

Approved 3-14-89  
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Wint Winter, Jr. at  
Chairperson

10:00 a.m./~~p.m.~~ on February 28, 1989 in room 514-S of the Capitol.

All members were present ~~except~~: Senators Winter, Yost, Moran, Bond, Feleciano, Gaines, D. Kerr, Martin, Morris, Oleen, Parrish, Petty and Rock.

Committee staff present:

- Mike Heim, Legislative Research Department
- Jerry Donaldson, Legislative Research Department
- Gordon Self, Revisor of Statutes
- Jane Tharp, Committee Secretary

Conferees appearing before the committee:

- Doug Mays, Securities Commissioner of Kansas

Senator Bond moved to approve the minutes of February 13, 16, 20, 21, 1989. Senator Morris seconded the motion. The motion carried.

Senate Bill 116 - Corporations, business combinations with interested stockholders.

The chairman reviewed the bill. Doug Mays, Securities Commissioner of Kansas, suggested amending the bill in Section 3 (b), line 190, by changing 90 days to one year. Following committee discussion, Senator Morris moved to amend the bill as indicated by Commissioner Mays. Senator Bond seconded the motion. The motion carried. Senator Petty moved to report the bill favorably as amended. Senator Bond seconded the motion. The motion carried.

Senate Bill 151 - Unlawful to arrange drug sale or purchase using communications facility.

Following committee discussion of the bill, Senator Feleciano moved to amend the bill by adopting the language appearing in the balloon concerning attempting, conspiring or soliciting (See Attachment I). Senator Parrish seconded the motion. The motion carried. Senator Feleciano moved to amend the bill to include beepers and pagers. Senator Parrish seconded the motion. Following committee discussion, the motion failed. A division was called. With a show of hands of five members voting in favor of the motion and four in opposition, the motion carried. Senator Gaines moved to amend the bill by adding the manufacturing provision. Senator Oleen seconded the motion. The motion carried. Senator Gaines moved to report the bill favorably as amended. Senator Parrish seconded the motion. The motion carried.

Senate Bill 152 - Increasing penalty for furnishing cereal malt beverage to a minor.

The chairman explained the bill. Senator Gaines moved to report the bill favorably. Senator Petty seconded the motion. The motion carried.

Senate Bill 153 - Increasing penalty for purchase or consumption of liquor by a minor.

The chairman reviewed the bill. Following committee discussion, Senator Bond moved to report the bill favorably. Senator Martin seconded the motion. The motion carried.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

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CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 10:00 a.m. ~~p.m.~~ on February 28, 19 89

Senate Bill 154 - Alcohol and drug abuse evaluation and treatment prior to sentencing.

Following considerable committee discussion concerning indigents expenses while in the hospital. Senator Bond moved to amend the bill conceptually by adding evaluation facilities before the treatment in line 25. Senator Petty seconded the motion. The motion carried. During further committee discussion, Senator Bond moved to re-refer the bill to Ways and Means Committee. Senator Gaines seconded the motion. The motion carried.

The meeting adjourned.

Copy of the guest list is attached (See Attachment II).

Copy of memorandum from Department of Corrections is attached (See Attachment III).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 2-28-89

	NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
1	JEFF ROSSIN	TOPEKA	UNION TO 4KS
2	Terry Hurley	2330 Shawnee Mission Pky, Westwood KS 66202	United Telecom
3	Von Sloan	Topeka	DOC
4	Gene Johnson	Topeka	Ks Comm. ASAP
5	Charles Simmons	Topeka	DOC
6	Curt Carpenter	Great Bend	Centel Electric
7	DAN McKEE	GREAT BEND	CENTEL ELECTRIC
8	Jamie Schwartz	Topeka	United Telecom
9	Paul Shelby	Topeka	OJA
10	Doug Mays	"	Sen. Commissioner
11	For Smith	"	Ks Bar Assoc
12	Matt Truell	Topeka	AD
13	Jacque Oakes	Topeka	KPOA
14	Prin. Clark	Topeka	KCPJA
15	Sue Bond	Overland Park	
16	Connie Biggs	Lawrence	
17	Julie Brunditt	Topeka	AG
18	Nancy Lindberg	Topeka	AG
19	BOB (KIRBY)	"	KCL
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SENATE BILL No. 151

By Committee on Judiciary

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AN ACT concerning controlled substances; relating to unlawfully arranging drug sales or purchases using a communication facility; penalties.

