Approved: 5-17-11
Date

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 March 9, 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:
David Hutchings, Kansas Bureau of Investigation
Dr. Jennifer Pealer, Juvenile Justice Authority
Jennifer Roth, Association of Kansas Defense Lawyers
Marc Bennett, KS County & District Attorneys Association
State Senator David Haley
Kyle Smith, Attorney General's Office
Ed Klumpp, KACP, Kansas Sheriffs Assoc., KPOA
Helen Pedigo, Special Counsel to Chief Justice, Supreme Court of KS

Others attending:
See attached.

Chairperson Colloton called the meeting to order and opened the continuation of hearing on **HB 2322-Amendments to the Kansas offender registration act.** The following appeared to testify on the bill and presented written copy of their testimony which can be found in its entirety in the offices of Legislative Administrative Services:

- David Hutchings, KBI, proponent. (Attachments 1, 2, & 3)
- Dr. Jennifer Pealer, JJA, neutral party. (Attachment 4)
- Jennifer Roth, Association of Kansas Defense Lawyers, opponent. (no written copy)

With no others to testify or speak to the bill, Chairperson Colloton closed the hearing on **HB 2322** and opened the hearing on **SB 6-Criminal procedure; search incident to arrest.** The following appeared before the Committee to testify on the bill. They presented written copy of their testimony which can be found in its entirety in offices of Legislative Administrative Services:

Proponents:
- Marc Bennett, KS County & District Attorneys Association (Attachment 5)
- State Senator David Haley, Neutral Party (Attachment 6)
- Kyle Smith, Attorney General's Office (Attachment 7)
- Ed Klumpp, KACP, Kansas Sheriffs Assoc., KPOA (Attachment 8)

Opponents:
- Jennifer Roth, Association of Kansas Defense Lawyers (Attachment 9)

A discussion followed. With no others to testify or speak to the bill, Chairperson Colloton closed the hearing on **SB 6** and opened the hearing on **SB 63-Amending the crime of sexual exploitation of a child.** The following testified on the bill. They presented written copy of their testimony which can be found in its entirety in the offices of Legislative Administrative Services:

Proponents:
- Marc Bennett, KS County & District Attorneys Assoc. (Attachment 10)

Opponents:
- Jennifer Roth, Association of Kansas Defense Lawyers (Attachment 11)

A question and answer session followed. With no others to testify or speak to the bill Chairperson Colloton closed the hearing on **SB 63** and opened the hearing on **SB 60-Eliminating direct appeals to the supreme court for certain off-grid felonies.**

Helen Pedigo, Special Counsel to Chief Justice, Supreme Court of Kansas, appeared as a proponent of the bill. She presented written copy of her testimony which can be found in its entirety in the offices of Legislative Administrative Services. (Attachment 12)

A short question and answer session followed. With no others to testify or speak to the bill, Chairperson Colloton closed the hearing on **SB 60** and opened the floor for consideration of **HB 2371**-**Amending the provisions of community corrections grants and continuing such programs in certain counties.** Sean Ostrow, Office of the Revisor of Statutes, explained the bill. **Representative Brookens moved to pass the bill out favorably as amended. Representative Brookens seconded.**

Representative Kinzer moved to change the effective date from January to July. Brookens seconded. Motion carried.

Representative Pauls moved to pass the bill out favorably as amended for passage. Representtive Roth seconded. Motion carried.

The meeting was adjourned at 3:00 pm with the next meeting scheduled for March 10, 2010 at 1:30pm in room 144-S.

CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 3-9-11

NAME	REPRESENTING
DAVID HUTCHINGS	KBI
Nicole Dekat	KBI
Shelia Sawyer-Tyler	KBI
Sheila Wacker	JO Co SO
Keoni Johnson	SG Co SO
Al Deathe	DG Co SO
Ed Klumpp	KSA/KACP/KPOA
Kyle Smith	Asst. Attorney General
[illegible]	Southern Law. Co Leadership Development.
Ashley Crane	" "
Jessica Farris	" "
Patty Dickinson	" "
Laura T. Carroll	" "
Owen Lewis	" "
Sarah Hansen	KS Assoc. of Addiction Prof.
Helen Pedigo	Const
Jennifer Roth	KA CDL
Sarah Fertig	KSC
Derek Hein	Hein Law Firm

CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 3-9-11

NAME	REPRESENTING
Chris Reece	JJA
Britt Nichols	JJA
Shawn Mann	JJA
Jennifer Pealer	JJA
Mary Murphy	KDHE.
Mandy Schlageter	Southern Kansas Leadership Development
Tayler Miles	Southern Leavenworth County Leadership Development.
Tonya Barnes	" "
Sandra Holler	" "
Cindy Dunn	" "
Georgia Brown	" "
Amber McCullough	" "
Karen Barone	The Cap Lab Grp. LLC.
Patrick Vogelsberg	KCDAA
[illegible]	KCDAA - ADA 56 Co.
Karen Harris	Leavenworth-Lansing Leadership Class.
Ron BROWN	FOP

Kansas Bureau of Investigation

Robert E. Blecha
Director

Derek Schmidt
Attorney General

Testimony in Support of HB 2322
Before the House Committee on Corrections and Juvenile Justice
David Hutchings, Special Agent in Charge
Kansas Bureau of Investigation
March 9, 2011

Overview
SORNA has 3 tiers of offenders. Varying registration periods and reporting requirements.

ORWG tried to preserve categories used in current Kansas offender registration act and use only two registration periods (15 years and lifetime).

Amendments for SORNA substantial compliance
1) Definitions in KSA 22-4902 ("out of state", "reside", "residence", "transient", others).

2) Changes to 22-4904 would require the court to document the age of the victim.

3) Changes to 22-4904 would require the registering law enforcement agency to enter NCIC information.

4) Changes to 22-4904 would preclude expungements of an offender's conviction that required registration while the offender is required to register.
*ORWG also requests a policy change to broaden this prohibition to all offenses while the person is registered.

5) Changes to 22-4904 would implement several agency requirements under SORNA, accomplished best by enhancing and coordinating all agency requirements within one statute.

6) Changes to 22-4905 would require the offender to report 4 times a year.
*Allowed to report fewer times for lower tiers under SORNA.

7) Changes to 22-4905 would allow for different requirement for the registration of transients who cannot comply otherwise.

8) Changes to 22-4905 would require the offender, if receiving inpatient treatment, to notify the treatment facility of the offender's status as an offender.

