House Corrections and Juvenile Justice Committee
Sen. Sub for SB 159
Testimony of Jennifer Roth – Opponent
on behalf of the Kansas Association of Criminal Defense Lawyers
January 30, 2012

In its current form, Sen. Sub for SB 159 provides as follows:
"Parolees and persons on postrelease supervision are, and shall agree in writing to be, subject to search or seizure by a parole officer, special enforcement officer or other law enforcement officer at any time of the day or night, with or without a search warrant and with or without cause."

and

The Kansas Prisoner Review Board "shall order that the parolee or person on postrelease supervision agree in writing to be subject to search or seizure by a parole officer, special enforcement officer or other law enforcement officer at any time of the day or night, with or without a search warrant and with or without cause."

This means everyone on parole or postrelease, regardless of his/her underlying offense(s), supervision level, amount of time he/she has been on parole or postrelease, etc. As of January 26, 2012, that would be at least 6,984 people.[1]

Background for Sen. Sub for SB 159
In *State v. Bennett*, 288 Kan. 86 (2009), the Kansas Supreme Court held that requiring a probationer to submit to random, suspicionless searches violates the probationer's constitutional rights under the 14th Amendment to the U.S. Constitution and Sect. 15 of the Kansas Constitution Bill of Rights. In so doing, the Court looked at twenty years of U.S. Supreme Court precedent, including *Samson v. California*, 547 U.S. 843 (2006), which involved a California law authorizing suspicionless searches of parolees. The *Bennett* Court also considered *U.S. v. Freeman*, 479 F.3d 743 (10th Cir. 2007), which held a warrantless search of a parolee under Kansas law must be supported by reasonable suspicion:

> *Samson* does not represent a blanket approval for warrantless parolee or probationer searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law. Kansas has not gone as far as California in authorizing such searches, and this search therefore was not permissible in the absence of reasonable suspicion.

Freeman, 479 F.3d at 748.

"Kansas' procedures for parole supervision specifically inform parolees that they have an expectation that searches will not be conducted unless an officer has a (reasonable) suspicion that such a search is necessary to enforce the conditions of parole. Put another way, parolees in Kansas have an expectation that they will not be subjected to suspicionless searches." *Bennett*, 288 Kan. at 98 (emphasis provided).

SB 159 takes on *Freeman* and *Bennett* and treats Kansas like California.

[1] http://www.doc.ks.gov/publications/pop/POP%2001-26-2012.PDF/view. This is the Kansas parole populations as of last week. An interesting question: would this provision cover people on parole in other Kansas for whatever reason (working, visiting, going to school, etc.)?

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It is important to note that in *Samson* (decided in 2006 for an incident occurring in 2002), the issue was whether a California law was constitutional. The Court determined that California's legislature made its decision to pass a suspicionless search law because of its particular problem with the number of and success of its parolees. As of November 2005, California had 130,000 parolees. *Samson*, 547 U.S. at 853. In contrast, as of January 26, 2012, Kansas had 6,984 parolees.[2]

California's recidivism rate early in the decade was 68-70% - the highest recidivism rate in the nation. *Samson*, 547 U.S. at 853-54. By contrast, in Kansas in FY 2011 "a total of 1,027 parole/post release condition violators were admitted to prison, representing a 5.3% decrease when compared with that in FY 2010." Of that total, 161 violators returned with new felony sentences.[3] When Kansas' model re-entry programs were fully funded, "[r]ecidivism rates — the percent of ex-convicts committing new crimes — had in 2007 plunged statewide to 2.2 percent, less than half the recidivism of the early part of the decade."[4]

"The California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders." *Samson*, 547 U.S. at 854 (emphasis provided).

We are Kansas, not California. Kansas has different demographics and values. As of January 18, 2012, the total California Department of Corrections and Rehabilitation population was 258,108, which includes 144,782 offenders in institutions and camps and 98,689 offenders on parole.[5] As of January 26, 2012, there were 9,125 people in Kansas prisons and 6,984 people in the parole population.[6] Furthermore, Kansas has a different philosophy about how to use corrections dollars. Kansas has been a model to the other 49 states as far as our programs for parolees and use of corrections dollars are concerned.