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

Section 1. (a) Except as authorized by the uniform controlled substance act, it shall be unlawful for any person knowingly or intentionally to use any communication facility in committing ~~or in~~ causing or facilitating the commission of a sale, offer for sale, purchase or offer to purchase any controlled substance designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto. Each separate use of a communication facility shall be a separate offense under this subsection.

or in attempting, conspiring or soliciting, as defined in article 33 of chapter 21 of the Kansas Statutes Annotated.

(b) As used in this section, "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes telephone, wire, radio, computer, computer networks and all other means of communication.

(c) Any person who violates this section shall be guilty of a class D felony.

(d) This act shall be part of and supplemental to the uniform controlled substances act.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

2-28-89  
Senate Judiciary  
Attachment I

6 Kan.App.2d 831  
Rodney SUTTON, Appellant,  
v.  
STATE of Kansas, Appellee.  
No. 52773.  
Court of Appeals of Kansas.  
Nov. 13, 1981.

Action was brought seeking to modify sentence imposed upon appellant, who was sentenced to four to 20 years after pleading guilty to attempted murder. The District Court, Sherman County, Jack L. Burr, J., denied motion, and appeal was taken. The Court of Appeals, Herd, J., held that application of statute imposing mandatory minimum sentences for crimes involving firearms to crime of attempted murder was erroneous.

Ordered accordingly.

### 1. Statutes ⇌ 190

When a statute is plain and unambiguous, the reviewing court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be.

### 2. Statutes ⇌ 241(1)

Criminal statutes must be strictly construed against the state and in favor of defendant.

### 3. Homicide ⇌ 354

Application of statute imposing mandatory minimum sentences for crimes involving firearms to crime of attempted murder was erroneous. K.S.A. 21-3301, 21-3401, 21-4618.

### Syllabus by the Court

In a criminal appeal the record is examined and it is held: The trial court erred in applying K.S.A. 1977 Supp. 21-4618, which imposed mandatory minimum sentences for crimes involving firearms, to the crime of attempted murder.

Lisa Nathanson and Michael D. Gibbens, of Legal Services for Prisoners, Inc., Lansing, and Carl Wagner, legal intern, Kansas Defender Project, Lawrence, for appellant.

Perry Warren, Asst. County Atty., and Robert T. Stephan, Atty. Gen., for appellee.

Before HERD, Justice Presiding, SWINEHART, J., and LEWIS L. McLAUGHLIN, District Judge Retired, Assigned.

HERD, Justice Presiding:

On August 12, 1978, Rodney Sutton, along with three others, abducted a man at a Goodland rest area. During a scuffle with the victim, Sutton's gun discharged twice, one shot grazing the victim's cheek and ear lobe. The victim escaped.

Sutton was later picked up in Las Vegas, Nevada. On August 31, 1978, he was charged in Sherman County District Court with aggravated kidnapping (K.S.A. 21-3421) and aggravated robbery (K.S.A. 21-3427). He was sixteen years old at the time.

On October 27, 1978, as a result of plea bargaining, the county attorney amended the information to charge Sutton with attempted murder pursuant to K.S.A. 21-

1281 and K.S.A. 21-3401. Sutton pleaded guilty to the amended information.

On December 21, 1978, Sutton was sentenced to four to twenty years as provided by K.S.A. 21-4501(c). Judge Burr found the crime involved would fall under K.S.A. 1977 Supp. 21-4618, thereby creating a mandatory term of imprisonment of four years before Sutton would become eligible for parole.

