

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON 2008 SB 413**

(November 19, 2008)

In June, 2008, Sen. John Vratil, Chair of the Senate Judiciary Committee, requested that the Judicial Council study 2008 Senate Bill 413, concerning the collection of DNA specimens upon arrest and prior to a determination of probable cause for arrest. The Kansas Judicial Council assigned the study to the Criminal Law Advisory Committee (hereinafter “the Committee”).

Specifically, the concerns of the Senate Judiciary Committee centered around two issues. “First, what is the purpose of collecting the DNA as described in the bill: investigation or identification? Second, would the proposed language pose constitutional issues?” (See the attached letter from Senator Vratil, page 5.)

COMMITTEE MEMBERSHIP

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. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
5. **Patrick M. Lewis**, Olathe; practicing attorney.
6. **Hon. Michael Malone**, Lawrence; District Judge in the 7th Judicial District.
7. **Steven L. Opat**, Junction City; Geary County Attorney.
8. **John M. Settle**, Larned; Pawnee County Attorney.
9. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
10. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
11. **Debra J. Wilson**, Topeka; Appellate Defender’s Office.

BACKGROUND

The Legislature amended K.S.A. 21-2511 in 2006 require that on and after January 1, 2007 through June 30, 2008, any adult arrested or charged, or juvenile placed in custody for or charged, with the commission or attempted commission of any person felony or drug grid severity level 1 or 2 felony would be required to submit such specimen or sample at the same

time such person is fingerprinted pursuant to the booking procedure. In addition, on or after July 1, 2008 any arrested or charged adult or juvenile placed in custody for the commission or attempted commission of any felony would be required to submit a specimen or sample in addition to finger prints. If a sample is already on file with the Kansas Bureau of Investigation (KBI), then a new sample need not be taken.

If charges against a person are dismissed, a conviction is expunged, a verdict of acquittal is returned, or the person has not been charged and the statute of limitations has run, the KBI shall forthwith destroy the specimen or sample, but retain the record in the database, either upon receiving notification of the foregoing from the Court or the prosecutor, or upon request of the person. If a court later determines that there was not probable cause for the arrest, charge or placement in custody, the court shall send a copy of such determination to the KBI and the KBI shall remove such specimen or sample from the KBI database records.

The DNA records obtained pursuant to this act shall be confidential and shall be released only to authorized criminal justice agencies. The DNA records shall be used only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters or for other humanitarian identification purposes, including identification of missing persons. The KBI shall promulgate rules and regulations for a procedure which allows the defendant to request the DNA samples be destroyed in the event of a dismissal of charges expungement, acquittal at trial or statute of limitations expiration. Refusing to provide such a sample as required is a class A misdemeanor. The detention, arrest or conviction of a person based upon a database match or database information would not be invalidated if it is determined that the specimen was obtained or placed in the database by mistake or not removed from the database as required.

In 2007 the Legislature again amended K.S.A. 21-2511 to require any adult or juvenile charged with commission or attempted commission of certain felonies, where one of the parties is younger than 18 or who is required to register as an offender, to submit a specimen of blood or biological sample to the Kansas Bureau of Investigation (KBI) whenever fingerprints are required, beginning after July 1, 2008. In addition, the KBI would now be required to expunge the DNA sample and the profile record, but only upon petition by the person, when charges against a person are dismissed, a verdict of acquittal is returned, when there is a determination of no probable cause, or the charges are otherwise dismissed and the case is not appealed.

STATUTORY AMENDMENTS PROPOSED IN 2008 SB 413

2008 SB 413 proposes to once again amend K.S.A. 21-2511. Under current law, after July 1, 2008, generally any person who is arrested must submit a specimen at the time of booking. SB 413 would no longer require a DNA specimen at the time of booking. Rather, a specimen would be required only if a magistrate makes a probable cause determination on the arrest and then it would be required as a condition of bond. (A copy of 2008 SB 413 is attached, pages 6-10.)

COMMITTEE'S REVIEW OF 2008 SB 413

The Committee met on August 31, 2008 and September 5, 2008. The Committee reviewed the amendments proposed in 2008 SB 413, as well as written testimony from Retired Chief of Police Ed Klumpp, Attorney Ed Collister, the Kansas Bar Association, Sheriff Frank Denning, and Director of the Kansas Bureau of Investigation Robert E. Blecha. In addition, the Committee reviewed public comments from the Center for Constitutional Rights on the Department of Justice's proposed rules relating to the taking of DNA samples under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006, testimony and written minutes of the House Judiciary pertaining to 2006 House Bill 2554 which enacted the DNA sample upon arrest provision, and several scholarly articles and memorandums on the constitutionality of taking DNA samples upon arrest.

