Unlawful Voluntary Sexual Relations statute violated his right to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution and analogous provisions of the Kansas Constitution. Both in his written "Motion to Dismiss and Prevent Manifest Injustice" and at oral argument before the trial court, Mr. Limon argued that this provision discriminates against him solely on the basis of his gender and sexual orientation. Record Vol. I at 17-29 & Vol. III at 2-7 and 12-14. Without specifically addressing Mr. Limon's claim of gender-based discrimination, the trial judge rejected Mr. Limon's constitutional challenges. Record Vol. III at 14-20.

After a bench trial on stipulated facts, Mr. Limon was convicted of violating the Kansas Criminal Sodomy law and sentenced to ***over seventeen years*** in prison. He timely appealed his conviction. During the first round of briefing of his appeal, Mr. Limon again raised the issues of gender and sexual orientation discrimination. *See, e.g.*, Brief of Appellant at 10 & 34. Although this Court's prior opinion acknowledged that the statute creates a gender-based distinction, Opinion at 6, this Court rejected Mr. Limon's arguments, relying primarily on the U.S. Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Mr. Limon petitioned for certiorari to the United States Supreme Court on October 10, 2002, arguing, *inter alia*, that the limiting provision of the Unlawful Sexual Relations statute violates the Equal Protection Clause. The Supreme Court postponed ruling on this petition until it announced its historic decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). In *Lawrence*, the Court struck down Texas's Homosexual Conduct law, which criminalized certain sexual acts only when the participants were of the same sex. The *Lawrence* Court squarely overruled *Bowers* on substantive due process grounds. *Id.* at 2486-87. In a concurring opinion, Justice O'Connor agreed that Texas' Homosexual Conduct law was unconstitutional, but based her decision on the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 2487. The following day, the Supreme Court vacated this Court's prior decision in this case and remanded it to this Court for further consideration in light of *Lawrence*. 123 S. Ct. 2638 (2003)

ARGUMENT

I. Federal and State Equal Protection Analyses Require Heightened Scrutiny for Gender-Based Classifications Like This One.

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Sections 1 and 2 of the Bill of Rights of the Kansas Constitution provide the State's counterpart to the federal Equal Protection Clause. Kan. Const. Bill of Rights §§ 1 (Equal Rights). "[T]hese two provisions are given much the same effect as the clauses of the Fourteenth Amendment relating to due process and equal protection of the law." *Farley*, 241 Kan. at 667, 740 P.2d at 1061. Specifically, Section 1 of the

Kansas Bill of Rights applies in cases like this one when an equal protection challenge involves individual rights. *Id.*, 740 P.2d at 1061.

Under well-established federal and state equal protection requirements, cases involving "suspect classifications" demand heightened judicial scrutiny. *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 774-75, 830 P.2d 41, 45-46 (1992). In such cases, "the presumption of constitutionality [of a statute is] displaced and the burden [is] placed on the party asserting constitutionality to demonstrate a compelling state interest justifying the classification." *Farley*, 241 Kan. at 667, 740 P.2d at 1061. For purposes of equal protection analysis, gender is considered a "quasi-suspect" classification, and gender-based classifications are subjected to intermediate level or "heightened scrutiny." *Id.* at 669, 740 P.2d at 1062; *Virginia*, 518 U.S. at 532-33.

The Kansas Unlawful Voluntary Sexual Relations statute, K.S.A. § 21-3522, must be subjected to heightened scrutiny because it expressly provides for more lenient treatment of otherwise identical activity based solely on the gender of the actors. The statute applies only when the adolescents involved in the voluntary sexual relations, "are members of the opposite sex." *Id.* § 21-3522(a) If Mr. Limon were a female with the identical criminal history score, the same conduct with the same partner would have brought a maximum sentence of only 15 months. But because Matthew Limon is male, he has been sentenced to over ***seventeen years*** in prison for that conduct under K.S.A. § 21-3505(a)(2).

Under heightened scrutiny, "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Virginia*, 518 U.S. at 531. "The burden of justification is demanding and it rests entirely on the State." *Id.* at 533. Not only must the challenged classification serve an "important

governmental objective," but "the discriminatory means employed [must also be] substantially related to achievement of those objectives." *Id.* (internal quotations and citations omitted). Furthermore, the government's justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation; [And] it must not rely on overbroad generalizations about [differences between men and women.]" *Id.* The State has not and cannot meet this exacting burden.

The State cannot argue that the classification system created by the two statutes is not a sex-based classification because it applies equally to males and females. A parallel argument was soundly rejected by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967). There, the Lovings, a black woman and a white man, were married in the District of Columbia. When they returned to their home state of Virginia to live, they were convicted of violating Virginia's miscegenation laws, which banned interracial marriages. *Id.* Virginia argued that the miscegenation law did not discriminate on the basis of race because it applied equally to blacks and whites. *Id.* at 7-8. A unanimous Supreme Court struck down the Virginia miscegenation laws on both equal protection and due process grounds:

> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.

Id. at 11. Likewise, in *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) the Supreme Court struck down a law that penalized unmarried cohabitation more harshly when the offenders were members of a mixed-race couple. ("Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation"). While these seminal cases dealt with race-based classifications, the Supreme Court has also discredited such reasoning when

used to support sex-based distinctions. *See, e.g., Califano v. Westcott*, 443 U.S. 76, 84 (1979) (striking statute allowing AFDC payment to families where father, but not mother, became unemployed).

Contrary to this clear constitutional command, Kansas law imposes drastically different punishment for identical acts depending on the gender of the participants. Solely because of gender, Mr. Limon was sentenced to ***seventeen years rather than fifteen months***. Thus, Section 21-3522 facially discriminates on the basis of sex, and must therefore be subjected to the rigors of heightened equal protection scrutiny.

II. The State's Proffered Justifications For Different Treatment According to Gender Fail Under Heightened Scrutiny.

The alleged government interests proffered by the State to justify the gender-based distinction of Section 21-3522 cannot survive heightened scrutiny. First, the distinction is not substantially related to the State's interests in protecting children or encouraging marriage. Second, neither a desire to legislate morality nor animus toward an unpopular minority can serve as important government objectives.

A. The Gender-Based Classification Is Not Substantially Related to the Important Government Objective of Protecting Children.

The protection of children is without doubt an important governmental objective, and the Kansas statutes relating to statutory rape and the age of consent clearly forward that interest. Indeed, the Romeo and Juliet statute itself seeks to protect children since it lessens the punishment *for those children* when the teenage sexual acts are consensual, as they were here. But the statute's gender-based distinction, which withholds that protection for one group of teenagers, is not substantially related to protecting children. *Virginia*, 518 U.S. at 533. The State has not and cannot show that it substantially advances that protection by punishing a teenager for engaging in consensual oral sex with

someone of his or her own gender much more harshly than a teenager who commits the same act with someone of a different gender.

The State has proffered no evidence demonstrating that consensual sexual relations between adolescents of the same sex are any more injurious than similar consensual relations between adolescents of the opposite sex. Nor could it argue that it seeks to deter future non-consensual relations, because there is no evidence that same-sex sexual assault of minors by adults occurs more often than different-sex sexual assault. Indeed the opposite appears to be true. The vast majority of sexual assault on children is perpetrated by heterosexual men on girls. *See, e.g.,* Carole Jenny *et al.*, *Are Children at Risk for Sexual Abuse By Homosexuals?*, 94 Pediatrics 41, 44 (1994) (finding that a child is 100 times more likely to be sexually abused by the heterosexual partner of a relative than by a gay adult); Sam Houston State Univ., Criminal Justice Center, *Responding to Child Sexual Abuse: A Report to the 67th Session of the Texas Legislature 22* (1980) *cited in Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex . 1982) ("The vast majority of sex crimes committed by adults upon children are heterosexual, not homosexual"). In fact, homosexuals are no more likely to sexually assault children than heterosexuals. Gregory M. Herek, *Myths About Sexual Orientation: A Lawyers Guide to Social Science Research*, 1 Law & Sex. 133, 156 (1991) (reviewing social science literature and concluding that gay men are not more likely than heterosexual men to molest children).

But even if there were such evidence, the State cannot show that protecting children was, in fact, an interest behind the sex-based limitation of the Romeo and Juliet statute. Nothing in the legislative history of the statute supports such a conclusion. *See* Testimony of Senate Bill 131 House Judiciary Committee (March 16, 1999) & Senate

Judiciary Committee (February 11, 1999) (attached as Exhibits A & B).[2] Indeed, the legislative history articulates only the goal of lessening the existing substantial penalty for consensual sex between teenagers. Because the language limiting the exception to the Criminal Sodomy statute to "members of the opposite sex" is not substantially related to the State's interest in protecting children, the State's first argument must fail.

B. A State's Desire to "Legislate Morality" Does Not Satisfy the "Important Government Objective" Standard.

The State has also argued that the sex-based classification in the Unlawful Voluntary Sexual Relations statute is justified by the State's right to legislate morality. The State does not explain what moral principle it espouses that would justify this gender-based distinction, nor how the distinction is substantially related to this unidentified moral principle. The only principle the State offers is the "bias for marriage of persons of the opposite sex," Appellee's Brief at 21, yet there is no basis to suggest that the gender-based distinction is substantially related to this purported moral principle.

Moreover, moral disapproval of homosexuals is insufficient to justify this statute. Significantly, the legislative history is silent with regard to any moral concerns about homosexuals. And mere general moral disapproval of an unpopular group cannot serve as an exceedingly persuasive justification for government action. *Adams v. Baker*, 919 F.

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[2] The legislative history that counsel for *amicus curiae* has been able to obtain is for the bill originally proposed on this issue, Senate Bill 131. That bill does not even contain the language at issue here, and would plainly have applied equally to all teenagers, regardless of their gender. Senate Bill 131 was a predecessor bill that never was passed. Instead, the Unlawful Voluntary Sexual Relations provision was made part of Senate Bill 149, and was added by the joint House and Senate conference committee. That provision accomplished the same result as Senate Bill 131 with the single, unexplained addition of the gender-based limiting provision. Unfortunately, to the best of *amicus*' knowledge, no minutes are recorded of conference committee discussions and no report was created. Discussion with Kansas Legislative Services Office (Sept. 19, 2001).

Supp. 1496, 1504 (D. Kan. 1996) (moral belief that female students should not participate in wrestling not an important government objective justifying gender discrimination); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (that discriminatory beliefs are "widely and deeply held" cannot save government action that lacks a legitimate purpose); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) ("a community's animus towards homosexuals can never serve as a legitimate basis for state action"). As Justice O'Connor explained in her concurring opinion in *Lawrence*, a state cannot avoid the constitutional guarantees of equal protection simply by invoking public morality. *Lawrence*, 123 S. Ct. at 2486 ("[i]ndeed, we have *never* held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."). Justice O'Connor found that the facially discriminatory Texas statute at issue in *Lawrence* could not pass even rational basis review. *Id.* As a similar facially discriminatory law, the Unlawful Voluntary Sexual Relations statute could not either. It necessarily follows, then, that this statute must also fail the more exacting intermediate scrutiny that is triggered when a statute discriminates on the basis of gender.

Justice O'Connor's analysis, as well as the body of equal protection case law upon which she relies, reconfirms that the decision to punish the same acts differently on the basis of gender cannot be justified solely on the grounds that Section 21-3522 was passed by the legislature, or even that it may indeed be supported by a majority of Kansans. "[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law." *Id.* at 2487 (O'Connor, J., concurring). Government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or

objections of some fraction of the body politic." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Loving*, 388 U.S. at 3, 11 (public morals not permissible as state justification). Prevailing majority views about the proper roles or the morally appropriate private behavior for members of a particular sex cannot be given weight in an equal protection analysis. Government policies may not be based on "'archaic and overbroad' generalizations about gender." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (*quoting Schlesinger v. Ballard*, 419 U.S. 498, 506-07 (1975) Nor may gender classifications rest upon impermissible stereotypes or "judgments about people that are likely to . . . perpetuate historical patterns of discrimination." *Id.* at 139-40 & n.11.

Where an alleged interest in public morality is not demonstrably connected to furthering the *public* welfare, courts have found such invocations of "morality" to be a thin guise for private, albeit majoritarian, prejudice. Like the race-based classification in *Loving* and *McLaughlin*, the gender-based classification in this case is but a subterfuge for private bias against individuals who do not conform to the norm. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433 (internal quotation and citation omitted). "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Even before *Lawrence* was decided, numerous other state courts had invalidated same-sex-only sodomy laws as violative of the equal protection clause. In *Kentucky v. Wasson*, 842 S.W. 2d 487 (Ky. 1993) the Kentucky Supreme Court struck down that

state's sodomy statute on equal protection grounds because, like the statute at issue in this case, Kentucky's sodomy statute proscribed consensual sodomy, but only if performed by members of the same sex. *Id.* at 487. In rejecting the state's argument that protecting public morals justified the distinction, the Kentucky Court held: "The issue here is not whether sexual activity traditionally viewed as immoral can be punished by society, but whether it can be punished solely on the basis of sexual preference." *Id.* at 499. For similar reasons, the Arkansas Supreme Court also invalidated that sodomy law, which was limited to same-sex conduct. *Jegley v. Picado*, 80 S.W.3d 332, 352 (Ark. 2002) (noting that the state provided no explanation for its position that certain conduct would be injurious to the public welfare, but only when performed by members of the same sex). *See also Powell v. Georgia*, 510 S.E.2d 18, 25 (Ga. 1998) (rejecting "social morality" as compelling state interest justifying Georgia sodomy statute); *Gryczan v. Montana*, 942 P.2d 112, 124 (Mont. 1997) (same); *Campbell v. Sundquist*, 926 S.W.2d 250, 264 (Tenn. App. Ct. 1996) (same); *Pennsylvania v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) ("[P]olice power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality . . . .").

Because the State cannot prove that the sex-based classification in the Kansas Voluntary Unlawful Sexual Relations statute is substantially related to an important government interest, nor has it even attempted to do so, this portion of the statute is constitutionally infirm.