Sutton brought this action under K.S.A. 60-1507, seeking to modify the sentence. A hearing was held on October 24, 1980, and Judge Burr denied the motion. Sutton filed this appeal.

At the time of Sutton's sentencing, K.S.A. 1977 Supp. 21-4618 provided in pertinent part:

"Probation shall not be granted to any defendant who is convicted of the commission of any crime set out in article 34 of chapter 21 of the Kansas Statutes Annotated in which the defendant used any firearm in the commission thereof and such defendant shall be sentenced to not less than the minimum sentence of imprisonment authorized by law for that crime."

The crime of murder is set out in K.S.A. 21-3401. Attempts are defined in K.S.A. 21-3301(1):

"An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime."

Appellant argues that since only *murder* is defined in K.S.A. 21-3401, the crime of *attempted murder* is not "set out in article 34 of chapter 21 of the Kansas Statutes Annotated." K.S.A. 1977 Supp. 21-4618. We agree.

[1, 2] The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute. *City of Salina v. Jagers*, 228 Kan. 155, 169, 612 P.2d 618 (1980); *Johnson v. McArthur*, 226 Kan.

128, 135, 596 P.2d 148 (1979); *State v. Dummer*, 221 Kan. 386, 389, 559 P.2d 798 (1977). When a statute is plain and unambiguous, this court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. *State v. Chance*, 4 Kan.App.2d 283, 287, 604 P.2d 756 (1980). Additionally, criminal statutes must be strictly construed against the state and in favor of the defendant. *State v. Stuart & Jones*, 223 Kan. 600, 607, 575 P.2d 559 (1978).

[3] A synthesis of the foregoing rules leads us inevitably to our conclusion. First, the question of whether attempted murder should be covered by K.S.A. 1977 Supp. 21-4618 is not before us. Our task is only to determine whether the statute does in fact apply to the crime involved in the case at bar. We hold K.S.A. 1977 Supp. 21-4618 is plain and unambiguous. The intent of the legislature expressed therein is for that statute to apply only to article 34 crimes. Attempted murder is simply not an article 34 crime. Therefore, we hold K.S.A. 1977 Supp. 21-4618 was not applicable to attempts. Appellant's sentence is so modified.

STATE OF KANSAS



DEPARTMENT OF CORRECTIONS

OFFICE OF THE SECRETARY

Landon State Office Building  
900 S.W. Jackson—Suite 400-N  
Topeka, Kansas 66612-1284  
(913) 296-3317

Mike Hayden  
Governor

Roger V. Endell  
Secretary

February 21, 1989

To: Senate Judiciary Committee  
From: Thomas Sloan

Re: Questions regarding SRDC escapes and Sex Offender Treatment  
Contract

1. A review of the Department's records indicate that 1 person has escaped in 1989 and 4 in 1988 from the minimum security building located outside the perimeter fences. This is now called the Work Resource Center and houses only minimum custody inmates.

The most recent escapes from the Reception and Diagnostic Center proper (inside the fences) was in 1983 when two inmates were successful. Prior to that one inmate escaped in 1979.

The public may be confusing KCVTC with SRDC. KCVTC is a minimum security facility with dormitory type housing which has a simple chain link fence and no towers. SRDC is a true maximum security facility with double perimeter fencing, manned towers, lock-down capability, and tighter control of the inmates.

Since KCVTC became coed in 1979, 99 males have walked away and 10 females have done so. Since 1983, 54 males and 4 females have walked. KCVTC became all female in June 1988.

2. Attached for your review is a memorandum from Nicholas Roach, Director of Purchses, to Shelby Smith, Secretary of Administration reviewing the award of the sex offender treatment contract.

The criteria utilized to evaluate the various proposals is stated in the memorandum. Mr. Roach might be contacted for further information.

