

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Pat Colloton at 1:30 p.m. on January 24, 2011 in Room 144-S of the Capitol.

All members were present.

Committee staff present:

Sean Ostrow, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Lauren Douglass, Legislative Research
Robert Allison-Gallimore, Legislative Research
Jackie Lunn, Committee Assistant

Conferees appearing before the Committee:

Marc Bennett, Kansas County & District Attorneys Association
Todd Thompson, County Attorney, Leavenworth County

Others attending:

See attached.

Chairperson Colloton called the meeting to order and opened the floor for bill introductions. She introduced State Representative Sean Gatewood requesting a recodification to the DUI statutes.

Representative Brookens moved the request as a committee bill. Representative Roth seconded. Motion carried.

Chairperson Colloton announced she had a bill request from Johnson County Sheriff regarding mental health records, which would allow law enforcement to check and see if an offender had been previously treated from the scene of the crime.

Representative Kelly moved the request as a committee bill. Representative Smith seconded. Motion carried.

Chairperson Colloton recognized Todd Thompson, County Attorney, Leavenworth County, to make several bill requests, which are listed below:

- A bill regarding prescription drugs being in the possession of someone other than the person the prescription was written for.

Representative Goodman moved the request as a committee bill. Representative Cassidy seconded. Motion carried.

- A bill regarding tobacco possession by minors and issues regarding electronic cigarettes.

Representative Cassidy moved the request as a committee bill. Representative Meier seconded. Motion carried.

- A bill regarding unlawful sexual relations with people of authority.

Representative McCray-Miller moved the request. Representative Kelly Seconded. Motion carried.

Being no other bill request, Chairperson Colloton opened the hearing on **HB 2022-Allowing venue to be transferred back to the jurisdiction where the crime occurred when a defendant is to be conditionally released**, and called Sean Ostrow, Office of the Revisor of Statutes, to explain the bill.

Upon the completion of Mr. Ostrow's explanation, Chairperson Colloton called on Marc Bennett, Kansas County & District Attorneys Association, to give his testimony as a proponent of the bill. Mr. Bennett presented written copy of his testimony, which can be found in its entirety in the offices of Legislative Administrative Services. (Attachment 1)

A question and answer session followed.

With no others to speak or testify to the bill, Chairperson Colloton closed the hearing on **HB 2022**.

CONTINUATION SHEET

The minutes of the Corrections and Juvenile Justice Committee at 1:30 p.m. on January 24, 2011, in Room 144-S of the Capitol.

Chairperson Colloton then opened the hearing on **HB 2057-Adding Johnson County sheriff's laboratory and Sedgwick County regional forensic science center as admissible forensic examination centers**, and called on Sean Ostrow, Office of the Revisor of Status, to explain the bill.

Upon the explanation of Mr. Ostrow, Chairperson Colloton called on Marc Bennett, Kansas County & District Attorneys Association, to give his testimony as a proponent of the bill. (Attachment 2)

A short question and answer session followed.

With no others to speak or testify to the bill, Chairperson Colloton closed the hearing on **HB 2057** and opened the hearing on **HB 2045-Amending the definitions and penalties for eavesdropping and blackmail**, and called on Sean Ostrow, Office of the Revisor of Statutes, to explain the bill. Mr. Ostrow presented a copy of a balloon for **HB 2405** (Attachment 3) which he also explained.

Upon the conclusion of Mr. Ostrow's explanation, Chairperson Colloton called on Todd Thompson, County Attorney, Leavenworth County, to give his testimony as a proponent of the bill. (Attachment 4)

Upon the conclusion of Mr. Thompson's testimony, Chairperson Colloton called on Mr. Marc Bennett, Kansas County & District Attorney's Association, to give his testimony as an opponent of **HB 2045**. (Attachment 5)

A question and answer session followed.

With no others to speak or testify to the bill, Chairperson Colloton closed the hearing on **HB 2045**.

Chairperson Colloton adjourned the meeting at 2:40 pm with the next scheduled meeting on January 25, 2011 at 1:30 pm in room 144-S.