III. This Court Should Strike the Offending Section of K.S.A. § 21-3522.

The Court must next consider whether the constitutionally impermissible language in the Unlawful Voluntary Sexual Relations statute is severable from the

remaining portion of the statute. "It is generally recognized that, where unconstitutional parts of a statute can be readily separated from the remainder of the statute without affecting the meaning of what remains, the unconstitutional language will be stricken and the constitutional portion will stand." *Williams Natural Gas Co. v. Supra Energy, Inc.*, 261 Kan. 624, 629, 931 P.2d 7, 13 (1997) (*quoting State v. Rupert*, 247 Kan. 512, 515, 802 P.2d 511, 514 (1990) "If, from examination of the statute it can be said the act would have passed without the objectionable portion and if the statute can carry out the intention of the legislature without the stricken language, the remainder of the statute will stand." *Rupert*, 247 Kan. at 515, 802 P.2d at 514-15.

If the offending provision is struck from this statute, the remaining meaning of the statute is unaffected. The statute's legislative history shows that the legislature's goal was to acknowledge that consensual sexual relations between adolescents, while not legal, do not deserve the same severe criminal sanctions as do sexual relations between adults and adolescents or non-consensual relations between adolescents. Thus, the statute lessened the penalty for consensual sexual relations between teenagers. *See* Testimony on Senate Bill 131 (Exhibits A-B). When the offending language of the statute is struck, this legislative goal is preserved. Accordingly, the Court should order that the phrase "and are members of the opposite sex" should be struck from Kansas Code Section 21-3522.

With the constitutionally infirm language read out of the Unlawful Voluntary Sexual Relations statute, the more narrow and specific language of that statute must control over the more general broad language of the Criminal Sodomy provision under which Matthew Limon was convicted, unless the legislative history indicates that the intent of the legislature was otherwise. *State v. Williams*, 250 Kan. 730, 734, 829 P.2d

892, 896 (1992) Here, the legislative history reflects the intent that the Romeo and Juliet statute apply where the age qualifications were met. Thus, but for the unconstitutional limiting provision, the State could only have prosecuted Matthew Limon under the Unlawful Voluntary Sexual Relations statute. *Id.* at 736-37, 829 P.2d at 897 (where conduct prohibited under two statutes, State prohibited from charging defendant with more general crime). Accordingly, Mr. Limon's prosecution for Criminal Sodomy was unconstitutional.

CONCLUSION

Because Matthew Limon's conviction for Criminal Sodomy under Section 21-3505(a)(2) of the Kansas Code violates his right to equal protection of the laws protected by the Kansas and United States Constitutions, this Court should reverse his conviction.

Respectfully submitted,

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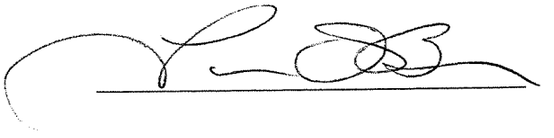

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State of Kansas

KANSAS SENTENCING COMMISSION

Testimony on Senate Bill 131
House Judiciary Committee
March 16, 1999

The Kansas Sentencing Commission is testifying today in support of Senate Bill 131. The proposed bill reflects the Commission's discussions and deliberations over the past months relating to the underlying intent and goals of Sentencing Guidelines. In addition, the bill addresses the issue of proportionality in sentencing, which has become a growing concern of the Commission.

Sentencing Guidelines were legislatively enacted into law on July 1, 1993. Five years after enactment, the Sentencing Commission met for two days last fall to review the sentencing guidelines and examine changes that have occurred over the past years. From the issues raised during that meeting, a Subcommittee was appointed to complete a comprehensive review and identify changes and modifications to the guidelines and sentencing grids that support the underlying philosophy that incarceration should be reserved for the most violent and chronic offenders. The Subcommittee met several times and drafted a set of recommendations that were presented to the full Commission for review and approval. In January, the Sentencing Commission voted to present its recommendations to the 1999 Legislature.

Senate Bill 131 before you contains a package of comprehensive changes to the sentencing guidelines that promote both public safety and enhanced penalties for our most violent offenders, while at the same time providing a clearer sense of proportionality for all felony sentences. During the past five years numerous changes have been made to sentencing guidelines in a fragmented manner. Although each individual change may have been made with the best of intentions, the cumulative effect of these changes has resulted in some grave inequities with regards to sentencing. All three classifications of offenses under Sentencing Guidelines, Off-Grid, Grid and Non-Grid, were examined and evaluated with respect to public safety and equity in sentencing. The primary purpose of this bill is to address the proportionality issues in sentencing that have arisen since the passage of the sentencing guidelines.

Included in this bill are several sentence enhancements that clearly result in longer sentences for many of the Off-Grid offenses. The Sentencing Commissions believes and supports the premise that this specific offender group, representing the most serious of all offenders whose intentional actions result in the loss of a human life, should remain incarcerated for a considerably long period of time,

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regardless of the number of prison beds required to accommodate these offenders. Of all criminal actions, those that deprive an individual of his or her life must be viewed as the greatest threat to public safety. In addition, the sentence lengths for nondrug severity level III have been increased to address the inequity of sentence lengths between severity level II and severity level III and the seriousness of severity level III offenses.

Specific enhancements contained in this bill included the following recommendations:

(a) Life sentence for Felony Murder and Treason be increased from 15 years to 20 years before parole eligibility. This increase represents an adjustment to the proportionality related off-grid sentences and the seriousness of the actions that would constitute a conviction for this offense.

(b) Increasing the sentence lengths in all criminal history categories on Nondrug severity level III by 20 percent. This recommendation would result in the range of sentences being increased from the current minimum of 3.8 years to 4.6 years and the current maximum from 17.2 years to 20.6 years. The mean sentence for that severity level increases from 6.1 years to 7.3 years. This enhancement is presented because of the seriousness of many of the offenses classified as severity level III crimes, including kidnapping, aggravated robbery, voluntary manslaughter and aggravated indecent liberties with a child. When reviewing the guidelines, it became apparent that there was a great inequity between sentence lengths on severity level II (ranging from 11.3 to 51.3 years) and those on severity level III (ranging from 4.6 to 17.2 years). Given the serious nature of the offenses on severity level III, the Commission believed an across the board increase was warranted and necessary.

(c) Reclassification of Intentional Second Degree Murder from an off-grid offense to a severity level I offense. Although initially this may not appear to be an enhancement since the reclassification designates the offense as a grid crime, the actual sentence length increases on grid. Under current statute, an offender convicted of Intentional Second Degree Murder is parole eligible, regardless of criminal history, at ten years. Severity level I provides a sentence range of 15.3 years to 68 years, depending on criminal history classification. The mean sentence for this severity level is 24.3 years. Even though 15 percent good time credits are available, the offender would still serve as much and, in most cases more time, than under the current off-grid classification.

(d) A new sentencing rule was created that designates a presumptive prison sentence for a conviction of Residential Burglary, when the offender has a prior conviction for either a residential burglary or a non-residential burglary. This recommendation is in response to numerous concerns raised by judges, prosecutors, and the public regarding the number of residential burglary convictions that must occur before an offender is sentenced to prison.

(e) Enhance the penalty for Aggravated Escape from Custody, from a severity level 6 person felony to a severity level 5 person felony, when the offender is in the custody of

the Secretary of Corrections and escapes from a state operated correctional facility. This proposal differentiates the degree of seriousness in escaping from a community corrections facility versus a correctional institution, even though both offenders can be in the custody of the Secretary of Corrections.

The bill also contains several recommendations that reclassify some low level felony offenses and attempt to address the proportionality issues that became very apparent when the Commission examined changes to the Sentencing Guidelines. These recommendations were developed based on two primary guiding principals: (1) Incarceration should be reserved for the most violent and chronic offenders and (2) the length of sentences should increase in proportion to the severity of the offense, with the loss of a human life representing the most severe threat to public safety.

(a) Sentence lengths in all criminal history categories on Nondrug severity levels I and II be reduced by 20 percent. Although this may not be a popular recommendation, there are sound and rational public policy reasons to support the proposed adjustment. This proposal would result in the minimum sentence for severity level I be changed from 15.3 years to 12.2 years and the maximum sentence from 68 years to 54.4 years, with the mean adjusted from 24.3 years to 19.5 years. Even with the proposed change, the lengths of sentences are by no means short. Under Sentencing Guidelines, a conviction for an attempted off-grid murder results in sentencing as a severity level I offense. This has resulted in some offenders pleading up from an attempted murder charge to murder charge because the sentence for an off-grid offense can actually be shorter than for a severity level I offense. This type of action is not reflective of good sentencing policy, which should provide the longest sentences for more serious offenses. The Commission acknowledges the seriousness of the offenses classified as severity level I (rape, aggravated kidnapping and attempted murder) and supports long periods of incarceration for convictions of these offenses. However, in reviewing the proportionality of sentences, the Commission feels that a conviction for the crime of murder should carry the most severe sentence.

(b) Felony Driving with a Suspended License and the Habitual Violator statute, both current severity level 9, nonperson felonies be reclassified as Class A, nonperson misdemeanors. Sentencing Guidelines distinguishes offenses by person and nonperson, which differentiates betweens crimes against a person and crimes against property. These specific offenses are basically of the traffic nature and can be more appropriately dealt with at the local level. A severity level 9 felony, for most criminal history categories imposes a presumptive nonprison sentence. Even if the offender violates his or her probation and a revocation occurs, the underlying prison sentence for that severity level only ranges from 5 to 13 months. If the offense is classified as a Class A misdemeanor, the judge may impose up to a 12 month jail sentence upon conviction. If the intent is to stop offenders from driving while their drivers license is suspended, then the offense can be more adequately and effectively dealt with at the local level.

(c) Criminal Deprivation of Property - a Motor Vehicle is reclassified from a non-grid felony to a Class A, nonperson misdemeanor. This statute is commonly referred as the "joy riding" statute and the current classification as a non-grid felony sets forth that

incarceration be at the local level. In attempting to attain consistency in sentencing policy, the reclassification would address the proportionality issue.

(d) Amendment to K.S.A. 21-3520, Unlawful Sexual Relations, which would create a new sentencing structure for what is commonly referred to as the "Romeo and Juliet" situations. The new section would allow for a severity level VIII, person felony conviction, when the offender is less than three years older than the victim and the victim is greater than 14 years of age but less than 16 years of ago and the sexual activity is voluntary. Numerous concerns have been raised by judges on the sentencing when the parties are in a mutual relationship and the parents or other parties initiate prosecution. This would allow for the sanctioning of the activity as a person felony, but would designate a presumptive nonprison sentence. In addition, a conviction under this new section would not require the offender to register as a sex offender, which may result in long term consequences.

(e) Designates the location of incarceration for a Third or Subsequent Felony Domestic Battery Conviction, a nongrid felony, to be at the local level to provide consistency with other nongrid felonies, such as DUI. Nongrid felonies are not assigned a severity level nor a determinate period of incarceration. As with felony DUI, the Commission believed incarceration should occur at the local level.

In addition to the above enhancements and proportionality adjustments, the Commission reviewed several procedural issues in which recommendations for change are included in this bill. One issue relates to procedures surrounding postrelease revocation hearings. Under current law, when an offender violates the conditions of postrelease supervision, the offender must wait until the revocation hearing before the Parole Board occurs, to start serving the appropriate sentence for the violation. The change proposed would allow the offender to waive his/her right to a revocation hearing and begin to immediately serve the appropriate period of incarceration. The offender would still have the right to request a hearing and wait until the hearing takes place to begin serving, if warranted, the incarceration period. However, if the offender voluntarily chooses to waive the right to a hearing, the offender could begin his sentence immediately.

This bill also contains a section which recommends that misdemea'. Pre-Sentence Investigation Reports be part of the official court record and accessible to the public in the same manner as current law allows for felony Pre-Sentence Investigation Reports. This would allow for consistency in sentencing and providing reliable data.

Finally, this bill contains a proposal, which is very similar to SB 435, which was introduced by the Sentencing Commission during the 1998 Legislative Session. The proposal requests that when an offender commits a new felony while released on felony bond, that the judge shall impose consecutive sentences upon a conviction.

In the past, the Sentencing Commission has limited introduction of bills to either technical or clarification issues surrounding the Sentencing Guidelines Act. In a perfect world, the Guidelines would have been implemented in 1993 and allowed to operate for a period of time before amendments were introduced and changes imposed. However, we do not operate in a perfect world.

The Sentencing Commission is mandated by statute to monitor the Sentencing Guidelines and recommend changes to the Legislature. Senate Bill 131 represents a comprehensive review of the Sentencing Guidelines after five years of enactment.

Senate Bill 131 contains a mix of recommendations that support the underlying goals of the Sentencing Guidelines and support public safety. For the past ten years the consensus of the criminal justice community has been to get tough on crime and we have. Violent offenders are serving much longer sentences than they had prior to sentencing guidelines. Offenders are now being held more accountable for their actions. However, in developing good sentencing policy, we need to be both tough and smart about crime. Distinguishing between criminals we are afraid of and criminals we are mad at, is often necessary but difficult to do at times. Senate Bill 131 represents this effort by the Sentencing Commission. Good public policy should not only be concerned with addressing current issues but also anticipating future consequences.

For Additional Information Contact:

Barbara Tombs
Executive Director

Testimony in Support of Senate Bill 131

Presented by: Paul J. Morrison
03/16/99

As a public official, one of the most important things we can do for the people of this State is help ensure their safety. This is primarily accomplished through the operation of our criminal justice system. Our primary goal has always been to protect the public and punish those who break the law. Overall, I have been very impressed over the years with how the legislature has handled these issues. We must never forget that the primary goal of the criminal justice system is to provide justice.

Since the Guidelines were passed in 1993, we have seen many modifications to the sentencing grid. Most of these modifications involved lengthening of sentences for career and violent offenders. They have been good, necessary changes that have received a lot of support from the criminal justice community. For example, some offenders who commit severity level 1 and 2 type crimes have had their sentences quadrupled in the last few years. For the most part, this has been great news for the people of Kansas. However, there have been some unintended consequences. One of those consequences has been the fact that some inequities have been created within the sentencing grid. For example, many severity level 1 crimes now carry much lengthier sentences than their more severe off-grid counterparts. As a specific example, many times a failed attempt to commit a homicide will carry a much lengthier prison sentence than a completed murder. Rapes and aggravated kidnappings now many times carry much lengthier sentences that first degree murder. The list goes on and on. I do not believe that these inequities were created intentionally. I believe that they often occur as a result of "patchwork" type amendments to the grid.