9) Changes to 22-4905 would require the offender to report any change in required information within three days.

10) Changes to 22-4905 would require the offender to report international travel 21 days in advance.

11) Changes to 22-4906 would change all 10 year registration durations to 15 years and change some 10 year durations to life.
*SORNA requires a tiered duration of registration of 15 years, 25 years, and lifetime registration.
*The ORWG prefers to continue the current program utilizing a two-tier system.

12) Changes to 22-4906 would require lifetime registration for kidnapping and aggravated kidnapping.
*Currently in correspondence with the SMART office about this.

13) 22-4906 would require registration for a juvenile offender less than 14 years of age to register until 18 or for 5 years, whichever is later; court may also waive registration requirement; or require non-public registration with the sheriff.
* SMART office has approved not changing the current law.

14) 22-4906 would require a juvenile offender 14 or more years of age to register until 18 or for 5 years, whichever is later.
*SMART office has approved not changing the current law; court may also waive registration requirement; or require non-public registration with the sheriff.

15) Changes to 22-4906 would require a juvenile offender 14 or more years of age adjudicated of an off-grid felony or a felony ranked in severity level 1 of the nondrug grid to register for life.
*Current law is register until 18 or for 5 years, whichever is later; court may also waive registration requirement; or require non-public registration with the sheriff.

16) Changes to 22-4906 to require registration of a juvenile offender who is adjudicated of an off-grid felony or a felony ranked in severity level 1 of the nondrug grid.
*For this small class of serious offenders, SORNA essentially eliminates current provision giving courts' discretion to not require registration. Court is allowed court discretion for all other juveniles.

17) Changes to 22-4906 would require lifetime registration for aggravated human trafficking and promoting prostitution when the victim is under 18 rather than under 14.

18) Changes to 22-4907 would require the signing of registration form must be witnessed by the registering officer.

19) Changes to 22-4907 would add alias information and more detailed information about conviction data to the information required to be reported by the offender.

20) Repeal 22-4912 (Relief from requirement of registration).

Policy Amendments recommended by the ORWG

1) Changes to 22-4903 would title the offenses of "Violation of the Kansas Offender Registration Act" and the new offense of "Aggravated Violation of the Kansas Offender Registration Act" and amend the penalties to address the first offenses more leniently and repeat offenders more harshly.

2) Changes to 22-4903 would expand the venue for prosecution.

3) Changes to 22-4904 would preclude expungements of an offender's entire criminal record while the offender is required to register.

4) Changes to 22-4904 would require the court to provide necessary information to the KBI upon request.

5) Changes to 22-4902 categorize all offenders as either sex, violent, or drug offenders. But amendment would keep current duration times for violent and drug offenders.

6) Changes to 22-4902 remove Sexual Battery from the definition of a Sexually Violent Crime.

7) Changes to 22-4902 require registration for Kidnapping when not committed by the parent and Aggravated Kidnapping regardless of the age of the victim. Existing law required victim to be less than 18 years of age.

8) Changes to 22-4905 would require the offender to surrender of all other DL's if maintaining primary residence in Kansas, unless military.

9) Changes to 22-4905 would waive the $20 registration fee for offenders found to be indigent by the court.

10) Changes to 22-4906 allow for court discretion on public notification on juvenile offenders.
*Discretion allowed now as well.

Thank you for your time and consideration. I would be happy to answer any questions.

Kansas Bureau of Investigation

Robert E. Blecha
Director

Derek Schmidt
Attorney General

Testimony in Support of HB 2322
Before the House Committee on Corrections and Juvenile Justice
Nicole Dekat, Public Service Administrator II
Kansas Bureau of Investigation
March 9, 2011

Below is the Offense Tiering for sexual offenses and a few violent offenses if the State of Kansas decides to use three tiers- This has not been approved by the SMART office.

State Tier	**Statute Citation**
Tier I Offenses	**Requires 15 Year Registration**
Sexual Battery	21-3517
Adultery	21-3507
Criminal Sodomy	21-3505 (a)(1)
Patronizing a Prostitute	21-3515
Lewd and Lascivious behavior	21-3508
Capital Murder	21-3439
Murder in the first degree	21-3401
Murder in the second degree	21-3402
Voluntary Manslaughter	21-3403
Involuntary Manslaughter	21-3404
Criminal Restraint	21-3424

Tier II Offenses	**Requires 25 Year Registration**
Criminal Sodomy	21-3505 (a)(2), (a)(3)
Indecent Solicitation of a Minor	21-3510
Electronic Solicitation	21-3523
Aggravated Incest	21-3603
Indecent Liberties with a Child	21-3503

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State Tier	Statute Citation
Unlawful Sexual Relations	21-3520
Sexual Exploitation of a Child	21-3516
Aggravated Sexual Battery	21-3518
Promoting Prostitution	21-3513

Tier III Offenses	Requires Lifetime Registration
Rape	21-3502
Aggravated Indecent Solicitation of a child	21-3511
Aggravated Indecent Liberties with a Child	21-3504
Aggravated Criminal Sodomy	21-3506
Sexual Exploitation of Child <14	21-3516
Aggravated Human Trafficking	21-3447
Promoting Prostitution <14	21-3513
Kidnapping	21-3420
Aggravated Kidnapping	21-3421

Thank you for your time and consideration. I would be happy to answer any questions.

Kansas Bureau of Investigation

Robert E. Blecha
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Testimony in Support of HB 2322
Before the House Committee on Corrections and Juvenile Justice
Nicole Dekat, Public Service Administrator II
Kansas Bureau of Investigation
March 9, 2011

Below is the Offense Tiering for sexual offenses and a few violent offenses if the State of Kansas uses a two tier system. This has been approved by the SMART office.

Tier I Offenses	**Requires 15 Year Registration**
Sexual Battery	21-3517
Adultery	21-3507
Criminal Sodomy	21-3505 (a)(1)
Patronizing a Prostitute	21-3515
Lewd and Lascivious behavior	21-3508
Capital Murder	21-3439
Murder in the first degree	21-3401
Murder in the second degree	21-3402
Voluntary Manslaughter	21-3403
Involuntary Manslaughter	21-3404
Criminal Restraint	21-3424
Tier III Offenses	**Requires Lifetime Registration**
Rape	21-3502
Indecent Liberties with a Child	21-3503
Aggravated Indecent Liberties with a Child	21-3504
Criminal Sodomy	21-3505 (a)(2) & (a)(3)
Aggravated Criminal Sodomy	21-3506

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Indecent Solicitation of a child	21-3510
Aggravated Indecent Solicitation of a child	21-3511
Sexual Exploitation of a Child	21-3516
Aggravated Sexual Battery	21-3518
Aggravated Incest	21-3603
Electronic Solicitation	21-3523
Unlawful Sexual Relations	21-3520
Aggravated Human Trafficking	21-3447
Promoting Prostitution	21-3513
Kidnapping	21-3420
Aggravated Kidnapping	21-3421

Thank you for your time and consideration. I would be happy to answer any questions.

