

**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 7<sup>th</sup> 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.

# State of Kansas

JOHN VRATIL  
SENATOR, ELEVENTH DISTRICT  
JOHNSON COUNTY  
LEGISLATIVE HOTLINE  
1-800-432-3924



COMMITTEE ASSIGNMENTS  
CHAIR: JUDICIARY  
VICE CHAIR: EDUCATION  
MEMBER: FEDERAL AND STATE AFFAIRS  
ORGANIZATION, CALENDAR  
AND RULES  
SENTENCING COMMISSION  
INTERSTATE COOPERATION

## Vice President Kansas Senate

May 6, 2008

Mr. Randy M. Hearrell,  
Executive Director  
Kansas Judicial Council  
301 S.W. 10<sup>th</sup> Street, Suite 140  
Topeka, KS 66612

Dear Randy,

Please ask the Kansas Judicial Council to review and make recommendations on the two topics described below:

1. The language in 2008 Senate Bill 413 proposes to prohibit the collection of DNA from an individual prior to a judicial determination of probable cause. After a hearing on the bill and discussion among committee members, the bill was tabled. Concern 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? During the discussion, it was suggested that I ask the Judicial Council to review the language in the bill.
2. In March, the Legislature passed, and the Governor signed into law, Senate Bill 431 which amended the probate code to increase the threshold from \$20,000 to \$40,000 to transfer small estates of personal property to successors by affidavit. I received the enclosed letter from Ron Smith expressing concern about language in the legislation that may allow someone to remove cash from a decedent's account before all bills are paid. The letter details Ron's concerns.

I would request the Judicial Council's study the two issues described prior to the 2009 Legislative Session.

Sincerely yours,

A handwritten signature in black ink that reads "John".

Senator John Vratil

JLV/cb

HOME  
9534 LEE BLVD.  
LEAWOOD, KS 66206  
(913) 341-7559  
jvratil@lathropgage.com

DISTRICT OFFICE  
10851 MASTIN BLVD.  
SUITE 1000  
OVERLAND PARK, KS 66210-2007  
(913) 454-5100  
FAX (913) 54-0875

STATE OFFICE  
STATE CAPITOL, ROOM 281-E  
TOPEKA, KANSAS 66612  
(785) 296-7361  
FAX (785) 296-6718  
vratil@senate.state.ks.us

**SENATE BILL No. 413**

By Special Committee on Judiciary

1-10

9 AN ACT concerning crimes, criminal procedure and punishment; con-  
10 cerning collection of certain specimens; amending K.S.A. 21-2511 and  
11 repealing the existing section.

12

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

14 Section 1. K.S.A. 21-2511 is hereby amended to read as follows: 21-  
15 2511. (a) Any person convicted as an adult or adjudicated as a juvenile  
16 offender because of the commission of any felony; a violation of subsec-  
17 tion (a)(1) of K.S.A. 21-3505; a violation of K.S.A. 21-3508; a violation of  
18 K.S.A. 21-4310; a violation of K.S.A. 21-3424, and amendments thereto  
19 when the victim is less than 18 years of age; a violation of K.S.A. 21-3507,  
20 and amendments thereto, when one of the parties involved is less than  
21 18 years of age; a violation of subsection (b)(1) of K.S.A. 21-3513, and  
22 amendments thereto, when one of the parties involved is less than 18  
23 years of age; a violation of K.S.A. 21-3515, and amendments thereto,  
24 when one of the parties involved is less than 18 years of age; or a violation  
25 of K.S.A. 21-3517, and amendments thereto; including an attempt, con-  
26 spiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or  
27 21-3303 and amendments thereto, of any such offenses provided in this  
28 subsection regardless of the sentence imposed, shall be required to sub-  
29 mit specimens of blood or an oral or other biological sample authorized  
30 by the Kansas bureau of investigation to the Kansas bureau of investiga-  
31 tion in accordance with the provisions of this act, if such person is:

32 (1) Convicted as an adult or adjudicated as a juvenile offender be-  
33 cause of the commission of a crime specified in subsection (a) on or after  
34 the effective date of this act;

35 (2) ordered institutionalized as a result of being convicted as an adult  
36 or adjudicated as a juvenile offender because of the commission of a crime  
37 specified in subsection (a) on or after the effective date of this act; or

38 (3) convicted as an adult or adjudicated as a juvenile offender because  
39 of the commission of a crime specified in this subsection before the ef-  
40 fective date of this act and is presently confined as a result of such con-  
41 viction or adjudication in any state correctional facility or county jail or is  
42 presently serving a sentence under K.S.A. 21-4603, 21-4603d, 22-3717 or  
43 K.S.A. 2007 Supp. 38-2361, and amendments thereto.