The reason I am supportive of Senate Bill 131 is that it attempts to address much of the proportionality problems within the guidelines. Many, many sentences are increased under this bill. A few are reduced. The reductions are modest and more importantly are an attempt to establish a greater parity within the grid.

SENTENCING RANGE - NONDRUG OFFENSES

Category → / Criminal History ↓	A	B	C	D	E	F	G	H	I
	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	3 + Misdemeanors	2 Misdemeanors Or Less/Juvenile
I	816 776 718	772 733 692	356 340 321	331 316 300	308 292 276	282 268 254	253 244 230	233 221 208	206 195 184
II	616 584 552	576 548 520	278 264 252	258 238 226	238 218 206	218 208 198	192 182 172	172 163 154	154 146 136
III	206 194 184	198 188 172	89 85 80	83 78 71	77 73 68	69 66 62	61 60 57	59 55 51	51 49 46
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	68 57 53	55 52 50	51 49 46	47 44 38	43 41 38	38 36 33	33 32 31
VI	46 43 40	41 39 37	38 36 34	34 32 32	33 30 28	29 27 25	24 23 22	22 20 19	19 18 17
VII	31 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

LEGEND

- Presumptive Probation
- Border Box
- Presumptive Imprisonment

Recommended probation terms are:

36 months for felonies classified in Severity Levels 1 - 5

24 months for felonies classified in Severity Levels 6 - 10

Postrelease terms are:

For felonies committed before 4/20/95

24 months for felonies classified in Severity Levels 1 - 6

12 months for felonies classified in Severity Level 7 - 10

For felonies committed on or after 4/20/95

36 months for felonies classified in Severity Levels 1 - 4

24 months for felonies classified in Severity Level 7 - 10

2-22

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
900 S.W. Jackson — Suite 400-N
Topeka, Kansas 66612-1284
(785) 296-3317

Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

DATE: March 16, 1999

TO: House Judiciary Committee

FROM: Charles E. Simmons
Secretary of Corrections

RE: SB 131 As Amended by the Senate Committee of the Whole

SB 131 is a legislative initiative of the Kansas Sentencing Commission. SB 131 contains a number of amendments to the definitions of crimes and criminal penalties, some of which involve proposals raised by the Department of Corrections. The Department supports the provisions of SB 131 with the exception of the reduction of the presumptive prison sentences established for nondrug Severity Levels I and II offenses. The Department also recommends amendments to SB 131 to achieve conformity with other statutory provisions and to correct technical errors. These recommended amendments are reflected included in the balloon amendment attached to this testimony.

The Kansas Sentencing Commission has estimated that the cumulative impact of the various sections of SB 131 will increase KDOC capacity needs by 113 beds over a ten year period. Our initial impression is that there will be a reduction in the number of minimum custody inmates due to the reclassification of some felony offenses to misdemeanors and possibly an increase in the number of medium custody inmates as a result of longer sentences or changes in sentencing presumptions. The Department, however, is not able at this time to project a numerical impact of SB 131 on the custody classifications of the inmate population.

This testimony will comment on several specific provisions of SB 131:

- Amendment of unlawful sexual relations to include consensual lewd fondling or touching by both employees of the Department and the Department's contractors.

Current law prohibits consensual sexual intercourse and sodomy between corrections personnel and offenders. The Department believes that it is inappropriate and should be unlawful for any form of

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sexual activity to occur between offenders and those with a custodial responsibility for supervision of them. True consent cannot be given under these circumstances. Moreover, sexual relations between offenders and employees leads to a number of operational and security problems.

- The crime of criminal deprivation of a motor vehicle is reduced to a class A nonperson misdemeanor from an unclassified felony. The penalty for that offense would stay the same.

This amendment is consistent with the law, codified at K.S.A. 21-4704, that offenders convicted of "joy riding" not be confined in a state correctional facility. However, since K.S.A. 21-4704 characterizes violations of K.S.A. 21-3705(b) as a felony, subject to local sanctions, K.S.A. 21-4704 should be amended to delete the classification of 21-3705(b) as a felony. This would bring section 13 into conformity with the provisions of section 9 at page 5 of SB 131 as amended by the Senate.

- The Department recommends an additional amendment of section 13 at page 16 regarding the reference to felony domestic battery at lines 23-24 and 29-30. That reference should be changed from "subsection (b)(3) of K.S.A. 21-3412" to "subsection (c)(3) of K.S.A. 21-3412".

The citation to "subsection (b)(3)" is erroneous since that subsection does not exist. Additionally, the felony definition for K.S.A. 21-3412 is at subsection (c)(3) of that statute.

- Increasing the penalty for the crime of escaping from a Department facility from a severity level VIII or Severity Level VI offense to a Severity Level V offense.

The Department has the concern that the Sentencing Guidelines Act does not take into account the entire criminal history of an inmate who escapes when applying the sentencing grid matrix. In fact, since a felony conviction is a necessary element of the crime, the KSGA prohibits the use of the current convictions in determining the criminal history of a person convicted of escape. Thus, first time offenders who escape from confinement have a criminal history classification of "I". (1 misdemeanor conviction or no record). Rather than create a special rule relative to criminal history for escape, the Sentencing Commission determined that increasing the severity level for the offense would be the preferred course of action. The Department supports this proposal.

- Finally, the one provision of SB 131 that the Department does not support is the 20% reduction in the presumptive prison sentences for nondrug Severity Level I and II offenses as set out in section 13.

Recent reports indicate that crime rates for violent crimes are down. A reduction in sentences at this time for the most severe offenses is the wrong message to be sending to the citizens of this state, to crime victims, and to criminals.

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Attachment

cc: Legislation file w/attachment

promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence if the offense is classified in grid blocks 5-H, 5-I or 6-C shall not be considered a departure and shall not be subject to appeal.

(g) The sentence for the violation of K.S.A. 21-3411, aggravated assault against a law enforcement officer or K.S.A. 21-3415, aggravated battery against a law enforcement officer and amendments thereto which places the defendant's sentence in grid block 6-H or 6-I shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence, if the offense is classified in grid block 6-H or 6-I, shall not be considered departure and shall not be subject to appeal.

(h) When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

(i) The sentence for the violation of the felony provision of K.S.A. 8-1567 ~~and, subsection (b) of K.S.A. 21-3705,~~ *and subsection* ~~(h)~~*(3) of K.S.A. 21-3412* and amendments thereto shall be as provided by the specific mandatory sentencing requirements of that section and shall not be subject to the provisions of this section or K.S.A. 21-4707 and amendments thereto. Notwithstanding the provisions of any other section, the term of imprisonment imposed for the violation of the felony provision of K.S.A. 8-1567 ~~and, subsection (b) of K.S.A. 21-3705,~~ *and subsection* ~~(h)~~*(3) of K.S.A. 21-3412* and amendments thereto shall not be served in a state facility in the custody of the secretary of corrections.

(j) The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. Except as otherwise provided in this subsection, as used in this subsection, "persistent sex offender" means a person who: (1) Has been convicted in this state of a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto; and (2) at the time of the conviction under subsection (1) has at least one conviction for a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto in this state or comparable

(c)

(c)

KANSAS PAROLE BOARD
LANDON STATE OFFICE BUILDING
900 SW JACKSON STREET, 4TH FLOOR
TOPEKA, KANSAS 66612-1236
(913) 296-3469

MEMORANDUM

TO: Representative Michael O'Neal, Chairman
House Committee on Judiciary

FROM: Marilyn Scafe, Chair
Kansas Parole Board MS

RE: SB 131
Waiver of Final Revocation Hearing

DATE: March 16, 1999

Under the current law, all offenders must have a personal interview with a Board member in order to revoke a period of post release, parole, or conditional release supervision. SB 131 would allow offenders under the determinate sentences to waive their appearances at the final hearings, if they admit guilt to all of their violations. The Board would then make an administrative decision regarding the revocation. Responsibility for oversight and review of all cases to ensure due process would continue to rest with the Board. If deemed necessary, the Board could set a hearing regardless of the waiver. If there are pending charges, the offender will not be eligible to waive the final hearing. The Department of Corrections would be responsible for the timing of the waiver and the full explanation of the rights waived and the consequences thereof.

At this time, offenders serving indeterminate sentences whose releases are governed by the Kansas Parole Board, will not be given the opportunity to waive their final hearings. Wide discretion exists for setting penalties and planning release in those cases. Therefore, it is felt that personal interviews are needed in order to determine the length of pass and recommendations for programs and treatment.

Benefits of the waiver of the final revocation hearing for post release violators are:

- Time (90 or 180 days) would start with the signing of the waiver rather than the appearance before the Board. This would be more in keeping with the legislative intent for violators.
- Use of the waivers will result in a reduction of the average daily population. It is difficult to project a reduction in actual bed space using the Prophet Model, due to the data format. However, it is reasonable to project some impact for a reduction.
- This is an efficient use of the Board's time. The Board has limited or no discretion for penalties if the offender admits guilt to the violations or has a new conviction. Personal interviews cannot change the options for final decisions.
- Since it is the offender's decision to waive, there will be fewer appeals to process.

Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR, JAMES W. CLARK

March 16, 1999

TO: House Judiciary Committee

FROM: Kansas County and District Attorneys Association

RE: SB 131

The Kansas County and District Attorneys Association is generally supportive of the provisions in SB 131, and is appreciative of the deliberation that went into the suggested changes to Kansas criminal law.

However, we are opposed to the provisions that distinguish sex crimes based on the offender's age on two grounds:

1. POLICY. A crime is a crime, whether committed by a 19-year old or a 22-year old, and, historically, the offender's age has only determined whether the case is filed in juvenile or adult court. As the attached testimony submitted by the Reno County Attorney there is a strongly-held belief that there are predatory relationships out there, regardless of the proximity in age between predator and victim. Those cases truly involving Romeo and Juliet are better left to prosecutor discretion; or more correctly victim and police discretion, since the prosecutor rarely hears about true Romeo and Juliet situations. Likewise, the bundling of the various consensual sex acts between Romeo and Juliet into a single crime is indicative that the State makes no distinction between heavy petting, sodomy or intercourse. Those of involved in the problem of teen pregnancy would beg to differ with that decision.

2. LEGAL. Removing offenders from certain sex crime statutes based on the proximity of age to the victim spawns at least two legal issues. First is the problem of pleading and proving the age issue. Must the state now allege in every rape case that the offender is more than 3 years older than the victim; or is the age issue an affirmative defense? Adding to the difficulty of Romeo and Juliet cases, with recanting or at least reluctant victim testimony and jury nullification by requiring the State to prove additional elements of the offender's age in relation to the victim's simply compounds the difficulty of such cases. Second is the constitutional question of the equal protection clause? What is the state interest in making a distinction based on the difference in age? Is the victim less fondled or, in the extreme case, made less pregnant, simply because a defendant is near her own age? Does a long-time boyfriend who is two days over the three-year period have a valid equal protection claim when he is sentenced as a severity level 3 and required to register as a sex offender, while the one-time or predatory suitor within the grace period is sentenced only to a level 8 and not required to register?

Conclusion: If the Legislature sees fit to treat all forms of sexual activity by Romeo and Juliet the same, and wishes to avoid the consequences of harsher penalties and registration, we would suggest treating the issue as a matter of sentencing and inserting a Romeo and Juliet exception in each of the sex offense statutes and in the sex offender registration statutes. There is much less scrutiny in sentencing procedures than in pleading and proving the crime itself.

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COUNTY ATTORNEY
Timothy J. Chambers

ASSISTANT COUNTY ATTORNEYS
Keith E. Schroeder
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JoAnna L. Darfelt
Linda L. Blackburn - Juvenile

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Testimony of Timothy J. Chambers, Reno County Attorney
Prepared For The
Committee on Judiciary of the Kansas Senate regarding
Senate Bill 131, February 11, 1999

I appreciate the opportunity to appear before this committee to speak regarding changes in the Kansas Criminal Code and Code of Criminal Procedures contained within Senate Bill 131.

The proposed legislation will eliminate felony offenses of Driving While Suspended and Driving as an Habitual Violator and relegate those offenses to misdemeanor status. I assume the impetus behind these amendments to current law is to prevent the incarceration of what is perceived as non-violent offenders within the state penal system.

Last year in Reno County, one hundred and seventeen (117) felony driving while suspended or habitual violator cases were filed.

By the time an individual is charged with a felony driving offense, they have exhibited a continued disregard for the driving laws of this State and the court system. Our court services chief has indicated to me a Supreme Court study has shown a non-violent offender on the average will be allowed six technical violations of probation before incarceration is a serious option.

The experience in Reno County has shown incarceration within the Department of Corrections occurs only with extreme cases and if it does occur, because of the commission of new offenses.

Twenty-eight felony D.U.I.'s were filed in Reno County last year. The majority committed the offense while their driving privileges were suspended or while declared to be habitual violators. Third time D.U.I.'s presently are listed as felonies, but in actuality are misdemeanors. At least with felony status for driving while suspended offenses and habitual violator offenses, some effective punishment is allowed to deal with the repeat driving offender.

I personally consider felony driving offenders to be violent. As a prosecutor, I have spent twenty years going to the scene of fatality accidents. Individuals who face incarceration in the state penal system for driving offenses are a danger to the people of this State. They have exhibited a continued pattern of dangerous driving patterns and a complete disregard for the laws of this State. Prosecution and law enforcement should not be further restricted in their efforts to combat this problem.

The second concern I wish to express concerning Senate Bill 131 deals with the so called "Romeo and Juliet" provisions. Sexual offenses involving fourteen and fifteen year old females where the perpetrator is within three years or less in age of the victim are proposed to be reclassified as "unlawful sexual relations". The new offense is a level eight offense and most generally will result in a minimal presumptive probation sentence.

Such a change in Kansas law will send a dangerous message to the young men and women of this State. I would urge the committee to reject this proposed statutory amendment. You are no less of a sexual predator because you select a victim who is near to you in age.

Before such a message is sent to the people of the State of Kansas, please contact the juvenile authorities across the State to learn their views concerning the problem that presently exists in sexual crimes against fourteen and fifteen year old females. Please contact police officers, juvenile prosecutors, judges, school officials, sexual assault centers and parents to become aware of the problem that presently exists.

