Approved by the Judicial Council December 4, 2009

REPORT OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE ON 2009 HB 2335

In May, 2009, the House Committee on Corrections and Juvenile Justice requested advice and recommendations on 2009 House Bill 2335. HB 2335 contemplates placing a "domestic violence tag" on all criminal cases involving domestic violence. The study was assigned to the Criminal Law Advisory Committee.

COMMITTEE

The members of the Committee taking part in this study are as follows:

1. **Stephen E. Robison, Chair**, Wichita; practicing attorney and member of the Judicial Council.
2. **James W. Clark**, Lawrence; attorney for the Health Care Stabilization Fund.
3. **Edward G. Collister**, Lawrence; practicing attorney.
4. **Representative Pat Colloton**, Leawood; Kansas State Legislator.
5. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
6. **Patrick M. Lewis**, Olathe; practicing attorney.
7. **Hon. Michael Malone**, Lawrence; District Judge in the 7th Judicial District.
8. **Joel Meinecke**, Topeka; practicing attorney.
9. **Steven L. Opat**, Junction City; Geary County Attorney.
10. **Senator Tim Owens**, Overland Park; Kansas State Legislator.
11. **John M. Settle**, Larned; Pawnee County Attorney.
12. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
13. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
14. **Debra J. Wilson**, Topeka; Capital Appeals and Conflicts Office.
15. **Ron Wurtz**, Topeka; Federal Public Defender's Office.

DISCUSSION

The Criminal Law Advisory Committee met in July, September, and October, 2009 and discussed 2009 Senate Bill 272 in those meetings. The committee also reviewed written testimony provided to the House Committee and included representatives from the Kansas Association of Chiefs of Police, Kansas Peace Officer's Association, Governor's Fatality Review Board and the Kansas Coalition against Sexual and Domestic Violence in the discussions. During the discussions on this bill Representative Colloton informed the committee that she had been working with staff of the Fatality Review Board to address some of the concerns that had arisen during hearings on the bill in 2009. The staff of the Fatality Review Board (FRB) advised the committee that it intends to introduce a revised version of the bill in the 2010 legislative session due to the work that had been done on the bill since the 2009 session.

After significant discussion on various aspects of the bill, Representative Colloton clarified that her legislative committee would like advice from the Criminal Law Advisory Committee on the constitutional issues raised by the bill as well as the advisability of eliminating the crime of domestic battery. In addition, she asked for input on the following questions:

1) Does the procedure adopted in the bill satisfy procedural due process requirements?

2) Is the definition of "domestic violence" clear enough to avoid a substantive due process challenge?

3) Does the imposition of costs for evaluation and treatment ordered by the court create a penalty enhancement for which a substantive finding of fact must be made on the record?

4) How would courts handle the indigent cases where evaluation and treatment are needed? Does the legislature need to allocate funds for this?

The committee first took on the question of whether the process adopted in the bill would satisfy due process requirements. Discussion centered on whether placing a domestic violence tag on a case prior to any sort of adjudication or finding of fact would have an effect on the individual involved. If so, it could easily amount to a violation of due process protections.

The bill currently proposes that the domestic violence tag would be placed on a case at the time of arrest if the law enforcement officer determined that the case involved domestic violence. One problem with this proposal is that most of the time the law enforcement officer has to deal in the moment and make quick decisions based on the information that is given him at the time, whether it is accurate or not. This means that it is possible that an officer could place the domestic violence tag on a case when it truly does not belong there and at this point, there is no real way to tell what kind of impact that tag could have on the wrongly tagged individual down the road. Ten years from now, the impact could be far different than anything we could contemplate now. The committee agreed that when the "tagging" occurs prior to any kind of factual adjudication by a fact-finder or court, or even prior to a person stipulating to the facts and pleading to a case or taking a diversion, it really leads one to question where the due process protections are. It was suggested, but not recommended, that if law enforcement is going to have to bear the responsibility of tagging these cases then we might want to include a requirement that an amended arrest report should be filed if it is later determined, from further investigation, that a tag was inappropriately placed on a case.

It was argued that the bill actually contemplates putting the domestic violence tag on the legal documentation involved in a case, and not the person individually. It was agreed that the goals of the legislation are not punitive but rather, the goals are to provide a method by which we can monitor and track data that can eventually be used to provide meaningful information to

policy-makers. However, a majority of the committee agreed that the tag would still inevitably have an effect on the individual involved.