DATE: 1-24-11

DATE: 1-24-11

[illegible]



Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgewick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

January 21, 2011

Testimony Regarding HB 2022
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of the Kansas County and District Attorneys Association

Honorable Chairwoman Colloton and Members of the House Committee on Corrections and Juvenile Justice:

Thank you for the opportunity to address you regarding House Bill 2022. On behalf of the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to K.S.A. 22-3428, Persons Acquitted or verdict of not guilty and jury answers affirmative to special question, et seq.

A defendant acquitted on the basis of "mental disease or defect" pursuant to K.S.A. 22-3220, is then institutionalized pursuant to K.S.A. 22-3430 to "the state security hospital or any county institution provided for the reception, care treatment and maintenance of mentally ill persons, if convicted of a felony." Given the lack of county institutions across the state, the reality is that Larned State and Osawatomie State Hospital are the two locations where such offenders are sent.

Pursuant to K.S.A. 22-3428(2)(b) when certain specific conditions are met (notice provided, a hearing held and specific orders entered), a defendant can be subject to "conditional release" to a "suitable re-entry program." (see K.S.A. 22-3428[3]). When such conditional release is granted, the defendant continues to be monitored to ensure compliance with "appropriate supportive provisions" (see 22-3428[4]), on a probation-like supervision. Under the current statute, the supervision of that conditional-release "shall" fall to the county in which the offender/patient is sent to reside.

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While this statute is, admittedly, rarely at issue given the lack of successful “mental disease or defect” defenses, it does still come up. By way of example, in 1999, a Sedgwick county defendant was found not guilty by reason of mental disease or defect. The defendant was sent to Larned State and ultimately transferred to Osawatomie State Hospital. In 2010, conditional release was granted. However, the only appropriate “suitable re-entry program” was in Jefferson County, Kansas. Sedgwick County, in particular, had no facilities appropriate to the needs of this defendant. The problem was neither the Jefferson County Attorney nor the District Court of Jefferson County had any tie to this person and had no files regarding the nature of her crime or her history. Some 90 days later, when the defendant de-compensated and fell back into a mentally unstable state, Sedgwick County had no standing to intercede—which placed the burden on Jefferson County to resolve this Sedgwick County case. (Note: the defendant’s attorney agreed, in this single case, that Sedgwick County should handle the issue).

To alleviate this issue in the future, the KCDAAs proposes to make one change: add the language “. . . or to the district court where the prosecution commenced . . .” to subsection (4) thereby allowing the court of the “home” county to retain jurisdiction over the offender during his or her conditional release. The change, though minor, would allow venue over issues related to conditional release to remain with the county of prosecution.

Though this issue may arise infrequently, when it does, the jurisdiction that knows the history of the case and the offender should retain venue rather than the county where the care-home or similar facility happens to be located.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District



Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

January 21, 2011

Testimony Regarding HB 2057
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of the Kansas County and District Attorneys Association

Honorable Chairwoman Colloton and Members of the House Committee on Corrections and Juvenile Justice:

Thank you for the opportunity to address you regarding House Bill 2057. On behalf of the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to K.S.A. 22-3437, Forensic Examinations; admissibility; certification; notices of proffer and objection to admission.

K.S.A. 22-3437 allows the use of forensic reports from certain delineated laboratories at "any hearing" when a certificate has been prepared by the analyst, supported by written declaration or sworn to before a notary and notice has been provided to the opposing party 20 days prior to the hearing. As necessary, an objection may be lodged by the opposing counsel. In this fashion, these procedural safeguards alleviate issues regarding hearsay and confrontation raised in Melendez-Dias v. Massachusetts.