Granted, a relationship can exist between a high school freshman female and a high school senior male. Prosecutor discretion and the courts exist to handle that situation. I submit that it is far too common where high school seniors pray on a particularly vulnerable segment of society, the younger female, when it is not a romantic relationship. That situation exists, and will continue to exist. I urge upon you, do not send a message that fourteen and fifteen year old girls are entitled to less protection and it is somehow less of an offense if the perpetrator happens to be near them in age. Thank you.

Timothy J. Chambers

Kansas Peace Officers' Association

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MEMORANDUM

TO: Representative Mike O'Neal, Chair
House Judiciary Committee

FROM: William W. Sneed
Kansas Peace Officers Association

DATE: March 16, 1999

RE: SB 131

Mr. Chairman, members of the committee, my name is Bill Sneed and I appear today on behalf of the Kansas Peace Officers Association ("KPOA"), Kansas' largest professional law enforcement organization, with more than 3,500 members statewide. We thank you the opportunity to appear today and express our views concerning Senate Bill 131.

The language of this Bill concerns us. The legislation would lessen the penalties for certain persons who are convicted of certain sex crimes against children.

In Unity There Is Strength

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Specifically, relevant portions of Sections 4, 5, 6 and 7 prohibit prosecution of persons who are less than three years older than the victim for indecent liberties with a child; aggravated indecent liberties with a child; criminal sodomy; and indecent solicitation of a child, respectively. While we recognize that Section 8 amends the crime of Unlawful Sexual Relations to essentially allow

prosecution of persons who are less than three years older than the victim for acts encompassing the aforementioned crimes, *this amendment also decreases the severity of the penalties for those offenders.*

The Legislature created the original crimes, and the original penalties, to protect children. It is unwise to dilute that protection, especially when the effect is based on the fortuitous circumstance that the suspect is not sufficiently older than the victim.

We recommend leaving these laws intact, and appreciate the opportunity to express our concerns with this legislature.

Very truly yours,

William W. Sneed

WWS/pk

[As Amended by Senate Committee of the Whole]

As Amended by Senate Committee

Session of 1999

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Attachment 1

SENATE BILL No. 131

By Committee on Judiciary

1-26

AN ACT concerning crimes, criminal procedure and punishment; prescribing certain penalties; amending K.S.A. 21-3503, 21-3504, 21-3505, 21-3510, 21-3520, 21-3705, ~~and~~ 21-4605, 21-4635 and 21-4638 and K.S.A. 1998 Supp. 8-262, 8-287, 21-3402, 21-3810, 21-4603d, 21-4704, 21-4705, 22-3717, 22-4902 and 75-5217 and repealing the existing sections.

21-4635 and 21-4638

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

Section 1. K.S.A. 1998 Supp. 8-262 is hereby amended to read as follows: 8-262. (a) (1) Any person who drives a motor vehicle on any highway of this state at a time when such person's privilege so to do is canceled, suspended or revoked shall be guilty of: (A) Class B nonperson misdemeanor on the first conviction; *and* (B) class A nonperson misdemeanor on the second conviction; ~~and (C) severity level 9, nonperson~~ felony on a third or subsequent conviction.

(2) No person shall be convicted under this section if such person was entitled at the time of arrest under K.S.A. 8-257, and amendments thereto, to the return of such person's driver's license or was, at the time of arrest, eligible under K.S.A. 8-256, and amendments thereto, to apply for a new license to operate a motor vehicle.

(3) Except as otherwise provided by subsection (a)(4), every person convicted under this section shall be sentenced to at least five days' imprisonment and fined at least $100 and upon a second or subsequent conviction shall not be eligible for parole until completion of five days' imprisonment.

(4) If a person (A) is convicted of a violation of this section, committed while the person's privilege to drive was suspended or revoked for a violation of K.S.A. 8-1567, and amendments thereto, or any ordinance of any city or a law of another state, which ordinance or law prohibits the acts prohibited by that statute, and (B) is or has been also convicted of a violation of K.S.A. 8-1567, and amendments thereto, or of a municipal ordinance or law of another state, which ordinance or law prohibits the

Sec. 4. K.S.A. 21-3503 is hereby amended to read as follows: 21-3503. (a) Indecent liberties with a child is engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age *and the offender is more than ~~three~~ four years older than the child*:

(1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(b) It shall be a defense to a prosecution of indecent liberties with a child as described in subsection (a)(1) that the child was married to the accused at the time of the offense.

(c) Indecent liberties with a child is a severity level 5, person felony.

Sec. 5. K.S.A. 21-3504 is hereby amended to read as follows: 21-3504. (a) Aggravated indecent liberties with a child is:

(1) Sexual intercourse with a child who is 14 or more years of age but less than 16 years of age *and the offender is ~~more than three~~ four years older than the child*; or

(2) engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age *and the offender is more than ~~three~~ four years older than the child* and who *the child* does not consent thereto:

(A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; or

(B) causing the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another; or

(3) engaging in any of the following acts with a child who is under 14 years of age:

(A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(B) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(b) It shall be a defense to a prosecution of aggravated indecent liberties with a child as provided in subsection (a)(1), (a)(2)(A) and (a)(3)(A) that the child was married to the accused at the time of the offense.

(c) Aggravated indecent liberties with a child as described in subsections (a)(1) and (a)(3) is a severity level 3, person felony. Aggravated indecent liberties with a child as described in subsection (a)(2) is a severity

level 4, person felony.

Sec. 6. K.S.A. 21-3505 is hereby amended to read as follows: 21-3505. (a) Criminal sodomy is:

(1) Sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal;

(2) sodomy with a child who is 14 or more years of age but less than 16 years of age *and the offender is* ~~more than~~ [three] *years older than the child*; or

(3) causing a child 14 or more years of age but less than 16 years of age *and the offender is more than* [three] *years older than the child* to engage in sodomy with any person or animal.

(b) It shall be a defense to a prosecution of criminal sodomy as provided in subsection (a)(2) that the child was married to the accused at the time of the offense.

(c) Criminal sodomy as provided in subsection (a)(1) is a class B nonperson misdemeanor. Criminal sodomy as provided in subsections (a)(2) and (a)(3) is a severity level 3, person felony.

Sec. 7. K.S.A. 21-3510 is hereby amended to read as follows: 21-3510. (a) Indecent solicitation of a child is:

(1) Enticing or soliciting a child 14 or more years of age but less than 16 years of age *and the offender is* ~~more than~~ [three] *years older than the child* to commit or to submit to an unlawful sexual act; or

(2) inviting, persuading or attempting to persuade a child 14 or more years of age but less than 16 years of age *and the offender is* ~~more than~~ [three] *years older than the child* to enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the child.

(b) Indecent solicitation of a child is a severity level 7, person felony.

Sec. 8. K.S.A. 21-3520 is hereby amended to read as follows: 21-3520. (a) Unlawful sexual relations is engaging in consensual sexual intercourse, *lewd fondling or touching*, or sodomy with a person who is not married to the offender if:

(1) The offender is an employee of the department of corrections or the employee of a contractor who is under contract to provide services in a correctional institution and the person with whom the offender is engaging in consensual sexual intercourse, *lewd fondling or touching*, or sodomy is an inmate; or

(2) the offender is a parole officer and the person with whom the offender is engaging in consensual sexual intercourse, *lewd fondling or touching*, or sodomy is an inmate who has been released on parole or conditional release or postrelease supervision under the direct supervision and control of the offender; *or*

(3) *the person with whom the offender is engaging in voluntary: (i)*

four

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Sexual intercourse; (ii) lewd fondling; (iii) touching; or (iv) sodomy is between the ages of 14 or more years of age but less than 16 years of age and the offender is not more than [five] four years older than the victim.

(b) For purposes of this act:

(1) "Correctional institution" means the same as prescribed by K.S.A. 75-5202, and amendments thereto;

(2) "Inmate" means the same as prescribed by K.S.A. 75-5202, and amendments thereto;

(3) "parole officer" means the same as prescribed by K.S.A. 75-5202, and amendments thereto; and

(4) "postrelease supervision" means the same as prescribed in the Kansas sentencing guidelines act in K.S.A. 21-4703.

(c) Unlawful sexual relations *as provided in subsection (a)(3) is a severity level 8 person felony. Unlawful sexual relations as provided in subsection (a)(1) and (a)(2)* is a severity level 10 person felony.

Sec. 9. K.S.A. 21-3705 is hereby amended to read as follows: 21-3705. (a) Criminal deprivation of property is obtaining or exerting unauthorized control over property, with intent to deprive the owner of the temporary use thereof, without the owner's consent but not with the intent of depriving the owner permanently of the possession, use or benefit of such owner's property.

(b) Criminal deprivation of property that is a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a *class A* nonperson felony *misdemeanor*. Upon a first conviction of this subsection, a person shall be sentenced to not less than 30 days nor more than one year's imprisonment and fined not less than $100. Upon a second or subsequent conviction of this subsection, a person shall be sentenced to not less than 60 days nor more than one year's imprisonment and fined not less than $200. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served the minimum mandatory sentence as provided herein. The mandatory provisions of this subsection shall not apply to any person where such application would result in a manifest injustice.

(c) Criminal deprivation of property other than a motor vehicle, as defined in K.S.A. 8-1437, and amendments thereto, is a class A nonperson misdemeanor. Upon a second or subsequent conviction of this subsection, a person shall be sentenced to not less than 30 days imprisonment and fined not less than $100, except that the provisions of this subsection relating to a second or subsequent conviction shall not apply to any person where such application would result in a manifest injustice.

Sec. 10. K.S.A. 1998 Supp. 21-3810 is hereby amended to read as follows: 21-3810. *(a)* Aggravated escape from custody is:

(a) *(1)* Escaping *(A)* While held in lawful custody upon a charge or

corrections; all reports under subsection (a)(1) shall be sent to the secretary of corrections and, in accordance with K.S.A. 75-5220, and amendments thereto, to the warden of the state correctional institution to which the defendant is conveyed.

(c) Nothing in this section shall be construed as prohibiting the attorney for the defendant from disclosing the report of the presentence investigation, or other diagnostic reports, to the defendant after receiving court approval to do so.

(d) Notwithstanding subsections (a), (b) and (c), the presentence report, any report that may be received from the Topeka correctional facility or the state security hospital and other diagnostic reports, shall be made available upon request to the Kansas sentencing commission for the purpose of data collection and evaluation. *The presentence report shall become part of the court record and shall be accessible to the public, except that the official version, the defendant's version, the victim's statement, any psychological reports and any drug and alcohol reports shall be accessible only to the parties [attorney for the state and the counsel for the defendant], the sentencing judge, the department of corrections and if requested, the Kansas sentencing commission. If the offender is committed to the custody of the secretary of corrections, the report shall be sent to the secretary and, in accordance with K.S.A. 75-5220 and amendments thereto, to the warden of the state correctional institution to which the defendant is conveyed.*

(e) *(c)* For felony crimes committed on or after July 1, 1993, the provisions of this section are not applicable to the presentence investigation report.

Sec. 13. K.S.A. 21-4635 is hereby amended to read as follows: 21-4635. (a) Except as provided in K.S.A. 21-4634, if a defendant is convicted of the crime of capital murder and a sentence of death is not imposed, or if a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years *or for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years* or sentenced as otherwise provided by law.

(b) In order to make such determination, the court may be presented evidence concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4636 and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating cir-

~~cumstances as the state has made known to the defendant prior to the sentencing shall be admissible and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the time of sentencing shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.~~

~~(c) If the court finds that one or more of the aggravating circumstances enumerated in K.S.A. 21-4626 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced pursuant to K.S.A. 21-4638 and amendments thereto; otherwise, the defendant shall be sentenced as provided by law. The court shall designate, in writing, the statutory aggravating circumstances which it found. The court may make the findings required by this subsection for the purpose of determining whether to sentence a defendant pursuant to K.S.A. 21-4638 notwithstanding contrary findings made by the jury or court pursuant to subsection (c) of K.S.A. 21-4624 and amendments thereto for the purpose of determining whether to sentence such defendant to death.~~

~~Sec. 14. K.S.A. 21-4638 is hereby amended to read as follows: 21-4638. When it is provided by law that a person shall be sentenced pursuant to this section, such person shall be sentenced to imprisonment for life and shall not be eligible for probation or suspension, modification or reduction of sentence. In addition, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 40 years' imprisonment, and such 40 years' imprisonment shall not be reduced by the application of good time credits. *For crimes committed on and after July 1, 1999, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 50 years' imprisonment, and such 50 years' imprisonment shall not be reduced by the application of good time credits.* Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced pursuant to K.S.A. 21-4638.~~

~~Sec. 15. K.S.A. 1998 Supp. 21-4704 is hereby amended to read as follows: 21-4704. (a) For purposes of sentencing, the following sentencing guidelines grid for nondrug crimes shall be applied in felony cases for crimes committed on or after July 1, 1993:~~

Sec. 13. K.S.A. 21-4635 is hereby amended to read as follows: 21-4635. (a) Except as provided in K.S.A. 21-4634, if a defendant is convicted of the crime of capital murder and a sentence of death is not imposed, or if a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the defendant shall be required to serve a mandatory term of imprisonment of 40 years or for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years or sentenced as otherwise provided by law.

(b) In order to make such determination, the court may be presented evidence concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4636 and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing shall be admissible and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the time of sentencing shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.

(c) If the court finds that one or more of the aggravating circumstances enumerated in K.S.A. 21-4636 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced pursuant to K.S.A. 21-4638 and amendments thereto; otherwise, the defendant shall be sentenced as provided by law. The court shall designate, in writing, the statutory aggravating circumstances which it found. The court may make the findings required by this subsection for the purpose of determining whether to sentence a defendant pursuant to K.S.A. 21-4638 notwithstanding contrary findings made by the jury or court pursuant to subsection (e) of K.S.A. 21-4624 and amendments thereto for the purpose of determining whether to sentence such defendant to death.

Sec. 14. K.S.A. 21-4638 is hereby amended to read as follows: 21-4638. When it is provided by law that a person shall be sentenced pursuant to this section, such person shall be sentenced to imprisonment for life and shall not be eligible for probation or suspension, modification or reduction of sentence. In addition, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 40 years' imprisonment, and such 40 years' imprisonment shall not be reduced by the application of good time credits. For crimes committed on and after July

1, 1999, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 50 years' imprisonment, and such 50 years' imprisonment shall not be reduced by the application of good time credits. Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced pursuant to K.S.A. 21-4638.

promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence if the offense is classified in grid blocks 5-H, 5-I or 6-G shall not be considered a departure and shall not be subject to appeal.