TESTIMONY ON HB 2322

before the

HOUSE COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE

by KANSAS JUVENILE JUSTICE AUTHORITY

MARCH 9, 2011

Appearing:

Dr. Jennifer Pealer, PhD, Assistant Commissioner of Research jpealer@jja.ks.gov

Britt Nichols, Inspector General ig@jja.ks.gov

Curtis Whitten
Commissioner
785-296-0042
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Thank you for the on-going interest and attention to matters of Juvenile Justice.

HB 2322, being referred to as SORNA codification, is important legislation for many reasons and for many stakeholders.

Insofar as the Juvenile Justice Authority is affected, we appear as neither a proponent or opponent to the legislation but to offer to provide information of which JJA may be specifically aware about the potential impact of the proposed legislation. JJA, due in part to its unique role, would offer experience and research based insight into the potential impact of the proposed legislation.

There are two major functional components to the proposed legislation.

First, the proposed legislation increases the responsibilities for JJA by directing JJA's role in the reporting and tracking requirements for "Sex offenders" as defined at HB 2322 § 2, page 3, line 8.

The second impact area increases the responsibilities on the part of the defined offender.

Size and Scope of Population

JJA usually supervises approximately 2500 youth (2587 FY09 and 2528 FY10). Of these youth, approximately 10 percent have a sex offense (269 youth in FY09 and 250 youth in FY10).

"Adjudicated juveniles"

For the same policy reasons that have caused the creation of a separate Juvenile Justice Authority in the first instance, it might also be wise for the legislature to treat adjudicated juveniles who might otherwise be included in the registration requirements of HB 2322 with separate and distinct rules and responsibilities.

- Current research concerning cognitive and reasoning abilities continue to develop until at least the age of 25.

- A basis for the creating of a separate justice system is that there are valid policy reasons not to treat the alleged juvenile offense as an adult offense and to not expose the alleged offender to the complete ramifications of adult correctional processes.

- Reasons to conform with "Adam Walsh" legislation – especially insofar as Romeo/Juliet offense scenario. It would appear that amendment would be required to remove Romeo/Juliet offenders from the reporting requirements.

By the time a juvenile has been adjudicated, at least one prosecutor and at least one court have made the fact based determination that it is NOT in the best interest of the state (the public) and the alleged offender to treat the alleged offender as an adult offender.

As the bill reads at this juncture (and current law), the registration requirements currently includes any person "is adjudicated as a juvenile offender for an act which if committed by and adult would constitute the commission of a sexually violent crime set forth in subsection (c)". HB 2322 § 2, page 3, lines 10 - 12. [NOTE that SB 39 addressing the same statute is likely to be amended to specifically exclude adjudicated juveniles from the scope of its registration and residential requirements – a middle ground might be to exclude adjudicated juveniles while in custody of the Commissioner of JJA].

The requirement of universal registration, which in some senses would universally second guess and supplant the determinations made in a juvenile's adjudication, would render to adjudicated juveniles offenders the same course of treatment as convicted adult sex offenders.

Impacts on the Adjudicated Juvenile

While JJA is not specifically charged with the obligation to advocate on behalf of persons ordered into the custody of JJA, there are a few experienced based observations about HB 2322 to be offered.

There are significant concerns about the impact or effectiveness of registration requirements. [NOTE DOC's testimony to the Senate Judiciary Committee on SB 39]

Issues implicated by registration and increased registration include:

- Negative impact on attachment to pro-social institutions such as schools – youth who are connected to school have better life outcomes.
- SORA registration may negatively impact families (re-integration/placement) by increasing barriers to resources:
  Housing (safe affordable housing)
  Intra-familial sexual perpetration (about 40 percent of the youth in the facilities) causes a problem with registration because:
  Loss of family support
  Inadvertently identifying victim(s)
  Lead to community ostracization of the offender, family and/or victim
- Mental health – registration may increase alienation from school and community which may result in increased social isolation resulting in depression and substance abuse.
- Additionally, the cumulative penalties for lack of registration may result in net widening because more youth would be sent to the correctional facilities because of failure to maintain registration.
- Research asking offenders whether the registration is a deterrent (preventing them from committing another sexual offense because they are listed) has shown split results with 37.9 percent completing disagreeing and 43.2 percent reporting complete agreement. Not only is it not a deterrent, but registration may be detrimental because of judicial decision making.
- Missed opportunities for treatment - Research in South Carolina examined judicial decision making over a 15 year period for juvenile sexual offenders. They found that prosecutors were significantly less likely to move forward on cases resulting in missed opportunities for treatment.
- Long-term registration may hinder the development of the youth and inadvertently decrease public safety by increasing the recidivism of the youth. The Supreme Court declared in Roper v. Simmons, children are categorically less culpable for their actions than adults because medical research has shown that the pre-frontal cortex is not fully developed. This area of the brain is responsible for higher level cognitive functioning including decision making and determination of risk. Moreover,

because the brain is still in development the youth are more amendable to treatment which is backed by research on recidivism. Most juvenile sex offenders are amendable to treatment and very few actually sexually recidivate. A review of 25 studies that examined juvenile sex offenders reported that the recidivism rates for sexual offending to be between 1.8-12.8 percent with the average being about 7.2 percent. Hence, with long-term and life-time registration for acts committed while an adolescent goes against the founding principles of the juvenile justice system.

While the obligation for the offender to register and re-report and register may, on its face, appear to solve some problems it also seems likely to create an additional hurdles for offenders trying to move beyond the fact of their conviction particularly when the proposal also appears to further tie the hands of the Courts and Prosecutors with respect to reaching alternative plea or sentencing arrangement when that might be a wiser course to follow in any particular case. The legislation appears to rely upon the questionable presumption, at least with respect to youth, that a conviction of any of the specified crimes foretells a lifetime of additional transgression. The evidence appears to be gaining otherwise.

