

Senate Judiciary Committee
SB 159
Testimony of Jennifer Roth - Opponent
February 15, 2011

Chairman Owens and Members of the Committee:

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.

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

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 February 11, 2011, Kansas had 7,009 parolees.¹

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. In contrast, FY 2010 in Kansas, there were 163 people admitted to KDOC for new felony convictions while on post-release (and 1,083 conditional violators, which includes “a significant number of cases in which the offender was officially returned with no new sentence, but actually had been convicted of a new felony offense”).² When Kansas’ model re-entry programs were fully funded, “[r]ecidivism rates — the percent of

¹ (<http://www.doc.ks.gov/publications/pop/POP%2002-11-2011.PDF>).

² (<http://www.doc.ks.gov/publications/StatProfile-FY2010-online.pdf>).

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.”³

“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).

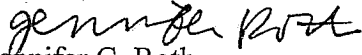
This is Kansas, not California. Kansas has different demographics. As of December 31, 2009, the total California Department of Corrections and Rehabilitation population was 297,406, including 155,641 in institutions and camps. Also in 2009, California prisons had 45,016 felon new admissions.⁴ As of February 11, 2011, Kansas had 9,054 people in prison.⁵

Furthermore, Kansas has different values. It 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.

This suspicionless search law proposed in SB 159 is not the only way to meet the goals of reintegration and public safety – in fact, it is arguably counter to both. “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). While I did not have time to review other states’ laws or parole policies to see what effect, if any, *Samson* has had, I did some review of cases. I found at least one state that rejected *Samson*’s reasoning on state constitutional grounds (*State v. Ochoa*, 792 N.W.2d 260 (Iowa Dec 17, 2010)) and one state that 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.”))

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


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³ (<http://www.mcclatchydc.com/2010/04/04/91592/economys-toll-kansas-cuts-its.html#>).

⁴ (http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2009.pdf).

⁵ ([http://www.doc.ks.gov/publications/pop/POP% 2002-11-2011.PDF/](http://www.doc.ks.gov/publications/pop/POP%2002-11-2011.PDF/)).