(g) The sentence for the violation of K.S.A. 21-3411, aggravated assault against a law enforcement officer or K.S.A. 21-3415, aggravated battery against a law enforcement officer and amendments thereto which places the defendant's sentence in grid block 6-H or 6-I shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence, if the offense is classified in grid block 6-H or 6-I, shall not be considered departure and shall not be subject to appeal.

(h) When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

(i) The sentence for the violation of the felony provision of K.S.A. 8-1567 and ~~[subsection (b) of K.S.A. 21-3705,]~~ *and subsection [(b)(3)] of K.S.A. 21-3412* and amendments thereto shall be as provided by the specific mandatory sentencing requirements of that section and shall not be subject to the provisions of this section or K.S.A. 21-4707 and amendments thereto. Notwithstanding the provisions of any other section, the term of imprisonment imposed for the violation of the felony provision of K.S.A. 8-1567 and ~~[subsection (b) of K.S.A. 21-3705,]~~ *and subsection [(b)(3)] of K.S.A. 21-3412* and amendments thereto shall not be served in a state facility in the custody of the secretary of corrections.

(j) The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. Except as otherwise provided in this subsection, as used in this subsection, "persistent sex offender" means a person who: (1) Has been convicted in this state of a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto; and (2) at the time of the conviction under subsection (1) has at least one conviction for a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto in this state or comparable

(c)(3)

payments for such services.

(n) If the court which sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of parole or postrelease supervision, the Kansas parole board shall order as a condition of parole or postrelease supervision that the inmate pay restitution in the amount and manner provided in the journal entry unless the board finds compelling circumstances which would render a plan of restitution unworkable.

(o) Whenever the Kansas parole board grants the parole of an inmate, the board, within 10 days of the date of the decision to grant parole, shall give written notice of the decision to the county or district attorney of the county where the inmate was sentenced.

(p) When an inmate is to be released on postrelease supervision, the secretary, within 30 days prior to release, shall provide the county or district attorney of the county where the inmate was sentenced written notice of the release date.

(q) Inmates shall be released on postrelease supervision upon the termination of the prison portion of their sentence. Time served while on postrelease supervision will vest.

(r) An inmate who is allocated regular good time credits as provided in K.S.A. 22-3725 and amendments thereto may receive meritorious good time credits in increments of not more than 90 days per meritorious act. These credits may be awarded by the secretary of corrections when an inmate has acted in a heroic or outstanding manner in coming to the assistance of another person in a life threatening situation, preventing injury or death to a person, preventing the destruction of property or taking actions which result in a financial savings to the state.

Sec. ~~18~~ 16. K.S.A. 1998 Supp. 22-4902 is hereby amended to read as follows: 22-4902. As used in this act, unless the context otherwise requires:

(a) "Offender" means: (1) A sex offender as defined in subsection (b); (2) a violent offender as defined in subsection (d); (3) any person who, on and after the effective date of this act, is convicted of any of the following crimes when the victim is less than 18 years of age:

(A) Kidnapping as defined in K.S.A. 21-3420 and amendments thereto, except by a parent;

(B) aggravated kidnapping as defined in K.S.A. 21-3421 and amendments thereto; or

(C) criminal restraint as defined in K.S.A. 21-3424 and amendments thereto, except by a parent;

(4) any person convicted of any of the following criminal sexual conduct if one of the parties involved is less than ~~18~~ 19 years of age *and the offender is three or more years of age older than the child*: and the offender is four or ~~more~~ less years of age older than the child

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Sec. ~~20~~ 18. K.S.A. 21-3503, 21-3504, 21-3505, 21-3510, 21-3520, 21-3705, and 21-4605, ~~21-4635 and 21-4638~~ and K.S.A. 1998 Supp. 8-262, 8-287, 21-3402, 21-3810, 21-4603d, 21-4704, 21-4706, 22-3717, 22-4902, and 75-5217 are hereby repealed.

21-4635 and 21-4638

Sec. ~~21~~ 19. This act shall take effect and be in force from and after its publication in the statute book.

Approved: 4.2.99
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on March 23, 1999 in Room 313-S of the Capitol.

All members were present except:
Representative David Adkins - Excused
Representative Andrew Howell - Excused
Representative Candy Ruff - Excused
Representative Clark Shultz - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

SB 130 - enacting the revised Kansas Trademark Act

Representative Carmody made the motion to report SB 130 favorably for passage. Representative Long seconded the motion.

Representative Pauls made the substitute motion to amend the bill by stating that the filing fee for registration and renewal of a trademark would be $25, and any other fees in the bill would be $5. Representative Klein seconded the motion. The motion carried.

Representative Long made the motion to report SB 130 favorably for passage, as amended. Representative Carmody seconded the motion. The motion carried.

SB 131 - crimes, punishments, sentencing

The committee was provided a balloon amendment that addressed the Romeo & Juliet issue, reinserting the Hard 50, reinserting that those that meet the Romeo & Juliet requirement would not have to register, and some technical amendments. (Attachment 1)

Representative Haley made the motion to adopt the balloon amendment. Representative Lightner seconded the motion. The motion was divided the following way:

1. the age of the offender has to be less than age 19 and that there has to be no less than 4 years difference between the two - The motion carried. Representative Haley requested that he be recorded as voting yes. Representatives Edmonds, Swenson, Long & Carmody requested that they be recorded as voting no.

2. reinsert that these persons would not be required to register - The motion carried. Representatives Edmonds & Long requested that they be recorded as voting no.

3. reinsert the Hard 50 - The motion carried. Representative Haley requested he be recorded as voting no.

4. technical amendments - The motion carried.

Representative Lloyd made the motion to amend the penalty section of K.S.A. 21-3435 so that intentionally exposing another to a life threatening disease would be a severity level 7, person felony. Representative Lloyd seconded the motion. The motion carried.

Representative Haley made the motion to amend in the provisions of SB 334 - absolute liability for certain crimes, but strike the reference to K.S.A. 8-262 & 8-287. Representative Klein seconded the motion. The motion failed. Having voted on the prevailing side, Representative Pauls requested that the committee reconsider its action. The motion carried.

Representative Crow made the motion to delete lines 23,24 & 30 on page 16, requiring mandatory sentencing requirements. Representative Rehorn seconded the motion. The motion carried.

Representative Loyd made the motion that upon application to the courts, it may hold a hearing to determine whether the juvenile who is under the age of 19, needs to continue to register. Representative Lightner seconded the motion. The committee was concerned that this would create two classes of offenders. With permission of the second, Representative Loyd withdrew his motion.

Representative Lightner made the motion to make the provisions of the bill retroactive and that those who are currently registered would need to contact the courts to have their registration requirement removed. Representative Gregory seconded the motion. The motion carried.

Representative Swenson made the motion to report SB 131 favorably for passage, as amended. Representative Klein seconded the motion. The motion carried. Representatives Long & Carmody requested that they be recorded as voting no.

HB 2500 - Kansas offender registration act; registration requirements

The committee was provided with a balloon that would make the effective date in Section 6 be "on and after July 1, 1999" and amend in the Romeo & Juliet provisions (Attachment 2)

Representative Long made the motion to amend in the balloon. Representative Rehorn seconded the motion. The motion carried.

Representative Flaherty made the motion to have the date be prospective application date. Representative Long seconded the motion. The motion carried.

Representative Haley made the motion to amend in the provisions of HB 2309 - hate crimes, presumed imprisonment, civil remedies, reporting and training, with the following change: strike new section 3 so there would be no doubling of sentencing. Representative Loyd seconded the motion. The motion failed 4-7

Representative Loyd made the motion to report HB 2500 favorably for passage, as amended. Representative Lightner seconded the motion. The motion carried.

HB 2553 - civil commitment of sexually violent predators

Representative Carmody made the motion to report HB 2553 favorably for passage. Representative Long seconded the motion.

Representative Carmody made the substitute motion to adopt the amendments suggested by the Department of Social & Rehabilitation Services. (Attachment 3) Representative Long seconded the motion. The motion carried.

Representative Carmody made the motion to amend the Kansas timelines to add Florida's jurisdictional language. (Attachment 4) Representative Long seconded the motion. The motion carried.

Representative Carmody made the motion to delete the language on page 3, line 4. Representative Long seconded the motion. The motion carried.

Representative Pauls made the motion to amend in the preamble that the acts have to be "repeated acts or likely to engage in those acts". Representative Klein seconded the motion. The motion carried.

Representative Klein made the motion to amend in "repeated acts" on line 23, page2 and everywhere that it needs to appear. Representative Gregory seconded the motion. The motion carried.

Representative Carmody made the motion to report HB 2553 favorably for passage, as amended. Representative Long seconded the motion. The motion carried.

The committee meeting adjourned at 6:00 p.m.

Approved: _____
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on March 16, 1999 in Room 313-S of the Capitol.

All members were present except:
Representative David Adkins - Excused
Representative John Edmonds - Excused
Representative Ward Loyd - Excused
Representative Candy Ruff - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Barbara Tombs, Kansas Sentencing Commission
Paul Morrison, Vice-Chairman Kansas Sentencing Commission
Charles Simmons, Secretary Department of Corrections
Marilyn Scafe, Kansas Parole Board
Jim Clark, Kansas County & District Attorneys Association
Marla Luckert, Judge, Judicial Council Criminal Law Advisory Committee
Kyle Smith, Kansas Bureau of Investigation

Hearings on SB 131 - crimes and punishments, sentencing, were opened.

Barbara Tombs, Kansas Sentencing Commission, appeared before the committee as a proponent of the bill. She explained the provisions of the bill. (Attachment 1)

Paul Morrison, Vice-Chairman Kansas Sentencing Commission, stated that the Sentencing Commission conducted a comprehensive review of the sentencing laws. Since they were enacted there have been numerous amounts of changes to the laws and the proposed bill would take care of the inequities that have been created. (Attachment 2)

Charles Simmons, Secretary Department of Corrections, appeared before the committee in support of all portions of SB 131 except the section that reduces the presumptive prison sentences that have been established for nondrug Severity Levels I and II. (Attachment 3)

Marilyn Scafe, Kansas Parole Board, appeared before the committee as a proponent of the bill. The proposed bill would allow those offenders who are under determinate sentences to waive their appearances at the final hearings, if they have admitted guilt to all violations. (Attachment 4)

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee with concerns about the section that distinguishes sex crimes based on the offender's age. (Attachment 5)

Kansas Peace Officers' Association did not appear before the committee but requested that their testimony be included in the minutes. (Attachment 6)

Hearings on SB 131 were closed.

Hearings on SB 98 - sentencing when new felony committed while offender is on release, were opened.

Marla Luckert, Judge, Judicial Council Criminal Law Advisory Committee, appeared before the committee in support of the bill. It would allow the sentencing judge to impose a sentence be served consecutively for a new crime that was committed while he was on bond for the original crime. (Attachment 7)

The Attorney General did not appear before the committee but requested her testimony be included in the minutes. (Attachment 8)

Hearings on SB 181 - nature of assault convictions and adjudications in determining criminal history classifications, were opened.

Barbara Tombs, Kansas Sentencing Commission, appeared before the committee as a proponent of the bill. The bill would simply clarify the calculation procedure for determining an offenders criminal history score. (Attachment 9)

Hearings on SB 181 were closed.

Hearings on SB 206 - search incident to lawful arrest includes evidence of any crime, were opened.

Kyle Smith, Kansas Bureau of Investigation, appeared before the committee as a proponent of the bill. The proposed bill would repeal the statute that sets out searches that may be conducted by a law enforcement officer incident to a lawful arrest. (Attachment 10)

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee in support of the proposed bill. He explained that this would allow searches of areas incident to arrest for the fruits of any crime, not just the crime for which the arrest was made. (Attachment 11)

The Kansas Peace Officers Association did not appear before the committee but requested that his testimony be included in the minutes. (Attachment 12)

Hearings on SB 206 were closed.

Hearings on SB 207 - background checks conducted by the KBI for appointees of the governor, were opened.

Kyle Smith, Kansas Bureau of Investigation, appeared before the committee as a proponent of the bill. He stated that the proposed bill would require background checks to any gubernatorial appointees and judicial appointments. (Attachment 13)

Hearing on SB 207 were closed.

The committee meeting adjourned at 6:00 p.m. The next meeting is scheduled for March 17, 1999.

B

State of Kansas

KANSAS SENTENCING COMMISSION

Testimony on Senate Bill 131
Senate Judiciary Committee
February 11, 1999

The Kansas Sentencing Commission is testifying today in support of Senate Bill 131. The proposed bill reflects the Commission's discussions and deliberations over the past months relating to the underlying intent and goals of Sentencing Guidelines. In addition, the bill addresses the issue of proportionality in sentencing, which has become a growing concern of the Commission.

Sentencing Guidelines were legislatively enacted into law on July 1, 1993. Five years after enactment, the Sentencing Commission met for two days last fall to review the sentencing guidelines and examine changes that have occurred over the past years. From the issues raised during that meeting, a Subcommittee was appointed to complete a comprehensive review and identify changes and modifications to the guidelines and sentencing grids that support the underlying philosophy that incarceration should be reserved for the most violent and chronic offenders. The Subcommittee met several times and drafted a set of recommendations that were presented to the full Commission for review and approval. In January, the Sentencing Commission voted to present its recommendations to the 1999 Legislature.

Senate Bill 131 before you contains a package of comprehensive changes to the sentencing guidelines that promote both public safety and enhanced penalties for our most violent offenders, while at the same time providing a clearer sense of proportionality for all felony sentences. During the past five years numerous changes have been made to sentencing guidelines in a fragmented manner. Although each individual change may have been made with the best of intentions, the cumulative effect of these changes has resulted in some grave inequities with regards to sentencing. All three classifications of offenses under Sentencing Guidelines, Off-Grid, Grid, and Non-Grid, were examined and evaluated with respect to public safety and equity in sentencing. The primary purpose of this bill is to address the proportionality issues in sentencing that have arisen since the passage of the sentencing guidelines.

