Approved _____
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Michael O'Neal
Chairperson

3:30 ~~a~~p.m. on March 20, 19 90 in room 527-S of the Capitol.

All members were present except:
Representative Hochhauser, Peterson and Vancrum, who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:
Paul Shelby, Office of Judicial Administration
Sarah Mays, Shawnee County Court Services
Jim Clark, Kansas County and District Attorneys Association
Neil Woerman, Chief of Staff, Attorney General's Office
Kyle Smith, Assistant Attorney General
Elwaine Pomery
Susan G. Stanley, Assistant Attorney General
Mary Murguia, Wyandotte County Assistant District Attorney
Bill Miskell, Department of Corrections
Rick Kittel, Assistant Appellate Defender, Appellate Defender Office, Shawnee County

HEARING ON SUB SB 724 Crimes and punishment; transfer of certain confined persons

Paul Shelby, Office of Judicial Administrator informed the Committee this bill was requested by the Kansas Association of Court Services Officers. The bill permits supervision of a defendant who is placed on parole or probation or suspended sentence or in a community corrections program to be transferred from one judicial district to another judicial district. The receiving Chief Court Services Officer or Director of Community Corrections must agree to the transfer. The District Court from which the defendant came may retain all power with respect to the defendant.

Sarah Mays, Shawnee County Court Services Officers, presented the testimony of Cathy Leonhart. Under Sub. SB 724 the District Court from which the defendant came may retain all power with respect to the defendant. She stated the defendant needs to be accountable to the sentencing court. The receiving district is essentially providing "courtesy supervision" and information to the sentencing court regarding the client's progress, see Attachment I.

There being no other conferees, the hearing on Sub. SB 724 was closed.

HEARING ON SB 718 Providing witness fees & mileage in criminal cases

Jim Clark, Kansas County and District Attorneys Association, explained this bill legitimizes what is already being done. SB 718 gives authority to the counties to pay witnesses in criminal cases actual expenses if authorized by the appropriate County Commission.

Neil Woerman, Chief of Staff, Attorney General's office, offered an amendment to Section 1(a)(4), to insert "or the attorney general", see Attachment II.

There being no other conferees, the hearing on SB 718 was closed.

HEARING ON SB 713 Law enforcement officer use of force in making arrest

Kyle G. Smith, Assistant Attorney General, testified SB 713 brings the Kansas statute into compliance with the constitutional mandate prohibiting the use of deadly force to prevent the escape of a suspected felon unless the officer has probable cause to believe that the suspect poses a danger to the officer or others. The bill also cleans up some of the gender-based language that currently appears in the statute, see Attachment III.

There being no other conferees, the hearing on SB 713 was closed.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 527-S, Statehouse, at 3:30 ~~xxx~~/p.m. on March 20, 1990.

HEARING ON SB 687 Relating to the definition of sodomy

Elwaine Pomeroy submitted an amendment to SB 687 changing the definition of sodomy, see Attachment IV.

Susan G. Stanley, Assistant Attorney General, testified SB 687 was introduced because the Supreme Court, in State v. Moppin, concluded oral genital contact with a five year old girl could not be charged under the aggravated sodomy statute, a class B felony, but could instead only be charged under the indecent liberties with a child statute, a class C felony. She requested the Committee adopt the amendment proposed by Elwaine Pomeroy and that the bill be recommended for passage, see Attachment V.

Mary Murguia, Wyandotte County Assistant District Attorney, testified in support of SB 687. She said the statute is unconstitutional because it discriminates between males and females. She recommended the amendment proposed by Elwaine Pomeroy and urged the Committee to recommend the bill for passage.

Bill Miskell, Department of Corrections, appeared on behalf of Steven J. Davies, Secretary, Department of Corrections. He said the Criminal Justice Coordinating Council unanimously endorses changes to the current definition of sodomy including the proposed amendment, see Attachment VI.

Rick Kittel, Assistant Appellate Defender, testified in opposition to SB 687. He said SB 687 goes too far to accomplish its purpose. He said the act known as cunnilingus is already prohibited by other criminal statutes and should not be included in the definition of sodomy because it clearly is not sodomy as that word is commonly defined and accepted, see Attachment VII.

There being no other conferees, the hearing on SB 687 was closed.

DISCUSSION AND ACTION ON BILLS

SUB SB 724 Crimes and punishment; transfer of certain confined persons

Representative Jenkins moved and Representative Fuller seconded to report Sub SB 724 favorably for passage. The motion passed.

SB 718 Providing witness fees & mileage in criminal cases

Representative Fuller moved and Representative Jenkins seconded to adopt the amendment proposed by the Attorney General to include "or the attorney general".