Attachment III  
SJC  
2-28-89

STATE OF KANSAS



DEPARTMENT OF ADMINISTRATION  
Division of Purchases

MIKE HAYDEN,  
Governor  
NICHOLAS B. ROACH,  
Director of Purchases

Landon State Office Building  
900 Jackson, Room 102 N  
Topeka, Kansas 66612-1286  
(913) 296-2376

MEMORANDUM

TO: Shelby Smith  
Secretary of Administration

FROM: Nicholas B. Roach *Nich Roach*  
Director of Purchases

DATE: January 6, 1989

RE: Award of Contract 27847, Sex Offender Treatment,  
Department of Corrections

Art Griggs has requested that I provide you information concerning the above-captioned negotiated procurement.

Responses to our invitation to bid were received from:

<u>BIDDERS</u>	<u>COST</u>	
	<u>10/15/88 - 06/30/89</u>	<u>01/01/89 - 06/30/90</u>
Mental Health Consortium, Topeka	\$ 714,000	\$1,086,600
Weldy & Associates, Phoenix, Arizona	1,182,445	1,784,464
The Kansas Institute, Olathe	1,349,334	1,922,235
Joseph J. Peters Institute, Philadelphia	2,019,531	2,981,478
VIP Companies, Oklahoma City, Oklahoma	Withdrew	Withdrew

The initial bid contemplated programs at Kansas State Penitentiary, Lansing and Kansas State Industrial Reformatory, Hutchinson. During the negotiating process the Ellsworth Correctional Facility was added.

Award of this contract was made to Weldy & Associates, the second low bidder because the low bidder had no program, no existing central administration and would have required two months for startup.

Specific evaluation of the programs and organizations of Weldy and Mental Health Consortium are as follows:

#### PROGRAM

The Weldy proposal included a description of types of activities and treatment modalities including a description of types of groups to be conducted with prescribed time frames, i.e., self-esteem building (6 weeks, 3 hour classes, 18 class hours). The proposal also included specific treatment goals, i.e., addressing denial, victim empathy, fantasy and cognitive distortions. The proposal included a complete "schedule of treatment activities" and a summary of diagnostic instruments to be utilized in the on-going assessment of the inmate's progress.

Finally, the proposal included sample protocols and forms to be utilized in the program.

The Mental Health Consortium proposal did not specify what types of assessment tools would be used. There was no description of groups to be conducted or treatment methods. The proposal did suggest development of a psycho-educational program. However, there was no description of that program presented. The Department of Corrections review team noted some confusion about what the Consortium was actually proposing since their proposal described the first year as being a year of intensive assessment and treatment, and went on to suggest that at the end of that first year, an inmate could be recommended for additional treatment by repeating the first year over again. This concerned Department of Corrections.

#### ORGANIZATION

The Weldy proposal outlined the number of staff positions by site and presented a description of the administrative and organizational structure of the company.

The Mental Health Consortium proposed to operate three separate programs to be supervised by the local mental health center nearest the facility. Although the proposal suggested central administration by the Consortium, there was no staffing assigned or description of how this would work.



SUMMARY

Given the foregoing, it was the judgement of the Department of Corrections, and the Procurement Negotiating Committee concurred that the best interest of the Department of Corrections program and the State of Kansas would be served by contracting with Weldy & Associates, an established organization with experience, proven success, organizational ability and a company which can provide the Department of Corrections a program deemed effective in other states, for a reasonable cost.

The Procurement Negotiating Committee consisted of Angela Rinaldo, Deputy Secretary of Corrections, Dan Carroll, and Nick Roach. Technical review of the proposals was provided by Department of Corrections' staff. The Committee recognized the cost differences and concurred that the program was best served by contracting with Weldy & Associates.

NBR:rc  
cc: Art Griggs

Delaware Anti-Takeover Law  
 (§203, Delaware General Corp. Law)

Operative Provision

Section 203 prohibits Delaware corporations from engaging in any business combination with any interested stockholder for a period of 3 years following the date the interested stockholder becomes an interested stockholder (the "acquisition date").