The re-registration fees may be a prime example. For a registrant unable to become meaningfully employed, the $20 per registration fee may be an impossible hurdle. It would appear wise to make some provision for indecency. Otherwise, the legislation may be creating a "pay to not be a criminal" situation. There are Constitutional principles implicated if that were ever the case.

The proposals, as for individuals who become trapped in a downward spiral of registration failures for whatever reasons or causes, appears likely to negatively impact prison population levels by virtually guaranteeing a registration related felony offense. Experience with youth indicates that there may be a great deal of management and maintenance required to monitor the quarterly re-registration process.

The proposed definition currently includes any person "is adjudicated as a juvenile offender for an act which if committed by and adult would constitute the commission of a sexually violent crime set forth in subsection (c)". HB 2322 § 2, page 3, lines 10 -12. [NOTE that SB 39 addressing the same statute is likely to be amended to specifically exclude adjudicated juveniles from the scope of its registration and residential requirements – a middle ground might be to exclude adjudicated juveniles while in custody of the Commissioner of JJA].

Extending length of Registration Requirements

Currently, youthful offenders have to register for a period of up to 5 years or their 18th birthday. The proposed bill would require juveniles to register for 5 years (if they committed an offense under the age of 14) or for their lifetime. The bill would increase the length of registration at least three-fold which may have some unintended consequences for the youth becoming productive successful members of society (i.e., precluding opportunities for educational and vocational achievement).

Impact on JJA Processes

While the concept of advising adjudicated offenders upon release from custody does not differ drastically from steps being currently taken on this and other issues at the end of custody, there is some question about the advisability of creating potential defenses for offenders by giving them the opportunity to claim the admonition was not complete or effective or received at all. If the point to registration is to cause a degree of personal responsibility for past offenders, causing that responsibility

to be shared between agencies and the offender may diffuse the effectiveness and might create excuses for failures on the part of the offender.

JJA reads HB 2322 § 5 (d), page 19 lines 20-25 to excuse on-going and quarterly registration and reporting requirements while remaining in custody thereof. JJA, as the Committee is aware, relies upon non-correctional facility and treatment facility placement to a large degree. It is not entirely clear whether JJA will continue to have the same number, extent or locations available for placement if registration and reporting are not excused for both registrant and JJA or its agency stakeholders while adjudicated juveniles are in the custody of the Commissioner.

Eliminating adjudicated juveniles from the registration and continuing registration requirements might be a better option.

Respectfully submitted,

KANSAS JUVENILE JUSTICE AUTHORITY

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March 9, 2011

House Corrections and Juvenile Justice Committee
Testimony in support of Senate Bill 6
On Behalf of the Kansas County and District Attorney Association

Madam Chair and Members of the Committee:

It is the pleasure of the Kansas County and District Attorney Association (KCDAA) to testify in regards to Senate Bill 6 as amended by the Senate. The purpose of this bill is to repeal K.S.A. 22-2501, which has been held to be unconstitutional under *Arizona v. Gant*, 129 S. Ct. 1710, 556 U.S. ____(April 21, 2009), and *State v. Henning*, 289 Kan. 136, 209 P.3d 711 (2009). It is the KCDAA's position that the codification of the *search incident to arrest exception* to the Fourth Amendment warrant requirement is inappropriate given the recent case law and respectfully request that the committee repeal K.S.A. 22-2501 by passing SB 6, as amended by the Senate, favorably.

SB 6 was originally worded to simply change K.S.A. 22-2501(c) from, "discovering the fruits, instrumentalities, or evidence of **a** crime," to "discovering the fruits, instrumentalities or evidence of **the** crime. This would have been a return to the pre-2006 language of K.S.A. 22-2501(c), which contained "the" from its enactment in 1970 until legislation amended the statute in 2006. Though the above change may comply with *Gant* and *Henning*, it is the position of the KCDAA that a better approach would be to repeal K.S.A. 22-2501 and let law enforcement operate under a case law rubric of search incident to arrest rather than a rigid statutory framework that runs the risk of being declared unconstitutional. This was the position of the KCDAA in the Senate. The Senate Judiciary committee amended SB 6 to remove the original language and opted to repeal the statute. The amended SB 6 is what this committee is considering today and the KCDAA ask that you pass this version out favorably.

Fourth Amendment jurisprudence has evolved over the years and case law on the search incident to arrest exception has been fluid. Approximately four decades ago the United States Supreme Court, in *Chimel v. California*, 395 U.S. 752 (1969), provided

boundaries to the search incident to arrest exception to the Fourth Amendment warrant requirement.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id. at 762-63. This limitation, as the U.S. Supreme Court explained forty years later in *Gant*, "continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." 129 S.Ct. at 1716.

With *Chimel* as its guide, the Kansas legislature first took to codifying its holding one-year after its publication in 1970. From 1970 until 2006, K.S.A. 22-2501 stated,

> When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of
> (a) Protecting the officer from attacks;
> (b) Preventing the person from escaping; or
> (c) Discovering the fruits, instrumentalities, or evidence of *the* crime.
> (Emphasis added.)

Since its enactment in 1970, two cases provided the underpinning for attempted legislation in 2004 and 2005 and then successful legislation in 2006 that changed "the" to "a" in K.S.A. 22-2501(c). The first was the U.S. Supreme Court case *New York v. Belton*, 453 U.S. 454 (1981) and the second was our own Kansas Supreme Court case, *State v. Anderson*, 259 Kan. 16, 910 P.2d 180 (1996).

In *Belton*, the Supreme Court held that, "[w]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. 453 U.S. at 460. The *Belton* court explained, "[t]he jacket [wherein cocaine was found] was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we

have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case. The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments." *Id.* at 462-63.

In 1996 the Kansas Supreme Court examined a vehicle search incident to arrest and directly considered the implications of the use of "the" in the then language of K.S.A. 22-2501(c) in *Anderson*. The *Anderson* court held that K.S.A. 22-2501(c) permitted a police officer to search a car or truck incident to an occupant's or a recent occupant's arrest, for the purpose of uncovering evidence to support *only* the crime of arrest. 259 Kan. at 24. Since the driver in *Anderson* was arrested for driving on a suspended license and a warrant for her arrest was in connection with a charge of operating a vehicle with no child restraint, the search of the vehicle could only be done for the purpose of unveiling evidence in connection with these crimes of arrest. With these two crimes in mind, there was no evidence that would be in the vehicle that would have a connection with the crimes of arrest. The result in *Anderson* was that a search of the vehicle's glove compartment, which revealed a crack pipe was impermissible under the K.S.A. 22-2501(c) and all subsequent evidence found was suppressed. At the time it was thought that K.S.A. 22-2501(c) placed more restrictive boundaries than what were allowable under *Belton*.