After Committee discussion, the motion was withdrawn.

Representative Jenkins moved and Representation Douville seconded the motion to report SB 718 favorably for passage. The motion passed.

SB 713 Law enforcement officer use of force in making arrest

Representative Jenkins moved to report SB 713 favorably for passage. Representative Walker seconded the motion.

After Committee discussion, the motion was withdrawn.

Representative Buehler moved and Representative Everhart seconded to amend SB 713 by changing the word "serious" to "great" on line 30. The motion passed.

Representative Jenkins moved and Representative Fuller seconded to report, as amended, SB 713, favorably for passage. The motion passed.

The Committee meeting was adjourned at 5:00 p.m. The next meeting will be Wednesday, March 21, 1990, at 3:30 p.m. in room 527-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: 3/20/90

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Paul Shelby	Topeka	OJA
Sarah Mays	Topeka	KACSO
Laurie Hartman	"	Ks Bar Assoc
Kyle Smith	Topeka	KBI
BILL MISKELL	TOPEKA	KDOC
Susan Stanley	"	Atty G.
Julene Martin	Topeka	A.G. Office
Joan Schmid	TOPEKA	KPOA
MARY MURGUIA	Kansas City	Wy Co DA's Office
JIM CLARK	TOPEKA	KCDAA
Rick Kittel	Topeka	Appellate Defender Office
DON LINDSEY	OSAWATOMIE	UTU
Wendy Pellow	Lawrence	Intern - Rep. Lynch
Elwaine F. Pomeroy	Topeka	Parole Bd

KANSAS ASSOCIATION OF COURT SERVICES OFFICERS

M E M O R A N D U M

TO: Judiciary Committee

FROM: Cathy Leonhart - Legislative Chairman

RE: SB 724: An act concerning crimes and punishment repealing K.S.A. 21-4613

The current statute provides for transfer of cases between judicial districts with the receiving district assuming all power over the defendant . However, the length of supervision shall not be changed without written order of the sentencing court.

We are asking that this statute be changed to reflect that all power with respect to this defendant will remain with the sentencing court. The district of original jurisdiction is most likely to have a Judge, District or County Attorney, Court Services Officer, Community Corrections staff, and sometimes a victim who has knowledge of this client's history and investment in the successful completion of programs ordered by the court. We feel the individual needs to be accountable to the sentencing court. The receiving district is essentially providing "courtesy supervision" and information to the sentencing court regarding the client's progress.

The Office of Judicial Administration's current procedure for intra-state transfers is that the sentencing district handles all subsequent actions on a case at the recommendation of the receiving district. We ask that the existing statute be changed to reflect what we have found works well in practice.

3/20/90
H. Jud. Com.

Attachment I

3/20/90
H. Jud Com
Attachment II

As Amended by Senate Committee

Session of 1990

SENATE BILL No. 718

By Committee on Judiciary

2-20

AN ACT concerning courts; relating to witness fees and mileage; amending K.S.A. 28-125 and repealing the existing section.

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

Section 1. K.S.A. 28-125 is hereby amended to read as follows: 28-125. (a) Witnesses shall receive the following fees:

(1) For attending before any court or grand jury, or before any judge, referee, or commission, $10 per day;

(2) for attending on an inquest, $10; ~~and~~

(3) for each mile necessarily and actually traveled in going to and returning from the place of attendance, mileage at the rate prescribed by law if the distance is more than one mile; *and*

(4) in criminal cases, reasonable out-of-pocket expenses for food and lodging expenses ~~as determined~~ if authorized by the appropriate county commission/----------or the attorney general.

(b) No witness shall receive per diem or mileage in more than one case covering the same period of time or the same travel, and each witness shall be required to make oath that the fees claimed have not been claimed or received in any other case. No juror shall receive pay as a witness while serving as a juror.

(c) Witnesses shall be entitled to receive, for attending before any attorney general, county attorney or assistant attorney general, under any provision authorizing the officers to compel the attendance of such witnesses, the sum of $10 per day, together with mileage at the rate prescribed by law for each mile necessarily traveled in going to and returning from the place of attendance.

(d) Witness fees shall be paid by the board of county commissioners where the violation of the law being investigated is alleged to have occurred.

Sec. 2. K.S.A. 28-125 is hereby repealed.