Exceptions

The prohibition does not apply, if (i) prior to the acquisition date the target's board approves the transaction, or (ii) the transaction results in the interested stockholder's ownership of at least 85% of the target's outstanding voting stock (excluding certain insider-held shares), or (iii) subsequent to the acquisition date, the business combination is approved by the target's board and two-thirds of the target's outstanding voting stock not held by the interested stockholder.

Exclusions

White Knight - If the target is subjected to a competing takeover approved by its board, the restrictions on business combinations do not apply.

Opt-out - The target may opt out of the statute by board or shareholder action.

Definitions

Interested Stockholder - Any person (subject to certain exceptions) who has acquired or owned 15% or more of the target's outstanding voting stock during the previous 3-year period.

Business Combination - Includes mergers, asset dispositions, stock issuances, disproportionate recapitalizations, reorganizations and similar transactions.

LGC  
2-28-89



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UNITED TELECOMMUNICATIONS, INC.

BOX 11315/KANSAS CITY, MISSOURI 64112/(913) 676-3096

TERRY L. HURLEY  
SENIOR ATTORNEY

February 22, 1989

HAND DELIVERED

The Honorable Wint Winter, Jr.  
Chairman - Senate Judiciary Committee  
State Capitol Building  
Room 120 - S  
Topeka, KS 66612

Re: Senate Bill No. 116

Dear Senator Winter:

Please allow me to again express my appreciation for permitting me to speak last week on behalf of United Telecom in support of the above-referenced legislation.

Several questions were raised by you and other members of the Committee concerning the proposed legislation. I will attempt to provide answers to those questions which were not fully answered at the hearing. The answers are set forth below in a question and answer format for your convenience.

1. Question: Which states have adopted both an Indiana-type control share acquisition statute and a Delaware-type business combination moratorium statute?

Answer: Our research indicates that the states having both types of laws on their books are as follows:

Arizona  
Idaho  
Indiana  
Maine  
Missouri

Nebraska  
South Carolina  
Tennessee  
Wisconsin

*SJC*  
*2-28-89*

2. Question: Please identify the judicial decisions which have dealt with the constitutionality of the Delaware business combination moratorium law (Section 203 of the Delaware General Corporation Code).

Answer: The decisions are as follows:

- (a) BNS Inc. v. Koppers Company, 683 F.Supp. 458 (D. Del. 1988).
- (b) RP Acquisition Corp. v. Staley Continental, 686 F.Supp. 476 (D. Del. 1988).
- (c) City Capital Associates v. Interco, Inc., 696 F.Supp. 1551 (D. Del. 1988).

Each of the above decisions was rendered in response to requests for preliminary relief. The decisions upheld, on a preliminary basis, the constitutionality of the Delaware law.

3. Question: Are nexus requirements in addition to incorporation within the state necessary to ensure the constitutionality of the proposed legislation?

Answer: We think it is unlikely that the legislation would be struck down for failing to include additional nexus requirements, such as the presence of assets or shareholders within the state. As indicated above, the Delaware law already has been judicially tested on several occasions and preliminarily has been held constitutional. Additionally, New York's business combination moratorium statute has been upheld in a most recent decision captioned Vernitron Corp. v. Kollmorgen Corp., 89 Civ. 0241 (S.D.N.Y. Feb. 9, 1989). In Vernitron, the court ruled that the New York law does not place an impermissible burden on interstate commerce, citing CTS Corp. v. Dynamics Corp. of America, 107 S.Ct. 1637 (1987) (Upholding Indiana's control share acquisition law.).

In our view, the proposed legislation does not offend the Commerce Clause of the United States Constitution because (i) the statute does not discriminate between tender offers for foreign corporations and tender offers for domestic corporations, (ii) the proposed law would not subject corporations to inconsistent state regulation, since

it is applicable only to domestic corporations, and (iii) the burden imposed by the law on interstate commerce is not excessive, in view of the Supreme Court's recent decision in CTS.

4. **Question:** Why does Senate Bill No. 116 provide for a three-year "cooling-off" period during which business combinations are restricted?