In 2004 and 2005 there were attempts to change "the" to "a" in K.S.A. 25-2501(c). Neither of the years resulted in the statute being amended. However, the 2006 legislative session resulted in successful legislation. Therefore, K.S.A. 25-2501(c) currently reads:

> When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of
> (a) Protecting the officer from attack;
> (b) Preventing the person from escaping; or
> (c) Discovering the fruits, instrumentalities, or evidence of *a* crime.
> (Emphasis added).

In analyzing the legislative history of K.S.A. 25-2501(c), the court in *Henning* stated:

> [W]e believe we can safely say that the legislature at least intended to undercut our holding in *Anderson*. We thus rule here that K.S.A. 22-2501(c)'s current wording would permit a search of a space, including a vehicle, incident to an occupant's or a recent occupant's arrest, even if the search was not focused on uncovering evidence only of the crime of arrest.

289 Kan. at 718. One could assume that if the present language was in place in 1996 when the Kansas Supreme Court was applying K.S.A. 25-2501 to the facts in *Anderson* the search incident to arrest that revealed the drug evidence would have been permitted. Regardless, the *Henning* court ruled that K.S.A. 25-2501(c) was facially unconstitutional

under the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights by applying the recent U.S. Supreme Court ruling of *Arizona v. Gant*.

In *Gant*, the Supreme Court held that

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

129 S.Ct. at 1724. In striking down the current language of K.S.A. 25-2501(c), the Kansas Supreme Court stated that the U.S. Supreme Court's

> return to the first principles of *Chimel* [was] also significant because it set up without compelling reinforcement of [the Kansas Supreme] [C]ourt's *Anderson* interpretation of the pre-2006 version of K.S.A. 22-2501(c). *Gant 's* equation of purpose and scope deviated somewhat from the *Anderson* discussion, but it arrived at the same ultimate destination: To have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime, be it actual, suspected, or imagined. In the vehicle context, " in many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains ... evidence [relevant to the crime of arrest.]" (Citations omitted).

Therefore, K.S.A. 25-2501(c) as it stands now is unconstitutional under the holdings of *Gant*, which was applied in Kansas by *Henning*. The suggestion of SB 6, as it was introduced, was that by going back to the pre-2006 language with "the" instead of "a" would make the statute compliant with *Gant* and *Henning*. However, the main point of this testimony is that there is no need to have a statute that codifies case law regarding search incident to arrest. As the KCDAA's former president, Thomas Stanton provided in past testimony regarding this same subject matter:

> There are many other aspects of constitutional search and seizure law that do not rely on statutory codification that work well. Examples are inventory searches, searches based on emergency circumstances, and probable cause searches. None of these areas of the law are codified, yet law enforcement officers are well trained on the parameters of such searches. When changes occur in these areas of the law, officers are immediately trained on those searches, and the law, as handed down by the appellate courts, is followed. We believe this is the best approach to guiding the actions of law enforcement officers in the field. The KCDAA recommends the repeal of K.S.A. 22-2501 for these reasons.

Testimony given to Senate Judiciary Committee on March 3, 2010. The KCDAA has not changed its position regarding K.S.A. 22-2501. Repeal is the most appropriate action to be taken.

What this testimony has endeavored to convey by the chronological account of K.S.A. 25-2501(c) and search incident to arrest case law over the past 40 years is that at no point was a statutory framework for search incident to arrest necessary. Law enforcement remains capable of following court holdings as well as anyone, and as Mr. Stanton explained, law enforcement is capable of quickly conforming practices to the latest court rulings. If anything, having a statue has required duplication of analysis in search incident to arrest cases: one based on case law and one based on statute. K.S.A. 25-2501(c) is currently unconstitutional and the legislature should act to cure statutes that have been held unconstitutional. The KCDAA believes that passing SB 6 as currently written is that cure and the best action the legislature could take.

Respectfully submitted,

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SENATE CHAMBER

DAVID B. HALEY
SENATOR
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March 9, 2011

NEUTRAL TESTIMONY ON SB 6 AS AMENDED BY THE SENATE JUDICIARY

MADAME CHAIR ; MEMBERS OF THE HOUSE CORRECTIONS COMMITTEE :

Thank you for scheduling a hearing on this matter which I, for one, continue to consider of grave importance. Some might recall the discussion last year, and passage by the full Senate and this Committee, of SB 435 which is SB 6 this year and before you today. Having now once again passed the Senate, Senate Bill 6, as ORIGINALLY introduced, restored constitutional protections regarding search and seizure that were, until a few years ago, undisturbed in our statutes for forty (40) years.

The Kansas Supreme Court (*State v.Henning 2009*)reversed a decision that the technical fix in the original SB 6 purports to do; change "a" crime back to the time honored "the" crime when a lawful search is executed and property is seized for evidence of criminal wrong doing. That, Madame Chair and members of the Committee, is the definitive constitutional standard that we should all be the most comfortable with; a standard of specificity that prevails in the overwhelming majority of the States . The Supreme Court noted that the specificity of each search within the scope of a lawful arrest should (beyond the reasonable scope of protecting the officer or preventing the escape of the suspect) be only to find evidence of THE crime for which the person is being arrested. Even the Judicial Council appears unclear as to why the Legislature continues to vacillate and to demur from providing clear legislative intent in statute as alluded to our needing to do by the Kansas Supreme Court.

SB 6, as amended by the Senate Judiciary Committee and passed by the full Senate, is little better than the unconstitutional perversion of our current law which has allowed law enforcement to conduct "fishing expeditions" by searching for evidence of one (or "the" crime for which the warrant and subsequent search was executed) crime but allowing evidence seized of another, unrelated (of "a" or any)crime. In my opinion, the Senate Committee once again heeded the pleas of those who might prefer those unconstitutional "fishing expeditions" when attempting to find evidence of ANY crime under the pretext of looking for evidence of a SPECIFICALLY enumerated crime for which a warrant has been issued. By striking the statute and ambiguously stating that whatever can be proven (by legal argument of counsel in a court of law) to be constitutionally consistent, we fail again to show legislative leadership in insuring state and federal constitutional guarantees. A lower Court's decision was

COMMITTEE ASSIGNMENTS
FEDERAL & STATE AFFAIRS
JUDICIARY REAPPORTIONMENT
PUBLIC HEALTH & WELFARE

House Corrections and Juvenile Justice
Committee
2011 Session
Date 3-9-11
Attachment # 6-1

JOINT COMMITTEE ASSIGNMENTS
STATE TRIBAL RELATIONS CHILDREN'S ISSUES
CORRECTIONS & JUVENILE JUSTICE OVERSIGHT
HEALTH POLICY OVERSIGHT

reversed by the Supreme Court in the *Henning* case based on this one vague statute. (Opinion Attached). A similar case reached the Court of Appeals with a similar decision in 2010.