The bill currently provides a mechanism for the judge to remove the domestic violence tag after making a finding of whether it should apply. However, there isn't any similar mechanism that law enforcement officers or prosecutors could use to do the same if it becomes apparent during the investigation that the case really does not involve domestic violence. It was suggested that law enforcement could file an amended arrest report if further investigation revealed that the tag was inappropriately placed on a case. However, the committee agreed that making this a requirement would be impractical. While the legislation currently provides that a judge can remove the tag after a hearing, there does not seem to be a similar practical remedy for law enforcement or for prosecutors who decline to prosecute a case or otherwise determine that the domestic violence tag should not apply in a particular case.

It is this type of situation that the committee fears could result in unintended consequences. For instance, if a case is tagged with a domestic violence designation upon arrest and the prosecutor ultimately decides to dismiss the case, the arrest report will still be in the criminal justice system and it will still have the domestic violence tag. This could have an adverse impact if that person later applies for job which requires a license to carry a weapon. The background check would show an arrest with a domestic violence designation and that individual would likely not get the job because he would be denied the required license. In fact, it is possible that this domestic violence tag could prevent one from ever having a firearm again due to the federal firearms restrictions and this could have a very real impact law enforcement, military, security officers, and others.

The rule of law has always been that we do not label someone until we adjudicate them. We do not label someone as mentally ill until a judge adjudicates them mentally ill and we do not label someone a sex offender or sex predator until they are adjudicated as such. The committee agreed that if the domestic violence tag is applied at arrest as proposed, we risk labeling someone a domestic violence offender before there is ever an adjudication on that issue and this definitely has due process implications.

It was suggested that these due process concerns could be alleviated if the domestic violence tag were placed on the case at sentencing rather than at the beginning of the process. Placing the domestic violence tag on the case at sentencing would ensure that the defendant would have had the opportunity to have attorney representation, to put on a defense, and to have an actual adjudication based on the proved facts of the case.

The committee was informed that the Kansas Standard Offense Report (SOR) as well as arrest reports currently have box that is to be checked when the law enforcement officer believes that there is domestic violence involved in a case. In fact, law enforcement has been utilizing these check boxes for quite some time now because there are specific bonding requirements that come into play in domestic violence cases. The committee noted that since these reports already have a check box for domestic violence, it appears that the only information needed to help with tracking domestic violence is whether there is an intimate relationship. Therefore, since all law enforcement agencies are supposed to complete a SOR in each case, the committee recommended that the SOR and the arrest reports be amended in some fashion so that they would also collect information on the relationship between the victim(s) and defendant(s) involved in the case. However, the committee was advised that although the arrest reports are reported to the KBI, currently the KBI data collection program does not capture relationship information.

Therefore, revising the arrest reports and the SORs to capture this information may only be helpful if the KBI data collection program can be expanded to capture the relationship information as well.

The committee then turned to the second question regarding whether the definition of "domestic violence" was clear enough to avoid challenge. The committee was concerned that the definition contained too many vague terms and it recommended that at the very least the term "pattern" in the definition be changed back to the original term "method". However, the committee also thought that the phrase "method of control, coercion, punishment, intimidation or revenge" language seems to beg the question of how one would prove those terms and also seems to engraft an intent element onto the definition. The committee was concerned that this would make prosecution of the cases much more difficult because that intent element would now have to be proved. Therefore, the committee recommended that the domestic violence definition be revised to add back in the first two sentences and to strike the "method of control, coercion, . . ." language altogether. This revision should result in something similar to the following definition:

> "Domestic violence means an act or threatened act of violence against a person with whom the offender is involved or has been involved in an intimate relationship. Domestic violence also includes any other crime committed against a person or against property, or any municipal ordinance violation against a person or against property, when directed against a person with whom the offender is involved or has been involved in an intimate relationship. For the purposes of this definition, the offender shall be 18 years of age or older."

The committee recognized that this definition could create some proof problems but it seems to be clearer than the proposed amended version.