Included in this bill are several sentence enhancements that clearly result in longer sentences for many of the Off-Grid offenses. The Sentencing Commissions believes and supports the premise that this specific offender group, representing the most serious of all offenders whose intentional

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actions result in the loss of a human life, should remain incarcerated for a considerably long period of time, regardless of the number of prison beds required to accommodate these offenders. Of all criminal actions, those that deprive an individual of his or her life must be viewed as the greatest threat to public safety. In addition, the sentence lengths for nondrug severity level III have been increased to addresse the inequity of sentence lengths between severity level II and severity level III and the seriousness of severity level III offenses.

Specific enhancements contained in this bill contain the following recommendations:

(a) Hard 40 sentence for Capital Murder and Premeditated First Degree Murder be increased to a Hard 50 sentence. This represents a modification that makes the sentence for these specific types of murder conviction more representative of a "true life sentence." Since this sentence is often imposed as an alternative to the Death Penalty, the fact that an offender must serve the entire 50 years, with no good time credits allowed, even before appearing before the Parole Board provides a significant period of incarceration and enhances public safety.

(b) Life sentence for Felony Murder and Treason be increased from 15 years to 20 years before parole eligibility. This increase represents an adjustment to the proportionality of off-grid sentences and the seriousness of the actions that would constitute a conviction for this offense.

(c) Increasing the sentence lengths in all criminal history categories on Nondrug severity level III by 20 percent. This recommendation would result in the range of sentences being increased from the current minimum of 3.8 years to 4.6 years and the current maximum from 17.2 years to 20.6 years. The mean sentence for that severity level increases from 6.1 years to 7.3 years. This enhancement is presented because of the seriousness of many of the offenses classified as severity level III crimes, including kidnapping, aggravated robbery, voluntary manslaughter and aggravated indecent liberties with a child. When reviewing the guidelines, it became apparent that there was a great inequity between sentence lengths on severity level II and those on severity level III. Given the serious nature of the offenses on severity level III, the Commission believed an across the board increase was warranted.

(d) Reclassification of Intentional Second Degree Murder from an off-grid offense to a severity level I offense. Although initially this may not appear to be an enhancement since the reclassification designates the offense as a grid crime, the actual sentence length increases on grid. Under current statute, an offender convicted of Intentional Second Degree Murder is parole eligible, regardless of criminal history, at ten years. Severity level I provides a sentence range of 15.3 years to 68 years, depending on criminal history classification. The mean sentence for this severity level is 24.3 years. Even though 15 percent good time credits are available, the offender would still serve as much and, in most cases more time, than under the current off-grid classification.

(e) A new sentencing rule was created that designates a presumptive prison sentence for a conviction of Residential Burglary, when the offender has a prior conviction for either a residential burglary or a non-residential burglary. This recommendation is in response to numerous concerns raised by judges, prosecutors, and the public regarding the number of residential burglary convictions that must occur before an offender is sentenced to prison.

(f) Enhance the penalty for Aggravated Escape from Custody, from a severity level 6 person felony to a severity level 5 person felony, when the offender is in the custody of the Secretary of Corrections and escapes from a state operated correctional facility. This proposal differentiates the degree of seriousness in escaping from a community corrections facility versus a correctional institution, even though both offenders can be in the custody of the Secretary of Corrections.

The bill also contains several recommendations that reclassify some low level felony offenses and attempt to address the proportionality issues that became very apparent when the Commission examined changes to the Sentencing Guidelines. These recommendations were developed based on two primary guiding principals: (1) Incarceration should be reserved for the most violent and chronic offenders and (2) the length of sentences should increase in proportion to the severity of the offense, with the loss of a human life representing the most severe threat to public safety.

(a) Sentence lengths in all criminal history categories on Nondrug severity levels I and II be reduced by 20 percent. Although this may not be a popular recommendation, there are sound and rational public policy reasons to support the proposed adjustment. This proposal would result in the minimum sentence for severity level I be changed from 15.3 years to 12.2 years and the maximum sentence from 68 years to 54.4 years, with the mean adjusted from 24.3 years to 19.5 years. Even with the proposed change, the lengths of sentences are by no means short. It should be noted that even with the enhanced penalties for off-grid offenses noted above (20 to 50 years), severity level I sentences are very close in length. Under Sentencing Guidelines, a conviction for an attempted off-grid murder results in sentencing as a severity level I offense. This has resulted in some offenders pleading up from an attempted murder charge to murder charge because the sentence for an off-grid offense is actually shorter than for a severity level I offense. This type of action is not reflective of good sentencing policy, which should provide the longest sentences for more serious offenses. The Commission acknowledges the seriousness of the offenses classified as severity level I (rape, aggravated kidnapping and attempted murder) and supports long periods of incarceration for convictions of these offenses. However, in reviewing the proportionality of sentences, the Commission feels that a conviction for the crime of murdershould carry the most severe sentence.

(b) Felony Driving with a Suspended License and the Habitual Violator statute, both current severity level 9, nonperson felonies be reclassified as Class A, nonperson misdemeanors. Sentencing Guidelines distinguishes offenses by person and nonperson, which differentiates betweens crimes against a person and crimes against property. These

specific offenses are basically of the traffic nature and can be more appropriately dealt with at the local level. A severity level 9 felony, for most criminal history categories imposes a presumptive nonprison sentence. Even if the offender violates his or her probation and a revocation occurs, the underlying prison sentence for that severity level only ranges from 5 to 13 months. If the offense is classified as a Class A misdemeanor, the judge may impose up to a 12 month jail sentence upon conviction. If the intent is to stop offenders from driving while their drivers license is suspended, then the offense can be more adequately and efficiently dealt with at the local level.

(c) Criminal Deprivation of Property - a Motor Vehicle is reclassified from a non-grid felony to a Class A, nonperson misdemeanor. This statute is commonly referred as the "joy riding" statute and the current classification as a non-grid felony sets forth that incarceration be at the local level. In attempting to attain consistency in sentencing policy, the reclassification would address the proportionality issue.

(d) Amendment to K.S.A. 21-3520, Unlawful Sexual Relations, which would create a new sentencing structure for what is commonly referred to as the "Romeo and Juliet" situations. The new section would allow for a severity level VIII, person felony conviction, when the offender is less than three years older than the victim and the victim is greater than 14 years of age but less than 16 years of age and the sexual activity is voluntary. Numerous concerns have been raised by judges on the sentencing when the parties are in a mutual relationship and the parents or other parties initiate prosecution. This would allow for the sanctioning of the activity as a person felony, but would designate a presumptive nonprison sentence. In addition, a conviction under this new section would not require the offender to register as a sex offender, which may result in long term consequences.

(e) Designates the location of incarceration for a Third or Subsequent Felony Domestic Battery Conviction, a nongrid felony, to be at the local level to provide consistency with other nongrid felonies, such as DUI. Nongrid felonies are not assigned a severity level nor a determinate period of incarceration. As with felony DUI, the Commission believed incarceration should occur at the local level.

In addition to the above enhancements and proportionality adjustments, the Commission reviewed several procedural issues in which recommendations for change are included in this bill. One issue relates to procedures surrounding postrelease revocation hearings. Under current law, when an offender violates the conditions of postrelease supervision, the offender must wait until the revocation hearing before the Parole Board occurs, to start serving the appropriate sentence for the violation. The change proposed would allow the offender to waive his/her right to a revocation hearing and begin to immediately serve the appropriate period of incarceration. The offender would still have the right to request a hearing and wait until the hearing takes place to begin serving, if warranted, the incarceration period. However, if the offender voluntarily chooses to waive the right to a hearing, the offender could begin his sentence immediately.

This bill also contains a section which recommends that misdemeanor Pre-Sentence Investigation Reports be part of the official court record and accessible to the public in the same manner as current law allows for felony Pre-Sentence Investigation Reports. This would allow for consistency in sentencing and providing reliable data.

Finally, this bill contains a proposal, which is very similar to SB 435, which was introduced by the Sentencing Commission during the 1998 Legislative Session. The proposal requests that when an offender commits a new felony while released on felony bond, that the judge shall impose consecutive sentences upon a conviction.

In the past the Sentencing Commission has limited introduction of bills to either technical or clarification issues surrounding the Sentencing Guidelines Act. In a perfect world, the Guidelines would have been implemented in 1993 and allowed to operate for a period of time before amendments were introduced and changes imposed. However, we do not operate in a perfect world. The Sentencing Commission is mandated by statute to monitor the Sentencing Guidelines and recommend changes to the Legislature. Senate Bill 131 represents a comprehensive review of the Sentencing Guidelines after five years of enactment.

Senate Bill 131 contains a mix of recommendations that support the underlying goals of the Sentencing Guidelines and support public safety. For the past ten years the consensus of the criminal justice community has been to get tough on crime and we have. Violent offenders are serving much longer sentences than they had prior to sentencing guidelines. Offenders are now being held more accountable for their actions. However, in developing good sentencing policy, we need to be both tough and smart about crime. Distinguishing between criminals we are afraid of and criminals we are mad at, is often necessary but difficult to do at times. Senate Bill 131 represents this effort by the Sentencing Commission. Good public policy is not only concerned with current issues but also anticipates future consequences.

For Additional Information Contact:

Barbara Tombs
Executive Director

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2-11-99

Proposed Amendments
to the language of

SENATE BILL No. 131

By Committee on Judiciary

AN ACT concerning crimes, criminal procedure and punishment; prescribing certain penalties; amending K.S.A. 21-3503, 21-3504, 21-3505, 21-3510, 21-3520, 21-3705, 21-4605, 21-4635, and 21-4638 and K.S.A. 1998 Supp. 8-262, 8-287, 21-3402, 21-3810, 21-4603d, 21-4704, 21-4706, 22-3737, 22-4902 and 75-5217 and repealing the existing sections.

Sections to be Amended:

1. At Section 5, page 3 of the bill, beginning at line 18, delete the phrase *"and the offender is more than three years older than the child"* from the proposed language for K.S.A. 21-3504(a)(2).

2. At Section 18, page 25 of the bill, beginning at line 42, delete the phrase *"and the offender is three or more years of age older than the child"* from the proposed language for K.S.A. 1998 Supp. 22-4902(a)(4).

Please refer to the attached pages to see how the proposed amendments would appear in Senate Bill 131.

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AMENDED

Session of 1999

SENATE BILL No. 131

By Committee on Judiciary

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AN ACT concerning crimes, criminal procedure and punishment; prescribing certain penalties; amending K.S.A. 21-3503, 21-3504, 21-3505, 21-3510, 21-3520, 21-3705, 21-4605, 21-4635 and 21-4638 and K.S.A. 1998 Supp. 8-262, 8-287, 21-3402, 21-3810, 21-4603d, 21-4704, 21-4706, 22-3717, 22-4902 and 75-5217 and repealing the existing sections.

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

Section 1. K.S.A. 1998 Supp. 8-262 is hereby amended to read as follows: 8-262. (a) (1) Any person who drives a motor vehicle on any highway of this state at a time when such person's privilege so to do is canceled, suspended or revoked shall be guilty of a: (A) Class B nonperson misdemeanor on the first conviction; *and* (B) class A nonperson misdemeanor on the second conviction; ~~and (C) severity level 9, nonperson felony on a third~~ or subsequent conviction.

(2) No person shall be convicted under this section if such person was entitled at the time of arrest under K.S.A. 8-257, and amendments thereto, to the return of such person's driver's license or was, at the time of arrest, eligible under K.S.A. 8-255, and amendments thereto, to apply for a new license to operate a motor vehicle.

(3) Except as otherwise provided by subsection (a)(4), every person convicted under this section shall be sentenced to at least five days' imprisonment and fined at least $100 and upon a second or subsequent conviction shall not be eligible for parole until completion of five days' imprisonment.

(4) If a person (A) is convicted of a violation of this section, committed while the person's privilege to drive was suspended or revoked for a violation of K.S.A. 8-1567, and amendments thereto, or any ordinance of any city or a law of another state, which ordinance or law prohibits the acts prohibited by that statute, and (B) is or has been also convicted of a violation of K.S.A. 8-1567, and amendments thereto, or of a municipal ordinance or law of another state, which ordinance or law prohibits the acts prohibited by that statute, committed while the person's privilege to drive was so suspended or revoked, the person shall not be eligible for suspension of sentence, probation or parole until the person has served

age *and the offender is more than three years older than the child*:

(1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(b) It shall be a defense to a prosecution of indecent liberties with a child as described in subsection (a)(1) that the child was married to the accused at the time of the offense.

(c) Indecent liberties with a child is a severity level 5, person felony.

Sec. 5. K.S.A. 21-3504 is hereby amended to read as follows: 21-3504. (a) Aggravated indecent liberties with a child is:

(1) Sexual intercourse with a child who is 14 or more years of age but less than 16 years of age *and the offender is more than three years older than the child*;

(2) engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age ~~and the offender is more than three years older than the child~~ and who *the child* does not consent thereto:

(A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; or

(B) causing the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another; or

(3) engaging in any of the following acts with a child who is under 14 years of age:

(A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(B) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(b) It shall be a defense to a prosecution of aggravated indecent liberties with a child as provided in subsection (a)(1), (a)(2)(A) and (a)(3)(A) that the child was married to the accused at the time of the offense.

(c) Aggravated indecent liberties with a child as described in subsections (a)(1) and (a)(3) is a severity level 3, person felony. Aggravated indecent liberties with a child as described in subsection (a)(2) is a severity level 4, person felony.

Sec. 6. K.S.A. 21-3505 is hereby amended to read as follows: 21-3505. (a) Criminal sodomy is:

→ [The phrase *"and the offender is more than three years older than the child"* has been deleted from the proposed language for K.S.A. 21-3504(a)(2).]

payments for such services.

(n) If the court which sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of parole or postrelease supervision, the Kansas parole board shall order as a condition of parole or postrelease supervision that the inmate pay restitution in the amount and manner provided in the journal entry unless the board finds compelling circumstances which would render a plan of restitution unworkable.

(o) Whenever the Kansas parole board grants the parole of an inmate, the board, within 10 days of the date of the decision to grant parole, shall give written notice of the decision to the county or district attorney of the county where the inmate was sentenced.

(p) When an inmate is to be released on postrelease supervision, the secretary, within 30 days prior to release, shall provide the county or district attorney of the county where the inmate was sentenced written notice of the release date.

(q) Inmates shall be released on postrelease supervision upon the termination of the prison portion of their sentence. Time served while on postrelease supervision will vest.