Last year, the Legislature considered STRIKING the ENTIRE statute in an attempt to rewrite then SB 435 !

I believe legislative leadership can provide clear legislative intent in statute to be interpreted by the courts, prosecution and defense. Striking KSA 25-2201 I humbly suggest would only subject the statute to the patchwork interpretation of case law arguing for or against the validity of a search and seizure.

My greatest concern is some potential civil suit against our State for so unconstitutional a statute. By bringing this issue up here, at least the Courts will have some framework of legislative intent by the Minutes and Explanations found in our votes here and/or on the Floor.

Madame Chair; members of the Committee ... I request the Committee once again consider restoring KSA 25-2201 to its' previously undisturbed form by replacing the "a" crime with "the" crime and, thereby, bringing clarity to our statutory intent.

Thank you again for your consideration. I'm happy to stand for any questions you might have.

– David Haley, Ranking Minority, Senate Judiciary

(ADDENDA : Sen.Owens' Example : Stolen TV's and the Pot Drawer and How That Makes the Point)

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House Corrections and Juvenile Justice Committee

In Support of SB 6, as amended
Kyle Smith, Assistant Attorney General
March 9, 2011

Chairman Colloton and Members of the Committee,

On behalf of Attorney General Derek Schmidt, I appear today in support of SB 6, as currently amended.

While this issue is well known to the commit, perhaps a quick review might be helpful. The general rule is that any search conducted without the benefit of a search warrant is presumed to be unreasonable, unconstitutional and invalid. The U.S. Supreme Court has recognized specific, limited exceptions to this rule such as exigent circumstances, abandoned property, exposed characteristics, plain view, fleeting vehicles, open fields and inventory. I would note the legislature has not attempted to codify these other judicially recognized exceptions, and the problems with this effort aptly demonstrate why.

This bill is just the latest chapter in a long story regarding efforts to address the U.S. Supreme Court's decisions regarding the 'search incident to arrest' exception to the warrant requirement. For those with long memories, for the majority of the last 14 years there has been a bill in one format or another attempting to get it right. Then in 2009 the United States Supreme Court again changed the rule and the statute is again out of sync with the law.

SB 6 as introduced again attempted to codify that ruling but, frankly, again, failed to properly reflect that ruling. First, it would have applied to all searches incident to arrests, while the Supreme Court's ruling only applied to a narrow sliver of such cases: searches of cars after a person has been arrested and secured. Second, the case law allows officers to search the car even after the arrest if they have reasonable suspicion of another crime.

The legislative intent to provide clear guidance to the courts, attorneys and law enforcement is good, but as demonstrated here, sometimes a more fluid approach is needed. The ebb and flow of court controlled decisions is best suited for training rather than statutory rules. Law enforcement is well aware of

the need to keep current on these topics as not only can evidence be suppressed, but civil liability attaches for violating constitutional rights under 42 U.S.C. 1983.

As such, the Senate amended the bill and went with a better and simpler solution: Treat this exception to the search warrant requirement like all the other exceptions, repeal K.S.A. 22-2501and leave it to training on the evolving case law. Law enforcement will get along just fine, bound by the same rules that apply regardless what a statute says, and we can finally put this issue to rest.

On behalf of Attorney General Schmidt, I would urge your support for SB 6 and be happy to answer any questions.

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Testimony to House Corrections and Juvenile Justice Committee
In Support of SB6 as amended by the Senate
March 9, 2011

Chairperson Colloton and Committee Members,

The Kansas Association of Chiefs of Police, the Kansas Sheriffs Association, and the Kansas Peace Officers Association support SB6 as amended by the Senate Judiciary Committee. You will recall this same proposal came to you last year as SB435. During the testimony last year you heard from the three law enforcement associations plus the Kansas County and District Attorneys Association, and the Kansas Attorney General's Office all recommending this bill be amended to simply repeal KSA 22-2501. In its current form that is what SB6 does. Since the current Attorney General supports repealing the statute, we now have that recommendation coming from two different Attorneys General one a Democrat and one a Republican.

In the end, the House and Senate seemed to be in agreement last year that the law should not be amended but repealed and that the search incident to arrest case law should not be codified. They just differed in how to get there.

We believe Kansas should repeal, not amend, KSA 22-2501 and join the other 44 states that do not attempt to codify search incident to arrest case law. It is worth noting that Kansas nor any other state we are aware of attempts to codify any other search warrant exceptions approved by case law.

Since a statute cannot permit the search to be any less restricted than the constitution as determined by case law, the statute can only serve to be more restrictive than the courts have ruled. Law enforcement does not need to be further restricted than allowed by the courts. Further, codifying search and seizure case law creates confusion, not clarification, when new case law develops.

We strongly urge you to support SB6 as amended by the Senate Committee which simply repeals the statute.

Ed Klumpp
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House Corrections and Juvenile Justice Committee
Senate Bill 6
Testimony of the Kansas Association of Criminal Defense Lawyers
Opponent
March 9, 2011

The Kansas Association of Criminal Defense Lawyers is a 300-member organization dedicated to justice and due process for people accused of crimes. KACDL was in favor of SB 6 before it called for repealing K.S.A. 22-2501 – now we are in opposition.

Last year, when this bill existed as SB 435, it was characterized as a "technical correction . . . with no fiscal effect" (to quote the 2010 Fiscal Note). At that time, a number of opponents asked for K.S.A. 22-2501 to be repealed in its entirety. They did so again this year and SB 6 was amended. **KACDL opposes the repeal of K.S.A. 22-2501.**

History of K.S.A. 22-2501

K.S.A. 22-2501 has been around for 40 years. For the first 36 years, it read:

> When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of
>
> (a) Protecting the officer from attack;
> (b) Preventing the person from escaping; or
> (c) Discovering the fruits, instrumentalities, or evidence of **the** crime.