1 (b) Notwithstanding any other provision of law, the Kansas bureau of  
2 investigation is authorized to obtain fingerprints and other identifiers for  
3 all persons, whether juveniles or adults, covered by this act.

4 (c) Any person required by paragraphs (a)(1) and (a)(2) to provide  
5 such specimen or sample shall be ordered by the court to have such  
6 specimen or sample collected within 10 days after sentencing or  
7 adjudication:

8 (1) If placed directly on probation, that person must provide such  
9 specimen or sample, at a collection site designated by the Kansas bureau  
10 of investigation. Collection of specimens shall be conducted by qualified  
11 volunteers, contractual personnel or employees designated by the Kansas  
12 bureau of investigation. Failure to cooperate with the collection of the  
13 specimens and any deliberate act by that person intended to impede,  
14 delay or stop the collection of the specimens shall be punishable as con-  
15 tempt of court and constitute grounds to revoke probation;

16 (2) if sentenced to the secretary of corrections, such specimen or  
17 sample will be obtained as soon as practical upon arrival at the correc-  
18 tional facility; or

19 (3) if a juvenile offender is placed in the custody of the commissioner  
20 of juvenile justice, in a youth residential facility or in a juvenile correc-  
21 tional facility, such specimen or sample will be obtained as soon as prac-  
22 tical upon arrival.

23 (d) Any person required by paragraph (a)(3) to provide such speci-  
24 men or sample shall be required to provide such samples prior to final  
25 discharge or conditional release at a collection site designated by the  
26 Kansas bureau of investigation. Collection of specimens shall be con-  
27 ducted by qualified volunteers, contractual personnel or employees des-  
28 ignated by the Kansas bureau of investigation.

29 ~~(e) (1) On and after January 1, 2007 through June 30, 2008, any adult~~  
30 ~~arrested or charged or juvenile placed in custody for or charged with the~~  
31 ~~commission or attempted commission of any person felony or drug se-~~  
32 ~~verity level 1 or 2 felony shall be required to submit such specimen or~~  
33 ~~sample at the same time such person is fingerprinted pursuant to the~~  
34 ~~booking procedure.~~

35 ~~(2) On and after July 1, 2008, except as provided further, any adult~~  
36 ~~arrested or charged or juvenile placed in custody for or charged with the~~  
37 ~~commission or attempted commission of any felony; a violation of sub-~~  
38 ~~section (a)(1) of K.S.A. 21-3505; a violation of K.S.A. 21-3508; a violation~~  
39 ~~of K.S.A. 21-4310; a violation of K.S.A. 21-3424, and amendments~~  
40 ~~thereto, when the victim is less than 18 years of age; a violation of K.S.A.~~  
41 ~~21-3507, and amendments thereto, when one of the parties involved is~~  
42 ~~less than 18 years of age; a violation of subsection (b)(1) of K.S.A. 21-~~  
43 ~~3513, and amendments thereto, when one of the parties involved is less~~

1 than 18 years of age; a violation of K.S.A. 21-3515, and amendments  
2 thereto, when one of the parties involved is less than 18 years of age; or  
3 a violation of K.S.A. 21-3517, and amendments thereto; shall be required  
4 to submit such specimen or sample at the same time such person is fin-  
5 gerprinted pursuant to the booking procedure any time after a magistrate,  
6 as defined by K.S.A. 22-2202 and amendments thereto, has made a de-  
7 termination of probable cause to support such arrest, charge or placement  
8 in custody. If the magistrate makes a probable cause determination, the  
9 magistrate shall, as a condition of bond, require such person to submit a  
10 specimen or sample.

11 ~~(2)~~ (2) Prior to taking such samples, the arresting, charging or cus-  
12 todial law enforcement agency shall search the Kansas criminal history  
13 files through the Kansas criminal justice information system to determine  
14 if such person's sample is currently on file with the Kansas bureau of  
15 investigation. In the event that it cannot reasonably be established that a  
16 DNA sample for such person is on file at the Kansas bureau of investi-  
17 gation, the arresting, charging or custodial law enforcement agency shall  
18 cause a sample to be collected. If such person's sample is on file with the  
19 Kansas bureau of investigation, the law enforcement agency is not re-  
20 quired to take the sample.

21 ~~(3)~~ (3) If a court later determines that there was not probable cause  
22 for the arrest, charge or placement in custody or the charges are otherwise  
23 dismissed, and the case is not appealed, the Kansas bureau of investiga-  
24 tion, upon petition by such person, shall expunge both the DNA sample  
25 and the profile record of such person.