The proposal of the KCDAA is to simply add the Johnson County sheriff's laboratory and the Sedgwick County regional forensic science center to the list of laboratories already in the statute. Time and expense to the many counties that utilize these facilities can be saved by this addition, while still ensuring the protection of due process rights of the accused.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District

House Corrections and Juvenile Justice
Committee
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Date 1-24-11
Attachment # 2

HOUSE BILL No. 2045

By Committee on Corrections and Juvenile Justice

1-19

1 AN ACT concerning crimes, criminal procedure and punishment; relating
2 to breach of privacy and blackmail; amending K.S.A. 2010 Supp. 22-
3 4902 and section 64 and 171 of chapter 136 of the 2010 Session Laws
4 of Kansas and repealing the existing sections.
5

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

7 Section 1. Section 171 of chapter 136 of the 2010 Session Laws of
8 Kansas is hereby amended to read as follows: Sec. 171. (a) Breach of
9 privacy is knowingly and without lawful authority:

10 (1) Intercepting, without the consent of the sender or receiver, a
11 message by telephone, telegraph, letter or other means of private
12 communication;

13 (2) divulging, without the consent of the sender or receiver, the
14 existence or contents of such message if such person knows that the
15 message was illegally intercepted, or if such person illegally learned of
16 the message in the course of employment with an agency in transmitting
17 it;

18 (3) entering into a private place with intent to listen surreptitiously
19 to private conversations or to observe the personal conduct of any other
20 person or persons therein;

21 (4) installing or using outside *or inside* a private place any device for
22 hearing, recording, amplifying or broadcasting sounds originating in such
23 place, which sounds would not ordinarily be audible or comprehensible
24 outside, without the consent of the person or persons entitled to privacy
25 therein;

26 (5) installing or using any device or equipment for the interception
27 of any telephone, telegraph or other wire *or wireless* communication
28 without the consent of the person in possession or control of the facilities
29 for such ~~wire~~ communication; ~~or~~

30 (6) installing or using a concealed camcorder, motion picture camera
31 or photographic camera of any type, to secretly videotape, film,
32 photograph or record by electronic *or other* means, another, identifiable
33 person under or through the clothing being worn by that other person or
34 another, identifiable person who is nude or in a state of undress, for the
35 purpose of viewing the body of, or the undergarments worn by, that other
36 person, without the consent or knowledge of that other person, with the

1 intent to invade the privacy of that other person, under circumstances in
2 which the other person has a reasonable expectation of privacy;

3 (7) looking into any hole or opening, or otherwise viewing by means
4 of instrumentality, any person with the intent to invade the privacy of the
5 person being viewed; or

6 ~~(8) disseminating or permitting the dissemination of any videotape,
7 photograph, film or image obtained in violation of subsection (a)(6).~~

8 (b) Breach of privacy is a class A nonperson misdemeanor, as
9 defined in:

10 (1) Subsection (a)(1) and (a)(2) is a class A nonperson
11 misdemeanor;

12 (2) subsection (a)(3) is a severity level 9, person felony;

13 (3) subsections (a)(4) and (a)(5) is a severity level 8, person felony;

14 (4) subsections (a)(6) and (a)(7) is a severity level 7, person felony,
15 except as provided in subsection (b)(6);

16 ~~(5) subsection (a)(8) is a severity level 5, person felony; and~~

17 (6) subsections (a)(6) and (a)(7) is a severity level 6, person felony
18 if:

19 (A) The person viewed is less than 18 years of age at the time the
20 image was captured or the viewing occurred;

21 (B) the offender is in a position of authority, trust or control over the
22 person being viewed, including, but not limited to, a biological parent,
23 stepparent, adoptive parent, teacher, coach, school administrator, or
24 clergy member; or *(taken 2442 - 2009) existing language*

25 (C) the offender has been previously convicted under subsections (a)
26 (3) through (a)(7).

27 (c) It shall not be a defense to subsections (a)(6), (a)(7) ~~or (a)(8)~~
28 that:

29 (1) The person being viewed or recorded was not in a state of
30 partial or complete undress or that the person being viewed was a
31 landlord, tenant, cohabitant, employer, employee, business partner,
32 associate or agent of any such person; or

33 (2) no image was captured or recorded.

34 ~~(e)(d)~~ Subsection (a)(1) shall not apply to messages overheard
35 through a regularly installed instrument on a telephone party line or on an
36 extension.