(r) An inmate who is allocated regular good time credits as provided in K.S.A. 22-3725 and amendments thereto may receive meritorious good time credits in increments of not more than 90 days per meritorious act. These credits may be awarded by the secretary of corrections when an inmate has acted in a heroic or outstanding manner in coming to the assistance of another person in a life threatening situation, preventing injury or death to a person, preventing the destruction of property or taking actions which result in a financial savings to the state.

Sec. 18. K.S.A. 1998 Supp. 22-4902 is hereby amended to read as follows: 22-4902. As used in this act, unless the context otherwise requires:

(a) "Offender" means: (1) A sex offender as defined in subsection (b); (2) a violent offender as defined in subsection (d); (3) any person who, on and after the effective date of this act, is convicted of any of the following crimes when the victim is less than 18 years of age:

(A) Kidnapping as defined in K.S.A. 21-3420 and amendments thereto, except by a parent;

(B) aggravated kidnapping as defined in K.S.A. 21-3421 and amendments thereto; or

(C) criminal restraint as defined in K.S.A. 21-3424 and amendments thereto, except by a parent;

(4) any person convicted of any of the following criminal sexual conduct if one of the parties involved is less than 18 years of age ~~and the offender is three or more years of age older than the child~~:

[The phrase *"and the offender is three or more years of age older than the child"* has been deleted from the proposed language for K.S.A. 1998 Supp. 22-4902(a)(4).]

(A) Adultery as defined by K.S.A. 21-3507, and amendments thereto;

(B) criminal sodomy as defined by subsection (a)(1) of K.S.A. 21-3505, and amendments thereto;

(C) promoting prostitution as defined by K.S.A. 21-3513, and amendments thereto;

(D) patronizing a prostitute as defined by K.S.A. 21-3515, and amendments thereto;

(E) lewd and lascivious behavior as defined by K.S.A. 21-3508, and amendment thereto; or

(F) unlawful sexual relations as defined by *subsection (a)(1) or (2) of* K.S.A. 21-3520, and amendments thereto;

(5) any conviction for an offense in effect at any time prior to the effective date of this act, that is comparable to any crime defined in subsection (3) or (4), or any federal or other state conviction for an offense that under the laws of this state would be an offense defined in subsection (3) or (4); or

(6) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of an offense defined in subsection (3) or (4).

Upon such conviction, the court shall certify that the person is an offender subject to the provisions of K.S.A. 22-4901 *et seq.* and amendments thereto and shall include this certification in the order of commitment. Convictions which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this section. A conviction from another state shall constitute a conviction for purposes of this section.

(b) "Sex offender" includes any person who, after the effective date of this act, is convicted of any sexually violent crime set forth in subsection (c). Upon such conviction, the court shall certify that the person is a sex offender and shall include this certification in the order of commitment. Convictions which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this section. A conviction from another state shall constitute a conviction for purposes of this section.

(c) "Sexually violent crime" means:

(1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

(3) aggravated indecent liberties with a child as defined in K.S.A. 21-

STATE OF KANSAS

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Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

DATE: February 11, 1999

TO: Senate Judiciary Committee

FROM: Charles E. Simmons
Secretary of Corrections

RE: SB 131

SB 131 is a legislative initiative of the Kansas Sentencing Commission. SB 131 contains a number of amendments to the definitions of crimes and criminal penalties, some of which involve proposals raised by the Department of Corrections. The Department supports the provisions of SB 131 with the exception of the reduction of the presumptive prison sentences established for nondrug Severity Levels I and II offenses. The Department also recommends amendments to SB 131 to achieve conformity with other statutory provisions and to correct technical errors.

The Kansas Sentencing Commission has estimated that the cumulative impact of the various sections of SB 131 will increase KDOC capacity needs by 113 beds over a several year period. Our initial impression is that there will be a reduction in the number of minimum custody inmates due to the reclassification of some felony offenses to misdemeanors and possibly an increase in the number of medium custody inmates as a result of longer sentences or changes in sentencing presumptions. The Department, however, is not able at this time to project a numerical impact of SB 131 on the custody classifications of the inmate population.

This testimony will comment on several specific provisions of SB 131:

- Amendment of unlawful sexual relations to include consensual lewd fondling or touching by both employees of the Department and the Department's contractors.

Current law prohibits consensual sexual intercourse and sodomy between corrections personnel and offenders. The Department believes that it is inappropriate and should be unlawful for any form of sexual activity to occur between offenders and those with a custodial responsibility for supervision

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Recent reports indicate that crime rates for violent crimes are down. A reduction in sentences at this time for the most severe offenses is the wrong message to be sending to the citizens of this state, to crime victims, and to criminals.

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Attachments

cc: Legislation file w/attachments

nonprison sentence, if the offense is classified in grid block 6-H or 6-I, shall not be considered departure and shall not be subject to appeal.

(h) When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

(i) The sentence for the violation of the felony provision of K.S.A. 8-1567 ~~and, subsection (b) of K.S.A. 21-3705,~~ *and subsection ~~(b)~~(3) of K.S.A. 21-3412* and amendments thereto shall be as provided by the specific mandatory sentencing requirements of that section and shall not be subject to the provisions of this section or K.S.A. 21-4707 and amendments thereto. Notwithstanding the provisions of any other section, the term of imprisonment imposed for the violation of the felony provision of K.S.A. 8-1567 ~~and, subsection (b) of K.S.A. 21-3705,~~ *and subsection ~~(b)~~(3) of K.S.A. 21-3412* and amendments thereto shall not be served in a state facility in the custody of the secretary of corrections.

(c)

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(j) The sentence for any persistent sex offender whose current convicted crime carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. Except as otherwise provided in this subsection, as used in this subsection, "persistent sex offender" means a person who: (1) Has been convicted in this state of a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto; and (2) at the time of the conviction under subsection (1) has at least one conviction for a sexually violent crime, as defined in K.S.A. 22-3717 and amendments thereto in this state or comparable

felony under the laws of another state, the federal government or a foreign government. The provisions of this subsection shall not apply to any person whose current convicted crime is a severity level 1 or 2 felony.

(k) If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the offender's sentence shall be presumed imprisonment. Any decision made by the court regarding the imposition of the optional nonprison sentence shall not be considered a departure and shall not be subject to appeal. As used in this subsection, "criminal street gang" means any organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more person felonies or felony violations of the uniform controlled substances act, K.S.A. 65-4101 et seq., and amendments thereto, which has a common name or common identifying sign or symbol, whose members, individually or collectively engage in or have engaged in the commission, attempted commission, conspiracy to commit or solicitation of two or more person felonies or felony violations of the uniform controlled substances act, K.S.A. 65-4101 et seq., and amendments thereto, or any substantially similar offense from an-

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STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

PAUL J. MORRISON, DISTRICT ATTORNEY

TESTIMONY IN SUPPORT OF SENATE BILL 131

As a public official, one of the most important things we can do for the people of this State is help ensure their safety. This is primarily accomplished through the operation of our criminal justice system. Our primary goal has always been to protect the public and punish those who break the law. Overall, I have been very impressed over the years with how the legislature has handled these issues. We must never forget that the primary goal of the criminal justice system is to provide justice.

Since the Guidelines were passed in 1993, we have seen many modifications to the sentencing grid. Most of these modifications involved lengthening of sentences for career and violent offenders. They have been good, necessary changes that have received a lot of support from the criminal justice community. For example, some offenders who commit severity level 1 and 2 type crimes have had their sentences quadrupled in the last few years. For the most part, this has been great news for the people of Kansas. However, there have been some unintended consequences. One of those consequences has been the fact that some inequities have been created within the sentencing grid. For example, many severity level 1 crimes now carry much lengthier sentences than their more severe off-grid counterparts. As a specific example, many times a failed attempt to commit a homicide will carry a much lengthier prison sentence than a completed murder. Rapes and aggravated kidnappings now many times carry much lengthier sentences than first degree murder. The list goes on and on. I do not believe that these inequities were created intentionally. I believe that they often occur as a result of "patchwork" type amendments to the grid.

The reason I am supportive of Senate Bill 131 is that it attempts to address much of the proportionality problems within the guidelines. Many, many sentences are increased under this bill. A few are reduced. The reductions are modest and more importantly are an attempt to establish a greater parity within the grid.

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Testimony of Timothy J. Chambers, Reno County Attorney
Prepared For The
Committee on Judiciary of the Kansas Senate regarding
Senate Bill 131, February 11, 1999

I appreciate the opportunity to appear before this committee to speak regarding changes in the Kansas Criminal Code and Code of Criminal Procedures contained within Senate Bill 131.

The proposed legislation will eliminate felony offenses of Driving While Suspended and Driving as an Habitual Violator and relegate those offenses to misdemeanor status. I assume the impetus behind these amendments to current law is to prevent the incarceration of what is perceived as non-violent offenders within the state penal system.

Last year in Reno County, one hundred and seventeen (117) felony driving while suspended or habitual violator cases were filed.

By the time an individual is charged with a felony driving offense, they have exhibited a continued disregard for the driving laws of this State and the court system. Our court services chief has indicated to me a Supreme Court study has shown a non-violent offender on the average will be allowed six technical violations of probation before incarceration is a serious option.

The experience in Reno County has shown incarceration within the Department of Corrections occurs only with extreme cases and if it does occur, because of the commission of new offenses.

Twenty-eight felony D.U.I.'s were filed in Reno County last year. The majority committed the offense while their driving privileges were suspended or while declared to be habitual violators. Third time D.U.I.'s presently are listed as felonies, but in actuality are misdemeanors. At least with felony status for driving while suspended offenses and habitual violator offenses, some effective punishment is allowed to deal with the repeat driving offender.

I personally consider felony driving offenders to be violent. As a prosecutor, I have spent twenty years going to the scene of fatality accidents. Individuals who face incarceration in the state penal system for driving offenses are a danger to the people of this State. They have exhibited a continued pattern of dangerous driving patterns and a complete disregard for the laws of this State. Prosecution and law enforcement should not be further restricted in their efforts to combat this problem.

The second concern I wish to express concerning Senate Bill 131 deals with the so called "Romeo and Juliet" provisions. Sexual offenses involving fourteen and fifteen year old females where the perpetrator is within three years or less in age of the victim are proposed to be reclassified as "unlawful sexual relations". The new offense is a level eight offense and most generally will result in a minimal presumptive probation sentence.

Such a change in Kansas law will send a dangerous message to the young men and women of this State. I would urge the committee to reject this proposed statutory amendment. You are no less of a sexual predator because you select a victim who is near to you in age.

Before such a message is sent to the people of the State of Kansas, please contact the juvenile authorities across the State to learn their views concerning the problem that presently exists in sexual crimes against fourteen and fifteen year old females. Please contact police officers, juvenile prosecutors, judges, school officials, sexual assault centers and parents to become aware of the problem that presently exists.

Granted, a relationship can exist between a high school freshman female and a high school senior male. Prosecutor discretion and the courts exist to handle that situation. I submit that it is far too common where high school seniors pray on a particularly vulnerable segment of society, the younger female, when it is not a romantic relationship. That situation exists, and will continue to exist. I urge upon you, do not send a message that fourteen and fifteen year old girls are entitled to less protection and it is somehow less of an offense if the perpetrator happens to be near them in age. Thank you.

Timothy J. Chambers

Sjud
2-11-99
att 2

KANSAS PAROLE BOARD
LANDON STATE OFFICE BUILDING
900 SW JACKSON STREET, 4TH FLOOR
TOPEKA, KANSAS 66612-1236
(913) 296-3469

MEMORANDUM

TO: Senator Tim Emert, Chairman
Committee on Judiciary, Kansas Senate

FROM: Marilyn Scafe, Chair
Kansas Parole Board MS

RE: SB 131
Waiver of Final Revocation Hearing

DATE: February 11, 1999

Under the current law, all offenders must have a personal interview with a Board member in order to revoke a period of post release, parole, or conditional release supervision. SB 131 would allow offenders under the determinate sentences to waive their appearance at the final hearing, if they admit guilt to all of their violations. The Board would then make an administrative decision regarding the revocation. Responsibility for oversight and review of all cases to ensure due process would continue to rest with the Board. If deemed necessary, the Board could set a hearing regardless of the waiver. If there are pending charges, the offender will not be eligible to waive the final hearing. The Department of Corrections would be responsible for the timing of the waiver and the full explanation of the rights waived and the consequences thereof.

At this time, offenders serving indeterminate sentences whose releases are governed by the Kansas Parole Board, will not be given the opportunity to waive their final hearings. Wide discretion exists for setting penalties and planning release in those cases. Therefore, it is felt that personal interview are needed in order to determine the length of pass and recommendations for programs and treatment.

Sen Jud
2-11-99
att 6

Benefits of the waiver of the final revocation hearing for post release violators are:

- Time (90 or 180 days) would start with the signing of the waiver rather than the appearance before the Board. This would be more in keeping with the legislative intent for violators.
- Use of the waivers will result in a reduction of the average daily population. It is difficult to project a reduction in actual bed space using the Prophet Model, due to the data format. However, it is reasonable to project some impact for a reduction.
- This is an efficient use of the Board's time. The Board has limited or no discretion for penalties if the offender admits guilt to the violations or has a new conviction. Personal interviews cannot change the options for final decisions.
- Since it is the offender's decision to waive, there will be fewer appeals to process.

Sen Jud
2-11-99 att 7

Senate Judiciary Committee
Testimony of Natalie G. Haag,
Office of the Governor
Senate Bill 131
February 11, 1999

Mr. Chair and members of the committee:

Thank you for the opportunity to address this committee regarding Senate Bill 131. On behalf of Governor Graves, let me express sincere appreciation for the difficult and dedicated work of the Sentencing Commission. The proposals recommended by the Commission and set forth in SB 131 are important steps in our continued fight against crime. The Governor supports increasing penalties as recommended by the Commission. He was pleased to see these recommendations include changes creating presumptive imprisonment upon a second conviction for residential burglary.

Statistical data shows crime rates are decreasing. The State of Kansas should not regress in its battle against crime. Accordingly, the Governor urges you to abandon the specific proposal that would result in shorter sentences for many of those considered the most dangerous to society. The proposal in question calls for a 20 percent reduction of all sentence lengths for all criminal history categories on non-drug grid levels I and II (at page 14 of the bill). The result could be shorter prison time for those convicted of a number of heinous crimes, such as kidnapping and rape.