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

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAY
ON BEHALF OF ROBERT T. STEPHAN, ATTORNEY GENERAL
BEFORE THE HOUSE JUDICIARY COMMITTEE
REGARDING SENATE BILL 713
MARCH 20, 1990

Mr. Chairman and Members of the Committee:

I am pleased to appear in support of Senate Bill 713 which can be described as a remedial update of K.S.A. 21-3215. This statute sets out the criteria to be used by law enforcement officers in applying force to make arrests. However, in 1985 the United States Supreme Court in the case of Tennessee v. Garner ruled as unconstitutional a similar Tennessee statute. Like K.S.A. 21-3215 the Tennessee statute authorized the use of lethal force in apprehending any fleeing felon. The court ruled that the Fourth Amendment prohibits the use of deadly force to prevent the escape of a suspected felon unless the officer has probable cause to believe that the suspect poses a danger to the officer or others. In other words, that the fleeing felon has committed a dangerous felony.

Senate Bill 713 simply brings the Kansas statute into compliance with this constitutional mandate and cleans up some of the gender-based language that currently appears in the statute.

I would be happy to answer any questions.

3/20/90
H. Jud. Com.

Attachment III

KANSAS PAROLE BOARD
LANDON STATE OFFICE BUILDING
900 JACKSON STREET, 4TH FLOOR
ROOM 452 S
TOPEKA, KANSAS 66612-1220
(913) 296-3469

SENATE BILL NO. 687

On Line 27, strike all after "oral"; strike all of lines 28 and 29; on line 30 strike all before "oral" and insert "contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or"; and strike all of line 33.

3/20/90
H. Jud. Com.
Attachment IV

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

TESTIMONY OF
ASSISTANT ATTORNEY GENERAL SUSAN G. STANLEY
ON BEHALF OF ATTORNEY GENERAL ROBERT T. STEPHAN
BEFORE THE HOUSE JUDICIARY COMMITTEE
MARCH 20, 1990
RE: SENATE BILL 687

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am Susan Stanley, Assistant Attorney General for the State of Kansas. On behalf of Attorney General Robert Stephan and his Victims Rights Task Force, I thank you for the opportunity to address you in support of Senate Bill 687.

Senate Bill 687 would amend K.S.A. 21-3501 to specifically delineate those offenses which constitute sodomy to include oral-genital stimulation. I would encourage you to amend this bill by adopting the definition proposed by Mr. Henderson and Mr. Pomeroy.

This amendment comes to us as the result of a recent Supreme Court Opinion, State v. Moppin, in which our court concluded oral-genital contact, commonly known as cunnilingus, with a five year old girl could not be charged under the aggravated sodomy statute, a class B felony, but could instead only be charged under the indecent liberties statute, a class C felony.

3/20/90
H Jud Com.
Attachment V

We ask that you pass Senate Bill 687 and allow this conduct to be charged along with the similar types of conduct described in the sodomy statute. Thank you.

3/20/90
N Jud Com
Att V

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

Steven J. Davies, Ph.D.
Secretary

March 20, 1990

TESTIMONY

SENATE BILL 687

Concerning Crimes and Punishment; relating to definition of sodomy

---

Senate Bill 687 was introduced at the request of the Criminal justice Coordinating Council (CJCC). The Council is chaired by the Secretary of Corrections, and it's membership includes the Chief Justice of the Kansas Supreme Court, the Attorney General, the Secretary of Social and Rehabilitation Services, the Chairman of the Kansas Parole Board, the Governor's Chief Legal Counsel, one District Court Judge and four members of the Legislature.

The need for S.B. 687 was brought to the attention of the Council by the Chairman of the Kansas Parole Board during the Council's meeting held in January of this year. The CJCC unanimously endorsed changes to the current definition of sodomy.

Representatives from both the Kansas Parole Board and the Attorney General's office have been working on necessary changes to the language of that definition. The Criminal Justice Coordinating Council strongly supports appropriate changes in that definition.

3/20/90
H. Jud. Com.

Attachment VI

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 62,425

STATE OF KANSAS,
Appellee,

v.

MICHAEL MOPPIN,
Appellant.

SYLLABUS BY THE COURT

1.

Oral-genital stimulation between the tongue of a male and the genital area of a female, commonly known as cunnilingus, is not included in the definition of "sodomy" found at K.S.A. 21-3501(2) and, therefore, a conviction for aggravated criminal sodomy in violation of K.S.A. 21-3506, based upon such acts, cannot stand.

2.

Aggravated sexual battery, K.S.A. 21-3518, is not a lesser included offense of indecent liberties with a child, K.S.A. 21-3503, and the trial court did not err in failing to so instruct. *State v. Fike,* 243 Kan. 365, 757 P.2d 724 (1988).

Appeal from Wyandotte district court; R. DAVID LAMAR, judge. Opinion filed December 8, 1989. Affirmed in part, reversed in part, and vacated in part.