26 ~~(4)~~ (4) If a conviction against a person, who is required to submit  
27 such specimen or sample, is expunged or a verdict of acquittal with regard  
28 to such person is returned, the Kansas bureau of investigation shall, upon  
29 petition by such person, expunge both the DNA sample and the profile  
30 record of such person.

31 (f) All persons required to register as offenders pursuant to K.S.A.  
32 22-4901 et seq., and amendments thereto, shall be required to submit  
33 specimens of blood or an oral or other biological sample authorized by  
34 the Kansas bureau of investigation to the Kansas bureau of investigation  
35 in accordance with the provisions of this act.

36 (g) The Kansas bureau of investigation shall provide all specimen vi-  
37 als, mailing tubes, labels and instructions necessary for the collection of  
38 blood, oral or other biological samples. The collection of samples shall be  
39 performed in a medically approved manner. No person authorized by this  
40 section to withdraw blood, and no person assisting in the collection of  
41 these samples shall be liable in any civil or criminal action when the act  
42 is performed in a reasonable manner according to generally accepted  
43 medical practices. The withdrawal of blood for purposes of this act may

1 be performed only by: (1) A person licensed to practice medicine and  
2 surgery or a person acting under the supervision of any such licensed  
3 person; (2) a registered nurse or a licensed practical nurse; or (3) any  
4 qualified medical technician including, but not limited to, an emergency  
5 medical technician-intermediate or mobile intensive care technician, as  
6 those terms are defined in K.S.A. 65-6112, and amendments thereto, or  
7 a phlebotomist. The samples shall thereafter be forwarded to the Kansas  
8 bureau of investigation. The bureau shall analyze the samples to the ex-  
9 tent allowed by funding available for this purpose.

10 (h) The DNA (deoxyribonucleic acid) records and DNA samples shall  
11 be maintained by the Kansas bureau of investigation. The Kansas bureau  
12 of investigation shall establish, implement and maintain a statewide au-  
13 tomated DNA databank and DNA database capable of, but not limited  
14 to, searching, matching and storing DNA records. The DNA database as  
15 established by this act shall be compatible with the procedures specified  
16 by the federal bureau of investigation's combined DNA index system  
17 (CODIS). The Kansas bureau of investigation shall participate in the  
18 CODIS program by sharing data and utilizing compatible test procedures,  
19 laboratory equipment, supplies and computer software.

20 (i) The DNA records obtained pursuant to this act shall be confiden-  
21 tial and shall be released only to authorized criminal justice agencies. The  
22 DNA records shall be used only for law enforcement identification pur-  
23 poses or to assist in the recovery or identification of human remains from  
24 disasters or for other humanitarian identification purposes, including  
25 identification of missing persons.

26 (j) (1) The Kansas bureau of investigation shall be the state central  
27 repository for all DNA records and DNA samples obtained pursuant to  
28 this act. The Kansas bureau of investigation shall promulgate rules and  
29 regulations for: (A) The form and manner of the collection and mainte-  
30 nance of DNA samples;

31 (B) a procedure which allows the defendant to petition to expunge  
32 and destroy the DNA samples and profile record in the event of a dis-  
33 missal of charges, expungement or acquittal at trial; and

34 (C) other procedures for the operation of this act.

35 (2) These rules and regulations also shall require compliance with  
36 national quality assurance standards to ensure that the DNA records sat-  
37 isfy standards of acceptance of such records into the national DNA iden-  
38 tification index.

39 (3) The provisions of the Kansas administrative procedure act shall  
40 apply to all actions taken under the rules and regulations so promulgated.

41 (k) The Kansas bureau of investigation is authorized to contract with  
42 third parties for the purposes of implementing this section. Any other  
43 party contracting to carry out the functions of this section shall be subject

1 to the same restrictions and requirements of this section, insofar as ap-  
2 plicable, as the bureau, as well as any additional restrictions imposed by  
3 the bureau.

4 (l) In the event that a person's DNA sample is lost or is not adequate  
5 for any reason, the person shall provide another sample for analysis.

6 (m) Any person who is subject to the requirements of this section,  
7 and who, after receiving notification of the requirement to provide a DNA  
8 specimen, knowingly refuses to provide such DNA specimen, shall be  
9 guilty of a class A nonperson misdemeanor.

10 Sec. 2. K.S.A. 21-2511 is hereby repealed.

11 Sec. 3. This act shall take effect and be in force from and after its  
12 publication in the statute book.