Governor Graves urges your support for all remaining provisions of Senate Bill 131.

Sen Jud
2-11-99
att 7

Written att 8
2-11

Kansas County & District Attorneys Association
827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(785) 357-6351 • FAX (785) 357-6352 • e-mail kcdaa01@ink.org
EXECUTIVE DIRECTOR, JAMES W. CLARK

February 11, 1999

TO: Senate Judiciary Committee

FROM: Kansas County and District Attorneys Association

RE: SB 131

The Kansas County and District Attorneys Association is generally supportive of the provisions in SB 131, and is appreciative of the deliberation that went into the suggested changes to Kansas criminal law.

However, we are opposed to the provisions that distinguish sex crimes based on the offender's age. As a matter of policy, a crime is a crime, whether committed by a 19-year old or a 22-year old. The fact that the offender and victim may be young and in love should not determine whether the conduct is criminal. After all, there is no statutory distinction made if they are young and in love and snorting cocaine. As a matter of constitutional law, is there a violation of the equal protection clause? What is the state interest in making a distinction based on the difference in age? Is the victim less fondled or, in the extreme case, made less pregnant, simply because a defendant is near his or her own age? Finally, proving a sex crime beyond a reasonable doubt when it involves consensual conduct between "Romeo and Juliette" is one of the most difficult cases a prosecutor faces. Adding to the problems of recanting or at least reluctant testimony of the victim, and jury nullification, by requiring the State to prove additional elements of the offender's age in relation to the victim's is not good policy, and is a waste of prosecutorial and judicial resources.

Likewise, the bundling of the various consensual sex acts between Romeo and Juliette into a single crime is no answer to the questions posed above. The constitutional and evidentiary questions remain. More importantly, the bundling raises separate constitutional and policy issues. When we make distinctions between the type of consensual sex acts for the population in general, what is the overwhelming state interest in erasing those distinctions for certain protected class of offender who happen to be within three years of their "victim"? And as a policy matter, do we want to tell Romeo and Juliette that sexual intercourse, with the possible consequences of teen pregnancy, is legislatively regarded as the same as touching or sodomy?

Other concerns: 1) why treat serious traffic offenses differently than DUI? 2) why the change in language regarding access to the PSI from attorneys to "parties"? 3) for crimes committed while on bond, why not use the language from last year's SB 435, which hopefully has now been amended into this year's SB 98, already approved by this Committee? 4) in dealing with the career property offender, why not borrow from SB 223 and make all nonperson felonies eligible to count toward presumptive imprisonment, instead of limiting the bill to career burglars?

Sen Jud
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att 8

written 2-11 att 9 SJ

State of Kansas

Office of the Attorney General

CARLA J. STOVALL
ATTORNEY GENERAL

February 11, 1999

Senator Tim Emert, Chair
Senate Judiciary Committee
State Capitol
Topeka, Kansas 66612-1504

Dear Chairperson Emert and Members of the Senate Judiciary Committee:

Senate Bill 131 is a comprehensive bill amending several key provisions of the current criminal law. For the most part I have no objection and am in favor of some of the amendments within this bill, such as Sec. 13 which would replace the current Hard 40 sentence with a Hard 50 sentence and Sec. 15 which would allow a presumptive sentence for an individual convicted of burglary to a dwelling when that individual has a prior conviction of burglary to a dwelling or building.

However, I cannot support and would urge the Committee not to accept the reduction of the sentencing range for severity level 1 and 2 criminal offenses.

As proposed in Section 15 of this bill the result would be to decrease the sentencing range of severity level 1 and 2 offenses by 20%. These criminal offenses include: Attempted First Degree Murder (1), Conspiracy to Commit Murder in the First Degree (2), Intentional Second Degree Murder (1), pursuant to Sec. 3 of this bill, Reckless Second Degree Murder (2), Aggravated Kidnapping (1), Rape (1 & 2), Aggravated Criminal Sodomy (2), Attempted Treason (1) and Conspiracy to Commit Treason (2).

As you can see these offenses involve some of the most violent crimes that take place against our society. The individuals who commit these crimes are a danger to the public and our children. Currently these defendants are entitled to earn 15% good time credit by which their prison sentence can be reduced. An additional reduction of 20% off the top is not warranted nor appropriate when we remember the safety of our communities demand that these criminals be isolated from the society in which they have inflicted so much physical and emotional trauma. This amendment is a reward to the criminals who terrorize our streets. In essence it violates the trust that the public has placed in our hands.

301 S.W. 10TH AVENUE, TOPEKA, KANSAS 66612-1597 ■ PHONE: (913) 296-2215 ■ FAX: 296-6296

Sen Jud 2-11-99 att 9

For these reasons I cannot support and urge this Committee not to adopt that portion of Sec. 15 which would authorize the reduction of the sentence for level 1 and 2 criminal offenses.

I am also opposed to amending the present law regarding aggravated indecent liberties with a child, indecent liberties with a child, criminal sodomy and indecent solicitation of a child to allow for an exception to the criminal conduct of the perpetrator if that individual is less than three years older than the victim and the victim is between the ages of 14 and 16 years of age. These laws were enacted to provide protection to children of tender years. If we are to provide for the guidance and protection which the young members of our society require and need, then it is imperative that the Sec. 4, 5, 6, and 7 be deleted from this bill.

I must further disagree with the recommendation to delete the felony penalty provisions for driving while suspended, canceled, revoked or as a habitual violator as set out in Sec. 1 and 2 of the bill. "FATAL" is a task force that was created by myself this past year to review traffic and alcohol laws. One of the recommendations of this committee was to amend K.S.A. 21-3204, which provides for guilt without criminal intent, to include felony offenses involving driving while suspended, operating a motor vehicle while a habitual violator and DUI. These recommendations have been presented to the Senate Federal and State Committee and will be forthcoming in bill form. I believe this is a more appropriate manner in which to handle these offenses.

Thank you for your consideration and support for the other portions of this bill.

Sincerely,

Carla Stovall

Carla J. Stovall
Attorney General

9-2

Written 5
2-11
att 10

MEMORANDUM

TO: Senator Tim Emert, Chair
Senate Judiciary Committee

FROM: Teresa Sittenauer
Kansas Peace Officers Association

DATE: February 11, 1999

RE: SB 131

Mr. Chairman, members of the committee, my name is Teresa Sittenauer and I appear today on behalf of the Kansas Peace Officers Association ("KPOA"), Kansas' largest professional law enforcement organization, with more than 3,500 members statewide. We appreciate this opportunity to express our concerns with SB 131.

We have several concerns with the language of this bill. First, the legislation would narrow the category of persons who can be prosecuted for sex crimes against children. Specifically, it would prohibit prosecution of persons who are less than three years older than the victim for indecent liberties with a child; aggravated indecent liberties with a child; criminal sodomy; and indecent solicitation of a child. The Legislature created these crimes to protect children. It is unwise to dilute that protection. The result is to decriminalize an otherwise unlawful act, based on the fortuitous circumstance that the suspect is not sufficiently older than the victim.

Sen Jud
2-11-99
att 10

For these reasons, we would recommend deletion of Sections 4 through 7 of the bill. We appreciate the opportunity to express our concerns. Please do not hesitate to contact me if you have questions or need further information.

Approved: Feb. 16, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:09 a.m. on February 11, 1999 in Room 123-S of the Capitol.

All members were present except: Senator Oleen (excused)
Senator Pugh (excused)

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Barbara Tombs, Kansas Sentencing Commission
Charles Simmons, Secretary, Department of Corrections
Paul Morrison, Kansas Sentencing Commission
Tim Chambers, Reno County Attorney
Marilyn Scafe, Parole Board Chair
Natalie Haag, Governor's Legal Counsel

Others attending: see attached list

The minutes of the February 10 meeting were approved on a motion by Senator Donovan and seconded by Senator Vratil. Motion carried.

SB 131--an act concerning crime; prescribing certain penalties

Conferee Tombs testified in support of SB 131. She stated that the bill reflects the deliberations done by the Sentencing Commission over the past months relating to the underlying intent and goals of the Sentencing Guidelines and that it's purpose is to address the issue of proportionality in sentencing. She discussed the proposed changes to the sentencing guidelines addressing: the three classifications of offenses, e.g., Off-Grid, Grid, and Non-Grid; sentence enhancements and recommendations; and procedural issues. (attachment 1) Discussion followed regarding certain language in the bill and Conferee Tombs referenced a handout on proposed amendments to the language of the bill. (attachment 2)

Conferee Simmons testified in support of SB 131 with the exception of the reduction of the presumptive prison sentences established for non-drug Severity Levels I and II offenses. He stated that this reduction would send the wrong message to citizens of Kansas, to crime victims, and to criminals. He commented on several specific provisions of the bill relating to sexual offenses, criminal deprivation of a motor vehicle, and escape from a Department facility. He discussed a change in the language of the bill which addresses felony domestic battery. He further stated that the Department is currently not able to project a numerical impact of the bill on the custody classifications of the inmate population. (attachment 3)

Conferee Morrison testified in support of SB 131. He discussed the necessary modifications made to the sentencing grid since the Guidelines were passed in 1993 and the unintended consequences of these changes which resulted in certain inequities in the grid. He stated that SB 131 addresses the proportionality problems within the guidelines. (attachment 4) Discussion followed.

Conferee Chambers testified in opposition to several changes in the Kansas Criminal Code and Code of Criminal Procedures contained within SB 131, changes which relate to felony driving offenses and sexual offenses. (attachment 5)

Conferee Scafe discussed a portion of SB 131 which addresses Waiver of Final Revocation Hearing and briefly outlined its benefits for post release violators. (attachment 6)

Conferee Haag expressed Governor Graves support of SB 131 with the exception of the proposal that "calls for a 20 percent reduction of all sentence lengths for all criminal history categories on non-drug grid levels I and II." (attachment 7)

Written testimony on SB 131 was received from the following: Kansas County and District Attorney's Association who supported most of the provisions in the bill but opposed the provisions related to sex crimes based on the offender's age (attachment 8); Office of the Attorney General who supported the bill with the exception of the provision to reduce the sentencing range for severity level 1 and 2 criminal offenses (attachment 9); and Kansas Peace Officers Association who expressed concern over certain language in the bill related to sex crimes against children and recommended deletion of Sections 4 through 7 of the bill. (attachment 10)

The meeting adjourned at 11:03 a.m. The next scheduled meeting is Tuesday, February 16, 1999.

Approved: February 17, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:13 a.m. on February 18, 1999 in Room 123-S of the Capitol.

All members were present except: Senator Pugh (excused)

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research (excused)
Mary Blair, Secretary

Conferees appearing before the committee:
Pat Baker, Kansas Association of School Boards

Others attending: see attached list

SB 203–concerning school safety and security

Conferee Baker testified in support of SB 203. She revealed how language changes in the bill will clarify for local school boards and local school districts the duty to report potentially dangerous behaviors. She further cited SB 191 and HB 2201 and suggested these bills might be "hooked" together with SB 203. (attachment 1 - includes SB 191 with language changes) Discussion followed.

Written testimony opposing SB 203 was submitted by Craig Grant, Kansas National Education Association. (attachment 2)

SB 168–concerning criminal procedure; relating to discovery; expert witness

The Chair briefly reviewed SB 168 which had been scheduled to be heard on 2-17-99 but was not due to time constraints. He offered to hear opposing statements to the bill and, hearing none, called for a vote. Senator Vratil moved to pass the bill out favorably. Senator Goodwin seconded, carried. Previously submitted testimony not heard on SB 168 on 2-17-99 is as follows: Jim Clark, Kansas County and District Attorneys Association (support); (attachment 3) Dave Debenham, Office of Attorney General (support); (attachment 4) and Thomas Bartee, Kansas Association of Criminal Defense Lawyers (oppose). (attachment 5)

Action on bills previously heard and subcommittee reports and action:

SB 143–an act concerning civil procedure; relating to exemptions from claims of creditors; pension and retirement assets
SB 92–an act concerning crime, criminal procedure and punishment; relating to parole hearings; comments of victims
SB 119–an act concerning the Kansas code for care of children; relating to post-termination dispositional alternatives following voluntary relinquishment of parental rights
SB 181–an act concerning crimes and punishment; relating to determination of criminal history classification; assault adjudications and convictions
SB 131–an act concerning crimes, criminal procedure and punishment; prescribing certain penalties
SB 97–an act concerning small claims procedure; relating to corporate representation

Following a summary of SB 143 Senator Vratil moved to pass the bill out favorably, Senator Bond seconded, carried. (attachment 6) The Chair summarized SB 92 which had been heard in Committee where an amendment had been recommended to clarify technological language. (See 2-10-99 minutes, att. 8). Senator Bond moved to pass the bill out favorably amending the language to read "prerecorded comments by any technological means". Senator Vratil seconded, carried.. Senator Oleen discussed SB 119 stating that her subcommittee recommended a provision be added to the bill that would ensure that the action would be considered a Child in Need of Care action and the court would hear the adoption petition filed under Chapter 38 and also that the effective date of the bill is publication in the Kansas Register. Senator Oleen moved to

pass the bill out favorably with the amended language. Senator Vratil seconded, carried. (See 2-10-99 minutes, att. 8) In the absence of Senator Pugh, the Chair reviewed SB 181, (attachment 7) Following discussion Senator Bond moved to pass the bill out favorably. Senator Goodwin seconded, carried. The Chair reviewed SB 131, which called for adjustments to the sentencing grid. Sentencing Commissioner Tombs was present and offered clarification during discussion. (no attachment) Senator Bond moved to amend the bill to remove the references of going from a Hard 40 to a Hard 50. Senator Vratil seconded, carried. Senator Bond moved to pass the bill out favorably as amended. Senator Goodwin seconded, carried 9-1 with Senator Donovan voting nay. The Chair reviewed SB 97 and suggested the bill be amended to state "corporations can be represented in small claims court by a president or treasurer of the corporation as long as that representative is not a lawyer." During discussion Senator Vratil moved to amend the jurisdiction limit in SB 97 to $300. Senator Petty seconded. After further discussion and a vote, the motion was defeated. Senator Bond moved to adopt the amendment the Chair recommended. Senator Harrington seconded, carried. Senator Bond moved to pass the bill out favorably as amended. Senator Harrington seconded, carried.

The meeting adjourned at 10:57 a.m. The next scheduled meeting is Monday, February 22, 1999.