Rick Kittel, assistant appellate defender, argued the cause, and *Jessica R. Kunen,* chief appellate defender, was with him on the brief for appellant.

FROM: Rick Kittel
Assistant Appellate Defender
Appellate Defender Office

RE: Senate Bill No. 687

Summary of Testimony in Opposition

The purpose of Senate Bill 687 is to address the matters which arose in the recent Kansas Supreme Court case of State v. Moppin. In Moppin, the defendant was alleged to have licked his two year old daughter between the legs. At trial, no evidence was produced to prove that penetration had occurred. Penetration was one of the elements of the crime with which the defendant was charged, aggravated criminal sodomy.

The offense of aggravated criminal sodomy is found at K.S.A. 21-3506. The particular act of sodomy that the defendant in Moppin was alleged to have committed was oral copulation, which is found under K.S.A. 21-3501, the definitional statute which Senate Bill 687 proposes to amend.

In the case of State v. Switzer, a Kansas Supreme Court case which was decided prior to Moppin in March 1989, the Court held that the act of oral copulation contained in K.S.A. 21-3501, refers to penetration by the male sex organ of a mouth.

When the law of Switzer is applied to the facts of Moppin, one can see that because the defendant was never alleged to have inserted his sex organ into a mouth, and furthermore, there was no evidence that he ever did so, the prosecution failed to prove the act of oral copulation as alleged in the charging instrument. Because there was no proof of oral copulation, there could be no conviction of aggravated criminal sodomy. Therefore, the defendant's conviction for that offense was reversed.

So, under the current state of the law, the act of inserting a male sex organ into a mouth, which is commonly known by the term fellatio, would constitute oral copulation, and could therefore be the basis for a charge of aggravated criminal sodomy, a class B felony.

But, the act of oral contact with the female sex organ, commonly known as cunnilingus, would not constitute oral copulation and, therefore, could not be the basis for a charge of aggravated criminal sodomy. The act, as noted by the Supreme Court in Moppin, could be the basis for a charge of indecent liberties with a child, a class C felony.

It is this discrepancy which Senate Bill 687 intends to cure. The problem with the bill, however, is that it goes much too far in an effort to accomplish its purpose.

3/20/90
H Jud Com
Attachment VII

Senate Bill 687 proposes to amend the definition of sodomy to include:

1. contact or penetration of the female genitalia by any body part other than a finger or the male sex organ; and

2. contact of the female genitalia by any object.

The first objection that we have to these definitions, is that they appear to describe acts which are not sodomy, and which are already prohibited by other criminal statutes.

For example, if a female victim is under 16 years of age, as in the Moppin case, contact of the female genitalia by a body part would be indecent liberties with a child. If the same act occurred with an adult victim, it would constitute the offense of sexual battery or aggravated sexual battery. Our contention is that because such acts are already prohibited under the criminal statutes, they should not be included in the definition for sodomy.

The next objection is that the new definitions remove the element of penetration, which is currently an essential element of the crime of sodomy. The Moppin opinion is found at page 639 of volume 245 of the Kansas Reports. At page 643 of the opinion, the Supreme Court reviewed the medical, and commonly accepted definitions of sodomy. Each of these definitions in some way includes the element of penetration. We believe that to properly describe and prohibit the crime of sodomy, the definition must include the element of penetration.

Under the current law, when the act of sodomy is committed by means of oral copulation, a male sex organ must penetrate a mouth. So, when there is contact between a mouth and the male sex organ, but there is no penetration, the act is not sodomy, but is indecent liberties, sexual battery, or aggravated sexual battery. We further contend, that although unlawful contact or fondling of the female genitalia is an offensive act, it should not be equated with an act which involves actual penetration of the female genitalia, which is a more offensive and more serious act. It is well accepted that there are varying degrees of illegal conduct, which correspond to the various classes of felonies and misdemeanors. For the same reason that not every killing is a first degree murder, not every unlawful contact with the female genitalia should constitute the act of sodomy.

We suggest that the proper way to correct the apparent discrepancy which exists in the criminal statutes, is to simply to prohibit the act which is commonly known as cunnilingus, corresponding to the act of oral copulation as defined in the Switzer case. This act would only be a class B felony if there was penetration of the female genitalia. This act should not be included in the definition of sodomy, because it clearly is not

3/20/90
H. Jud Com
Att VII
2

sodomy as that word is commonly defined and accepted. Furthermore, it is not necessary to include in the definition of sodomy, language which prohibits contact with the female genitalia, as these acts are already prohibited by other criminal statutes, and because these acts fall outside the proper and widely accepted definition of sodomy.

3/20/90
H. Jud Com
Att VII