The Committee had lengthy discussions covering several issues surrounding the taking of DNA samples from individuals upon arrest including: who is actually required to give samples now; the difficult process for getting samples destroyed or purged; whether taking a DNA sample is the equivalent of taking fingerprints – is it ministerial; whether individuals have an expectation of privacy extending to DNA; the potential for misuse of DNA samples and DNA databases; and the danger to law enforcement officials who are required to obtain the samples and the additional burden it would place on them to have to wait until a probable cause finding was made.

Although the public perception of DNA sampling has changed over time such that people tend to accept and even expect samples to be taken from certain people and in certain circumstances, the Committee is concerned with the fact that the people the statute currently affects are those who have been convicted of a crime and those who have only been arrested or charged with a crime but are nevertheless potentially innocent of any wrongdoing. Not only does the statute require that DNA samples be taken from potentially innocent people, it also places the burden of getting the samples and records destroyed on their shoulders as well. In the current statute, it is the individual's responsibility to petition to get the sample destroyed and the record purged when a conviction is expunged, a verdict of acquittal is returned, the charges are otherwise dismissed and even if a court finds that there was never any probable cause for the arrest. The Committee believes that this responsibility is misplaced and that it likely places an unreasonable financial burden on many individuals.

The Committee was unable to come to an agreement as to whether the taking of a DNA sample is the equivalent of taking fingerprints. It was generally accepted that just like fingerprints, people leave DNA on almost everything they touch. However, some members of the Committee still felt that the information that DNA encompasses and the more invasive nature of taking the sample via a swab of the mouth requires more serious protection and privacy considerations. Others felt that swabbing a person's cheek for a sample is not typically considered invasive. Furthermore, the type of DNA sample used for law enforcement identification purposes is not the same as those used for genetic testing or engineering. Therefore, there is little risk that someone could obtain the sample stored by the KBI and ultimately obtain genetic information about an individual.

After discussing these various issues, the Committee refocused on the proposed amendatory language in 2008 SB 413 and discussed the practical and constitutional aspects of

requiring that a magistrate make a probable cause finding on the arrest prior to taking a DNA sample from an arrested individual. The current statute requires law enforcement to take the DNA sample at the same time the individual is fingerprinted during the booking procedure. The Committee acknowledged that it is probably more convenient and less burdensome for law enforcement to take the sample at this time. It was mentioned that the booking procedure is a fairly dangerous process for law enforcement officers and that having to bring a potentially dangerous person through the booking process twice increases that danger. However, the Committee also recognized that requiring a magistrate to make a determination of probable cause for the arrest would insert at least a little due process protection into the statute. After reviewing several cases on the subject, the Committee was unsure of how the statute would stand up to a due process challenge if challenged and agreed that adding a probable cause finding requirement probably would be beneficial.

The Committee then turned to the question of whether the purpose of collecting DNA samples as provided in the statute is for identification or investigation. Some of the Committee members think that it is for identification while others think it is for investigation and database building purposes. The statute itself states that the DNA records shall be used only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters or from other humanitarian identification purposes, including identification of missing persons. K.S.A. 21-2511(i). However, the Committee noted that in the written testimony, a lot of the justification for taking the samples was that it is a valuable tool to find criminals and convict them, which sounded more like investigation. The Committee decided that in all actuality, the samples are ultimately used for both identification and investigation.

COMMITTEE'S CONCLUSIONS REGARDING 2008 SB 413

After discussing the issues at length, the Judicial Council Criminal Law Advisory Committee has agreed on the following conclusions for the two areas of concern set forth by Senator Vratil in his letter. The first question posed was, "What is the purpose of collecting the DNA as described in the bill: investigation or identification?" The Committee concludes that the purpose of taking of a DNA sample upon arrest and after a finding of probable cause by a judge, as proposed in the bill, is ultimately both for investigation and identification. The second question posed was, "Would the proposed language pose constitutional issues?" The Committee concludes that the proposed language requiring a magistrate's probable cause determination on the arrest prior to taking a DNA sample would not pose any constitutional issues. In fact, such a requirement would provide additional due process protections that seem to be lacking in the current statute.