The committee then turned to the issue of whether the imposition of costs for evaluation and treatment ordered by the court would create a penalty enhancement for which a substantive finding of fact must be made on the record. The committee agreed that if the tag is applied at sentencing, as was recommended previously, rather than at the beginning of the case then any of these *Apprendi*-like concerns should be alleviated. Therefore the committee did not consider this to be an issue as long as the tag was placed at sentencing.

The committee briefly considered how courts would handle the indigent cases where evaluation and treatment are needed and whether the legislature would need to allocate funds for this. It was pointed out that currently we assess a lot of these costs as court costs and expect them to get paid back as a condition of probation. The costs for this legislation could likely be handled in a similar manner. The committee agreed that although it would be nice to have state funds for this, the costs could probably be absorbed as a cost of the action as with any other case.

The committee then turned to discussion on the advisability of repealing the domestic battery statute. It was reported that only 2 people are currently serving prison time due to a third domestic battery conviction. Although the committee recognizes that many times domestic battery charges are pleaded down to other crimes, it was also argued that the penalty enhancements contained in the domestic battery statute are valuable tools to deter repeated domestic battery crimes. The committee also agreed that domestic violence can be involved in many other crimes rather than just domestic battery. Therefore, it was suggested that if the goal is to expand the net so that we can capture data on the many different crimes that could involve domestic violence, the domestic battery statute could be amended to include a domestic violence

element that could be applied to specific statutory violations, or a separate domestic violence statute could be created for use when charging any crime that involves domestic violence.

If the domestic battery statute is amended, it should provide that one could charge crimes X, Y, Z including the domestic violence element, or one could charge domestic battery and still utilize the enhanced penalties that are currently provided for domestic battery. The problem with this proposal is that the Recodification Commission has already completed its work on the section of statutes that contain domestic battery so it may be difficult to amend that statute in the near future. Regardless of whether the domestic battery statute is amended or a new domestic violence statute is created, the committee agreed that the element of domestic violence should be required to be proved so that due process protections are satisfied.

The committee also discussed the arrest standards proposed in the legislation. The proposed language indicates that "when a law enforcement officer determines that there is probable cause to believe that a crime or offense involving domestic violence . . . has been committed, the officer shall without undue delay arrest the person suspected of its commission." (Emphasis added). The committee is concerned that this arrest standard is in direct conflict with the probable cause standard in K.S.A. 22-2401 and would cause confusion for law enforcement. Therefore, the committee recommends that this language be amended to require probable cause to believe a crime has been committed and probable cause to believe the person committed the crime before an arrest shall be made.

Finally, the committee discussed the predominant aggressor language proposed in the bill. A majority of the committee is concerned that the list of considerations included in the proposed language could be interpreted to be an exclusive list which would mean that those items are the only things that the officer can consider when trying to determine who the

predominant aggressor is. This could be problematic because many times there are numerous things to consider when evaluating these situations and limiting an officer to only those few items listed could require the officer to make an incorrect decision. In addition, the committee had some concerns specific to the considerations listed. The committee was not convinced that all of the items were really relevant to the determination of which party is the predominant aggressor. Therefore, a majority of the committee recommends that the predominant aggressor language be revised to strike the considerations listed and simply leave the instruction that the officer shall arrest whomever the officer determines to be predominant aggressor.

CONCLUSION

The committee understands that the goals of this legislation are; 1) to provide a method for tracking and collecting data on all types of domestic violence related crimes so that better information may be provided to policy-makers in the future, and 2) to identify all domestic violence related crimes and require that domestic violence assessments and evaluations are done on those offenders in order to prevent escalation of the domestic violence. The committee recognizes that these are very positive goals. However, it is unconvinced that the current proposed legislation will reach these goals without creating due process issues. In light of the foregoing discussion, the committee makes the following recommendations:

1) Place the domestic violence tag on the case at sentencing rather than upon arrest;

2) Revise the Kansas Standard Offense Report and arrest reports so that they capture intimate relationship information;

3) Revise the domestic violence definition to reinstate the original language and remove the language that adds an intent element to the definition;

4) Do not repeal domestic battery. Create a separate statute for domestic violence that can be applied to a number of additional crimes that could involve elements of domestic violence;

5) Revise the arrest language so that it requires the officer to have probable cause to believe a crime has been committed and that the person to be arrested committed the crime; and

6) Remove the list of considerations in the predominant aggressor language so that it simply states that the officer is required to arrest the person he believes to be the predominant aggressor.