In 2004 and 2005, there was a movement by law enforcement and prosecutors to change "**the** crime" to "**a** crime" to expand the scope of searches incident to arrest. In part, they were reacting to a holding ten years earlier in *State v. Anderson*, 259 Kan. 16 (1996) and using as support a ruling 23 years prior in *New York v. Belton*, 453 U.S. 454 (1981). (The legislative history of this movement to amend and/or repeal K.S.A. 22-2501 is set forth in *State v. Henning*, 289 Kan. 136 (2009).) While efforts to amend or repeal initially failed, the Legislature did repeal K.S.A. 22-2501 in 2006 (Senate Bill 366) only to revive and amend the statute that same year to read "**a** crime" (House Substitute for Senate Bill 431). I could not find legislative history behind the 2006 actions, and *Henning* also notes that the legislative record is silent on this issue.

In 2009, the United States Supreme Court decided *Arizona v. Gant*, 129 S.Ct. 1710 (2009) and the Kansas Supreme Court subsequently decided *Henning*. Under these decisions, the "**a** crime" language is unconstitutional.

The proponents argue for the Legislature to abdicate its responsibility as lawmaker and leave that role to the courts. In short, the proponents say this area of the law is so fluid that we should not codify it.[1]

[1] Interestingly, some of the proponents for repealing K.S.A. 22-2501 are pushing for that same statute to be amended to include warrantless searches of parolees and probationers (as proposed in SB 159, which is currently in Senate Judiciary).

The Legislature crafted K.S.A. 22-2501 four decades ago. It made one change to it in 40 years and it spent three years deliberating that move. As *Henning* said of that change, "[a]lthough the language appears to move toward *Belton*, **the legislature's rejection of outright repeal in favor of amendment may indicate that it wished to retain some restrictions in excess of those demanded by the United States Supreme Court case law.**" (Emphasis provided.) This Legislature – whose members take an oath under the Kansas Constitution and who represent Kansans – can think and should act for itself and does not need to rely exclusively on the courts (state and/or federal).

What could happen in the absence of K.S.A. 22-2501

The point of a statute is clear guidance – for law enforcement, prosecutors, defendants and so on. Without K.S.A. 21-2501, we will have 105 counties (plus cities/towns, etc.) interpreting federal and state court rulings and making policies and procedures based on those interpretations, etc.

State v. Daniel, 242 P.3d 1186 (KSC 11/19/10), gives us insight into what might happen if K.S.A. 22-2501 is eliminated. In that case, the district court found a warrantless search lawful because of the "a crime" language in K.S.A. 22-2501. However, during the pendency of Ms. Daniel's appeal, that language was found unconstitutional in *Henning*. Therefore, the State asked the Kansas Supreme Court to "salvage Daniel's conviction by applying a good-faith exception to the exclusionary rule." *Daniel*, 242 P.3d at 1188. In the end, the Court did affirm Ms. Daniel's conviction: "The officer's objectively reasonable reliance on K.S.A. 22-2501(c) is demonstrated by (a) the substantial case law precedent across the country upholding similar searches; (b) an appellate court decision directly on point that was valid at the time of Daniel's search; and (c) the statute's legislative history." *Daniel*, 242 P.3d at 1195.

If this issue had arisen and K.S.A. 22-2501 had not existed, then the outcome could have been different – in the absence of a statute with case law and legislative history behind it, the State could have ended up losing *Daniel*.

Alternative language/possible balloon

It remains our primary position that the statute should remain as it is, with the correction of "a crime" to "the crime." However, if the Legislature wants to go down a different road, we suggest K.S.A. 22-2510 could read:

> When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence to the full extent allowed by and consistent with the constitution or laws of the United States, or the constitution or laws of the state of Kansas.

Thank you for your consideration,

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on behalf of the Kansas Association of Criminal Defense Lawyers
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Nola Foulston
District Attorney

Marc Bennett
Deputy District Attorney

March 4, 2011

Testimony Regarding SB 63
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 Corrections and Juvenile Justice Committee:

Thank you for the opportunity to address you regarding Senate Bill 63. On behalf of the Kansas County and District Attorneys Association, I would like to bring to your attention issues related to K.S.A. 21-3516/ section 74 of chapter 136 of the 2010 Session Laws of Kansas.

The proposal set forth in SB 63 proposes to add the language "or a person whom the offender believes to be a child under 18 years of age," to subsections (1) and (4) of K.S.A. 21-3516, Sexual Exploitation of child.

The legislature has taken steps in recent years to protect the children of Kansas from sexual predators operating on the internet by creating the crime of Electronic Solicitation under K.S.A. 21-3523, to cover defendants who entice or solicit children to commit an "unlawful sex act" as that term is defined by K.S.A. 21-3501(4) .

Last fall, an online-suspect tested the waters by asking what he thought was an underage girl to send nude photos of herself before moving on to request that they actually meet for sex. This act could not be charged as Electronic Solicitation because asking for the photo (sexual exploitation) is not among the enumerated list of sex crimes set forth as "unlawful sexual act[s]." The most that could be charged in this situation was a severity level 5 person felony under K.S.A. 21-3516(a)(1) Sexual Exploitation of a Child, " . . . inducing, enticing or coercing . . ." the child to provide the photo. In this case, because the "child" was actually an undercover officer, the only crime that could be charged was a severity level 7, Attempted Sexual Exploitation of a Child, because no "real" child existed.

The KCDAA had initially suggested making a change to either K.S.A. 21-3501(4) or to Electronic Solicitation, however, after consulting with the Reviser's Office, who raised a McAdams-type concern, and further considering the possibility that such changes could be misapplied to underage "sexting" between age-mates, the KCDAA proposes the fairly modest changes set forth in SB 63.

As proposed, the change would simply allow the situation set forth above to be charged as Sexual Exploitation of a Child, a Severity level 5 person felony. While that is a lower severity level than electronic solicitation, it would still allow the State to keep such acts at a level where the suspect would face no better than a border box, without opening the specter of concerns often raised about teen "sexting." Those who actually solicit specific sex acts listed as "unlawful sex act[s]" would still face the enhanced penalties available via Electronic Solicitation, while allowing the State to place even those who take the first, tentative steps toward the more serious act in a border box/ presumptive prison category.

S.B. 63 passed the Senate 39-0-0-1.

Respectfully submitted,

Marc Bennett
Deputy District Attorney
Eighteenth Judicial District

House Corrections and Juvenile Justice Committee
Senate Bill 63
Testimony of the Kansas Association of Criminal Defense Lawyers
(Prepared and presented by Jennifer Roth)
Opponent
March 9, 2011

The Kansas Association of Criminal Defense Lawyers is a 300-member organization dedicated to justice and due process for people accused of crimes. KACDL opposes SB 63.