37 ~~(d)(e)~~ The provisions of this section shall not apply to an operator of
38 a switchboard, or any officer, employee or agent of any public utility
39 providing telephone communications service, whose facilities are used in
40 the transmission of a communication, to intercept, disclose or use that
41 communication in the normal course of employment while engaged in
42 any activity which is incident to the rendition of public utility service or
43 to the protection of the rights of property of such public utility.

1 (e)(f) As used in this section:

2 (1) "Instrumentality" includes, but is not limited to, a
3 telescope, periscope, binoculars, telephoto lens or any other
4 instrument which is used to magnify or aid in viewing such
5 person; and

6 (2) "private place" means a place where one may
7 reasonably expect to be safe from uninvited intrusion or
8 surveillance, but does not include a place to which the public
9 has lawful access.

10 Sec. 2. Section 64 of chapter 136 of the 2010 Session Laws of
11 Kansas is hereby amended to read as follows: Sec. 64. (a) Blackmail is
12 gaining or attempting to gain anything of value or compelling or
13 attempting to compel another to act against such person's will, by
14 threatening to:

15 (1) Communicate accusations or statements about any person that
16 would subject such person or any other person to public ridicule,
17 contempt or degradation; or

18 (2) disseminate any videotape, photograph, film, or image obtained in
19 violation of section 171 of chapter 136 of the 2010 Session Laws of
20 Kansas, and amendments thereto

21 (b) ~~Blackmail is a severity level 7, nonperson felony.~~

22 (b) ~~Blackmail as defined in:~~

23 (1) ~~Subsection (a)(1) is a severity level 7, nonperson felony, and~~

24 (2) ~~subsection (a)(2) is a severity level 4, person felony.~~

25 Sec. 3. K.S.A. 2010 Supp. 22-4902 is hereby amended to read as
26 follows: 22-4902. As used in the Kansas offender registration act, unless
27 the context otherwise requires:

28 (a) "Offender" means: (1) A sex offender as defined in subsection
29 (b);

30 (2) a violent offender as defined in subsection (d);

31 (3) a sexually violent predator as defined in subsection (f);

32 (4) any person who, on and after May 29, 1997, is convicted of any
33 of the following crimes when the victim is less than 18 years of age:

34 (A) Kidnapping as defined in K.S.A. 21-3420, prior to its repeal, or
35 subsection (a) of section 43 of chapter 136 of the 2010 Session Laws of
36 Kansas, and amendments thereto, except by a parent;

37 (B) aggravated kidnapping as defined in K.S.A. 21-3421, prior to its
38 repeal, or subsection (b) of section 43 of chapter 136 of the 2010 Session
39 Laws of Kansas, and amendments thereto; or

40 (C) criminal restraint as defined in K.S.A. 21-3424, prior to its
41 repeal, or section 46 of chapter 136 of the 2010 Session Laws of Kansas,

may not be lifetime

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ASSISTANT COUNTY ATTORNEY

Thursday, January 20, 2011

RE: Eavesdropping Bill

To Whom It May Concern:

On April 22, 2008, sixteen year old B.W. awoke around 5:30 a.m. to take her shower. Her godfather, Andy Doty, was in the bathroom before her, so she had to wait. She entered the bathroom, undressed and showered. As she got out and went to leave, she found laying on the floor a bag with a video camera recording her.

The family only thought Andy Doty visited to watch his goddaughter's confirmation, but when Fort Leavenworth detectives investigated, they found that he not only filmed B.W. in the bathroom, but also her brother and mother. Obviously, B.W. and her family were devastated. When the case came to the Leavenworth County Attorney's office they wanted to see severe consequences.

When my office and I started processing this case we found our best and only option for these set of circumstances was eavesdropping, a class A misdemeanor. Nothing in the language took into consideration of the age of the person being viewed/filmed, whether they were clothed or not, or the possibility of sexual intent. The family was extremely dismayed. In researching this type of crime, I found that many if not most other states were able to file felony charges for this type crime, but we could not. Our defendant ultimately served several weekends in our county jail and was placed on probation. He was not required by law to register as a sexual offender, he was able to return to his home state with just a misdemeanor crime on his record and no one the wiser.

These crimes are not common, but are serious. I do not believe criminals should be allowed to get a slap on the wrist for something so significant and crushing to a young person and their entire family.