The suspicionless search proposed in SB 159 is arguably counter to goals of reintegration and public safety.

"Petitioner observes that the majority of States and the Federal Government have been able to further similar interests in reducing recidivism and promoting reintegration, despite having systems that permit parolee searches based upon some level of suspicion." *Samson*, 547 U.S. at 855 (dissent by Justice Stevens, joined by Justices Souter and Breyer). As *Freeman* points out, the DOC has the ability to provide for searches. It does provide for searches. In addition, the *Samson* dissent mentions that the majority "seems to acknowledge that unreasonable searches 'inflic[t] dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society." *Samson*, 547 U.S. at 865.

This suspicionless search law proposed in SB 159 does not appear to be widespread among states. "With only one or two arguable exceptions, neither the Federal Government nor any other State subjects parolees to searches of the kind to which petitioner was subjected." *Samson*, 547 U.S. at 863 (dissent).

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[2] http://www.doc.ks.gov/publications/pop/POP%2001-26-2012.PDF/view

[3] http://www.kansas.gov/ksc/documents/FY2012_Prison_Population_Projection_Report.pdf, p. 7-8

[4] http://www.mcclatchydc.com/2010/04/04/91592/economys-toll-kansas-cuts-its.html#

[5] http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad120118.pdf

[6] http://www.doc.ks.gov/publications/pop/POP%2001-26-2012.PDF/view

Senate Judiciary had its hearing on SB 159 on February 15, 2011. At that time, the proponents said other states had provisions like those in SB 159, but it was not clear which states. While I did not have time to review all other states' laws or parole policies to see what effect, if any, *Samson* has had, I did discover Iowa rejected *Samson*'s reasoning on state constitutional grounds (*State v. Ochoa*, 792 N.W.2d 260 (Iowa Dec 17, 2010)) and Pennsylvania refused to find its law allows suspicionless searches (*U.S. v. Rivera*, 727 F.Supp.2d 367 (E.D.Pa. Jul 22, 2010) ("Pennsylvania law does not permit parole officers to poke around in parolees' private spaces because they are curious or because they believe that parolees may be hiding something.")

SB 159 risks violating the U.S. and Kansas Constitutions.

In researching the cases in the above paragraph, I found *State v. Rowan*, No.2010AP1398-CR, decided July 28, 2011 by the Wisconsin Court of Appeals. Pursuant to a state statute, the Court certified the appeal for review and decision by the Wisconsin Supreme Court. Briefly stated, the facts are Ms. Rowan ran her car into a pole while drunk, threatened to shoot everyone, seriously injured a police officer's hand while at the hospital, and threatened and abused others at the hospital. The judge ordered that when she was released from incarceration in a year, she had to comply with the following condition during her three years of extended supervision:

> No possession of a firearm or ammunition. Consent to search your person, any premises you occupy or any vehicles you occupy at any time without probable cause. The goal is to make sure that you are not in possession of a firearm. Knowing that you could be searched will be an additional incentive for you not to have contraband.

Rowan, No.2010AP1398-CR, p. 1.

The Court looked at *Samson*, *Freeman*, *Ochoa*, etc., as well as statutes and cases from its own state, and came to this conclusion:

> However, those cases [two Wisconsin cases the State was analogizing] do not answer the question here because the condition imposed on Rowan is of a different nature than those in the cases cited: it continues for the entire period of her extended supervision, it can be enforced at any place, at any time of the day or night, and there is nothing she can do to remove the condition. While it is clear that limitations are allowed on a parolee or probationer's Fourth Amendment rights, the condition imposed here essentially eliminated Rowan's Fourth Amendment rights, by allowing searches by any law enforcement officer, at any time, at any place, for a small handgun, without need for even reasonable suspicion. Whether this is permissible is an open question of statewide importance and certain to recur.

Rowan, p. 3 (emphasis provided).

The condition at issue in *Rowan* is almost like what we have in SB 159 – only SB 159 is much broader in who it covers and what it covers.

For the reasons and evidence presented above, we encourage you to reject SB 159. Thank you.

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