Proponents' reason for proposed SB 63 and current law

At the Senate Judiciary hearing last month, the proponent of this bill (the Kansas County and District Attorneys Association) told one story. An agent posing as girl under 18 (not sure how old) was corresponding with a man in western Kansas (over the internet, as I recall). In the course of this, the man asked the agent to send him naked pictures of herself. The proponent's issue is that it could not charge the man with completed sexual exploitation of a child, but only with attempt. The proponent is asking the Legislature to add "*or a person whom the offender believes to be a child under 18 years of age,*" (which comes from the electronic solicitation statute) to the elements of sexual exploitation of a child, K.S.A. 21-3516. **The proponent wants to make a factually impossible crime into a completed offense in furtherance of sting operations.**

Under current law, the state could charge this man (or someone similarly situated) with attempted sexual exploitation of a child. If the fake child is 14 or older, it is a severity level 7 person felony (i.e. SL 5 for either possession of images/video or promoting a performance, then it drops two levels for an attempt). If the fake child is under 14, it is an offgrid felony or a SL 7 person felony (depending on which subsection is charged - attempted (a)(5) and (6) ("promoting a performance") are offgrids and otherwise an attempt would be a SL 7).

Historical context, cautionary tale and accompanying bed impact consideration

Despite the basic differences between electronic solicitation and sexual exploitation (and the question whether the proponent's case-at-issue would be a completed offense even with the proponent's proposed language), it is important to consider the historical context of this "believes to be a child" language.

Back in 2006, the House Judiciary Committee added the creation of electronic solicitation to the Jessica's Law bill. The person making that request had in hand a newspaper article about a judge who ruled a person could be guilty of an attempted solicitation only (rather than a completed crime) when the "victim" was actually an adult female from Colorado posing as a teenager.

After electronic solicitation was created (severity level 1 for child under 14; severity level 3 for child 14-15), this state saw a surge in sting operations – some run by law enforcement, some run by law enforcement in cooperation with the aforementioned woman (and her associates) from Colorado or other private citizens, etc. Agents or private citizens pretended to be a child (in Topeka, it was usually age 13; other places, it was 13 or 14+) and would "hang out" in internet chat rooms. These agents or private citizens would post profiles suggesting they were kids.

To be clear, the crime of electronic solicitation[1] covers real and fictional children. Kansas Sentencing Commission data shows the number of electronic solicitation convictions since the creation of that offense:[2]

Sentences under K.S.A. 21-3523: Electronic Solicitation
Based on KSC Sentencing Database

		Sentence Imposed	
FY	Number	Prison	Probation
2006	0	0	0
2007	5	4	1
2008	34	28	6
2009	35	23	12
2010	36	32	4

I have monitored news accounts for 4 ½ years. Last week, I polled approximately 300 criminal defense attorneys (private attorneys and every public defender) across Kansas – asking them if they ever had a case that involved a real child. I received two affirmative responses. **OUT OF 110 CONVICTIONS AND 83 PRISON SENTENCES, I FOUND TWO REAL KIDS.**[3]

The Supplemental Note for SB 63 states the bill would have no fiscal effect and no impact on prison beds. However, the Kansas Sentencing Commission stated the bill could potentially increase the number of prison beds needed, due to sting operations.

History tells us this change will most certainly have a bed impact. The proponent will tell you it wants this change to facilitate prosecutions that would treat factually impossible offenses as completed offenses. Why ask for a change unless you fully intend to make a bed impact? History shows when you pave the way for sting operations, you see a considerable bed impact.

Sincerely,
Jennifer C. Roth
on behalf of the Kansas Association of Criminal Defense Lawyers
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[1] Electronic solicitation is: "by means of communication conducted through the telephone, internet, or by other electronic means, enticing or soliciting a person whom the offender believes to be [a child 14 or more years of age but less than 16 years of age] or [a child under the age of 14] to commit or submit to an unlawful sexual act."

[2] I owe much thanks to Fengfang Lu and Sarah Fertig for providing this so quickly last week.

[3] One of those real kids was a 13-year-old girl who struck up a friendship with a young man (recent high school grad - 18 or 19) who worked at the Topeka mall. She told him, among other things that: she was 16 (with the physical appearance to support it), drove to the mall herself and had her own car. She gave him her cell phone number. She sent him a link to her MySpace page, where she had a photo of herself waist-up, wearing only a push-up bra. She continued to visit him while at work. They hung out at the mall over a period of months. They kissed once (at his work). They started sending suggestive texts to one another. She sent him a picture of her breasts and he replied with a picture of his penis. For this, he was charged with SL 1 electronic solicitation, to which he pled. He is a registered sex offender.

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HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

Honorable Representative Pat Colloton, Chair

Testimony in Support of SB 60 - Appeals

March 9, 2011

Madam Chairman, and committee members, thank you for the opportunity to testify in support of this bill. This was a request from the Supreme Court. The legislation would ensure that direct appeals on behalf of criminal defendants who are sentenced pursuant to Jessica's Law or departures from Jessica's Law go first to the Court of Appeals, rather than the Supreme Court.

More than thirty Jessica's Law cases have been heard so far by the Supreme Court, and many of the novel legal issues that inevitably arise out of new legislation with such far-reaching effect have been settled. Continuing to require that these particular off-grid offenses or departures come directly to the Supreme Court, rather than through the Court of Appeals, is no longer necessary.

In addition, the influx of Jessica's Law cases tends to delay other important cases already designated for initial Supreme Court review. For example, other off-grid criminal offenses, including capital cases; federal certified questions; original actions such as mandamus and quo warranto; and eminent domain matters may be delayed. Decisions in significant civil cases transferred to the Supreme Court also may be delayed, as may decisions in matters accepted for discretionary review after an opinion has been issued by the Court of Appeals. Frequently, these transfer and petition for review cases concern issues in particular need of the final decision the Supreme Court must provide. In short, the requested amendment to K.S.A. 22-3601 will correct the tendency of Jessica's Law cases, which are regrettably numerous, to fill the Supreme Court's docket, even when the legal issues they raise are no longer subject to considerable dispute.

The Senate made no amendments to the bill. On a vote of 38 – 0, the bill passed in the Senate. I ask that you consider this bill favorably. Thank you for your time and I'd be happy to answer questions that you may have.