**Answer:** The proposed law provides for the same cooling-off period as the Delaware law. A review of the transcript of hearings before the Joint House-Senate Judiciary Committee of the Delaware Legislature does not reveal a specific rationale for the three-year period. The three-year period appears to be a compromise between the need to protect shareholders for a period of time sufficient to discourage abusive two-tier takeovers and the need to allow targeted corporations to get on with their business as expeditiously as possible.

To place this in perspective, we have compiled the following list of states which have adopted a Delaware-type law, indicating the length of the cooling-off period for each state:

Arizona (3 yrs.)	Missouri (5 yrs.)
Connecticut (5 yrs.)	Nebraska (5 yrs.)
Delaware (3 yrs.)	New Jersey (5 yrs.)
Georgia (5 yrs.)	New York (5 yrs.)
Idaho (5 yrs.)	South Carolina (2 yrs.)
Indiana (3 yrs.)	Tennessee (5 yrs.)
Kentucky (5 yrs.)	Washington (5 yrs.)
Minnesota (5 yrs.)	Wisconsin (3 yrs.)

We believe the three-year cooling-off period contained in the Delaware law represents a fair compromise between competing policy considerations.

5. **Question:** Why is the legislation drafted with an opt-out rather than an opt-in provision?

**Answer:** The proposed law provides for an opt-out which can be accomplished by a corporation's board of directors during the first 90 days after the law goes into effect. The legislation also provides for a shareholder opt-out at any time, subject to the 12-month delay discussed below.

In our view, the statute adopts the opt-out approach for two basic reasons. First, the vast majority of corporation statutes are mandatorily applicable to, or provide for an opt-out by, subject corporations. This approach encourages uniform application of corporation laws to the broadest possible spectrum of corporations. Secondly, since this statute is aimed at protecting the interests of minority and long-term shareholders, there is some doubt that takeover specialists, arbitrageurs and institutional investors, whose interests often are short-term, would vote in favor of opting in under the proposed law.

This was a predominant issue during the hearings before the Delaware Legislature. After extensive testimony from both proponents and opponents of the opt-out approach, the legislature adopted the opt-out provision.

6. Question: Why does the proposed law provide for a 12-month delay in the effectiveness of a shareholder opt-out?

Answer: The 12-month delay is identical to the delay imposed by the Delaware law. The waiting period is necessary to prevent a controlling shareholder from circumventing the law by forcing an amendment to the target corporation's articles of incorporation upon minority shareholders. Presumably, the amendment would be accomplished through a proxy fight conducted by the controlling shareholder. Normally, such an amendment would require only the approval of a simple majority of those outstanding shares entitled to vote on the matter. If the effectiveness of such an amendment were immediate, the controlling shareholder could negate the application of the law with a simple majority of the target's stock, thereby avoiding the requirement under the proposed law that restricted business combinations must be approved by two-thirds of the target corporation's disinterested shares.

7. Question: Is Senate Bill No. 116 identical to the Delaware business combination moratorium law?

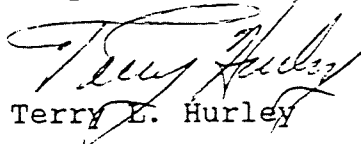
Answer: A comparison of the legislation currently under consideration in Kansas and Section 203 of the Delaware General Corporation Code indicates no substantive differences between the laws. It is our

understanding that the bill was intentionally drafted to be virtually identical to the Delaware law.

I hope that the answers provided above adequately address the questions raised by the Committee. In the event you would desire further clarification of these issues or if the Committee wishes to raise additional questions, I would be more than happy to provide my assistance.

Once again, the opportunity to present United Telecom's views to the Committee is appreciated.

Very truly yours,

  
Terry L. Hurley

TLH:lw

cc: J. F. Dodd, Esq.  
D. A. Jensen, Esq.  
Mr. J. M. Russell  
Mr. C. J. Schwartz ✓