Sincerely,

Todd G. Thompson
County Attorney
Leavenworth, Kansas

House Corrections and Juvenile Justice
Committee
2011 Session
Date 1-24-11
Attachment # 4



Office of the District Attorney
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Nola Foulston
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Marc Bennett
Deputy District Attorney

January 21, 2011

Testimony Regarding HB 2045
Submitted by Marc Bennett, Deputy District Attorney
On Behalf of the Kansas County and District Attorneys Association

Honorable Chairwoman Colloton and Members of the House Committee on Corrections and Juvenile Justice:

Thank you for the opportunity to address you regarding House Bill 2045. On behalf of the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to K.S.A. 21-4001, Eavesdropping and K.S.A. 21-3428, Blackmail.

The KCDAAs had initially intended to join the authors of HB 2045, and indeed, the proposed addition of "dissemination" set forth in Section 1, § (a)(8) (Eavesdropping) and Section 2, §(2) (Blackmail) were proposed by the KCDAAs. However, the other proposed changes set forth in HB 2045, raise sufficient concerns that the KCDAAs must oppose the remaining proposals. The concerns raised by the KCDAAs as to the remaining proposals are as follows:

1) Foremost among the concerns raised was that the broad language of Section 1, § (a)(7) is at risk to a constitutional challenge for vagueness: "... looking into any hole or opening or otherwise viewing by means of instrumentality..." Though the use of the phrase "instrumentality" may limit the range of behavior covered by the statute, the definition of "instrumentality" in Section 1, § (f)(1) is equally vague in that it covers any instrument used to "aid in viewing." Because plain words are given plain meaning by appellate courts, one looking through a window, a hole in a fence or into a neighbor's back yard while wearing eye-glasses could be subject to this bill as written.

2) Likewise, Section 1, § (b)(6)(B) enhances the felony level when "the offender is in a position of authority, trust or control over the person being

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viewed,” and provides a non-exclusive list of examples. The number of persons arguably in “a position of authority” is unclear. “[P]osition of authority” is an untested phrase in Kansas law, as opposed to “fiduciary relationship,” which has an established meaning.

3) HB 2045 seeks to make the behavior prohibited in Section 1, § (a)(7), a severity level 6 person felony. If the same behavior took place within the confines of most municipalities, the applicable “peeping tom” ordinance would call for a misdemeanor. Would the distinction between the felony and misdemeanor then be based not on the criminal behavior but on the physical location of the offender?

4) K.S.A. 21-4001(a)(1) already covers behavior wherein the offender enters “into a private place with intent to listen surreptitiously to . . . observe the personal conduct of any other person or persons therein.” As such, the KCDAAs questions the need to create a felony simply for the act of “looking into any hole or opening.”

5) When the constitutionality of peeping tom statutes has been challenged in other states (see Com. v. LePore, 40 Mass.App.Ct. 543, 666 N.E. 152 [1996]), the presence of a specific *mens rea* within the statute has protected those statutes from challenge. To that end, the intent to “invade the privacy of the person being viewed” would help, but is an untested phrase in Kansas law, except within the context of tort claims. A preferable concept would be one long-found in many chapter 35 offenses: “with the intent to satisfy the sexual desires of the offender.”

6) Finally, concern was expressed that Section 3 which makes this crime a subject to registration is also unnecessary. If the prosecutor sees a need to require an individual to register, the State can always file a motion to have the act declared a “sexually motivated” offense and therefore subject to sexual registry.

Again, the KCDAAs believes that Section 1, § (a)(8) (Eavesdropping) and Section 2, § (2) (Blackmail) regarding dissemination of material **are** both necessary additions given the current lack of statutory provisions to cover situations where one puts or threatens to put surreptitiously obtained recordings onto the internet—the Rutgers University suicide earlier this Fall comes immediately to mind. Therefore, the KCDAAs would request that those sections of HB2045 pass in their current form and the remaining proposals not be supported. Finally, the severity level of the KCDAAs proposals would need to be addressed by the committee, as appropriate.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District