

Approved 2-13-92
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative John Solbach at
Chairperson

3:30 ~~xxx~~/p.m. on February 6, 1992 in room 313S of the Capitol.

All members were present except: ~~xxxxxx~~

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Judy Goeden, Committee Secretary

Conferees appearing before the committee:

Helen Stephens, Kansas Peace Officers Association
Cathy Holdeman, Intergovernmental Relations Director, City of Wichita
Jim Copple, Executive Director, Project Freedom
Ronald Wurtz, Third Judicial District Public Defender
Captain Terry Scott, Kansas Highway Patrol
Joan Hamilton, State Representative
Richard Schodorf, Sedgwick County District Attorney's Office
LaVone J. Pirner, President, Carpet Centers
Burl Ingle, President, Wichita Better Business Bureau
Lois Cohorst, Kansas Independent Auto Dealers Association
Jim Clark, Kansas Motor Car Dealers Association
Dan Carlson, Kansas Independent Automobile Dealers Association

The Chairman called the meeting to order for the purpose of continued hearings on HB 2709, discharging a firearm at a house or vehicle, and HB 2724, aggravated battery to include injuries that are foreseeable.

Helen Stephens, Kansas Peace Officers Association, testified in favor of HB 2709. (Attachment #1) She testified that her organization also supported HB 2724.

Cathy Holdeman, Intergovernmental Relations Director, City of Wichita, testified in favor of HB 2709. (Attachment #2) She answered committee members questions.

Jim Copple, Executive Director, Project Freedom, said he was mailing "A Community Comprehensive Plan To Address The Emerging Presence of Gangs & Gang Related Activity In Wichita/Sedgwick County" report to each committee member. (Attachment #3) He said Wichita has over 1,200 gang members. He reviewed what the City of Wichita is currently doing in regards to gang violence. In answer to a committee member's question, he said that so far no one has been prosecuted under their new City ordinance which went into effect last October. He said he thought HB 2709 would be a deterrent to gang members. He said he was unclear on why current legislation could not be used to prosecute since he was not an attorney. He said in answer to a committee member's question that females are getting into gangs.

Ron Wurtz, Third Judicial District Public Defender, testified he thought drive-by shootings are currently being readily prosecuted. (Attachment #4) He clarified for committee how current law can be effectively used. He said the problem with drive-by shootings is not the inability to prosecute offenders, but with being able to catch them. He answered committee members questions and concerns about current law.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,
room 313S, Statehouse, at 3:30 ~~am~~/p.m. on February 6, 1992.

Captain Terry Scott, Kansas Highway Patrol, presented testimony for Colonel Bert Cantwell in favor of HB 2709. (Attachment #5)

Joan Hamilton, State Representative, submitted a proposal to HB 2724 which includes more than just drive-by shootings. (Attachment #6) She urged passage of HB 2724. Rep. Hamilton also provided committee members with copies of PIK (Pattern Instructions for Kansas) instructions for their review. (Attachment #7)

Hearings were closed on HB 2709 and HB 2724.

The Chairman opened hearings on HB 2792, creation of Kansas advertised sales code, and HB 2793, concerning used vehicle warranties.

Richard Schodorf, Chief Attorney, Consumer Fraud and Economic Crime Division of the Office of the District Attorney, 18th Judicial District, Sedgwick County, testified in favor of HB 2792. (Attachment #8)

Richard Schodorf also testified in favor of HB 2793. (Attachment #9) He answered committee members questions.

LaVone Pirner, President of Carpet Centers, testified in favor of HB 2792. (Attachment #10) He answered committee members questions.

Burl Ingle, President of Wichita Better Business Bureau, testified in favor of HB 2792. He testified that he felt this bill would protect consumers. He answered committee members questions.

Lois Cohorst, Board Member of Kansas Independent Automobile Dealers Association, testified in opposition to HB 2793. (Attachment #11)

Jim Clark, Junction City car dealer, Kansas Motor Car Dealers Association, testified in support of HB 2793. He said that he has sold over 70,000 used cars in Kansas and thinks this is positive legislation. He said that he felt some of the language in the bill should be changed to include all sellers of motor vehicles in Kansas, not only dealers.

Dan Carlson, Chairman of the Board of the Kansas Independent Automobile Dealers Association, testified in opposition to HB 2793. He felt the bill, if passed, could lead to consumer misuse. (Attachment 12)

Chairman Solbach announced that hearings on HB 2792 and HB 2793 would be continued to Tuesday, February 11, 1992.

The meeting adjourned at 5:50 P.M.

GUEST LIST

COMMITTEE:

House Judiciary

DATE:

2-6-92

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Belva Ott	821 Hitchfield Wichita	Project Freedom
Dan Carlson	Topoka	KS Ind Auto Dealers Assoc
Jacquie Oates	Topoka	KIADA
Don Coherst	Marysville	KIADA
Pat Barnes	Topelia	Ks. Motor Car Dealers Assoc.
Pam Samirille	TOPEKA	KS MOTOR CAR DEALERS
JIM CLARK	834 GRANT AVE JUNCTION CITY KS	JIM CLARK AUTO CENTER
Cathy Holdeman	City of Wichita	Wichita
Jim Capple	Project Freedom/Wichita	Project Freedom
Ken Wurtz	121 E 6th Ste 6 Topoka, KS	Public Defender
Pat Wiechman	Topoka	KADRA
John Ensley	Topoka	Kansas Press Assoc
Michelle Ginter	Topoka	KGC
John Clark	Topoka	KCDAA
Richard L Schodorf	Wichita	District Attorney ^{Office}
DURL INGLE	Wichita	BBB
LAWSON J. PIRNER	Wichita	Capitol Center's

not related

FRANK PAVEY, President
Ks. Law Enforcement Training Center
Lawrence, Kansas 67504

CLIFF FICKER, President-Elect
Lawrence County Sheriff
Emporia, Kansas 66801

LARRY MAHAN, Vice-President
Kansas Highway Patrol
Wichita, Kansas 67211

ALVIN THIMMESON
Secretary-Treasurer
Kansas Peace Officers' Association
Wichita, Kansas 67201

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Wichita, Kansas 67208

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Kansas Highway Patrol

Topeka, Kansas 66603

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Santa Fe R.R. Police

Topeka, Kansas 66612

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Paola, Kansas 66071

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Kansas Lottery Security

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Barton County Sheriff's Office

Great Bend, Kansas 67530

DICK BURCH

Kansas Law Enforcement Training Ctr.

Hutchinson, Kansas 67504

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LARRY WELCH

Ks. Law Enforcement Training Center

Hutchinson, Kansas 67504

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ALLEN FLOWERS

Chief of Police

Coffeyville, Kansas 67337

LOWELL PARKER

Greenwood County Sheriff

Eureka, Kansas 67045

TINY WILNERD

Ks. Dept. Wildlife & Parks

Howard, Kansas 67349

SERGEANT-AT-ARMS

KENNETH MCGLEASON

Kansas Highway Patrol

Wakeeney, Kansas 67672

Kansas Peace Officers' Association

INCORPORATED

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P.O. BOX 2592 • WICHITA, KANSAS 67201



February 4, 1992
House Bill No. 2709

Mr. Chairman and Members of the Committee:

My name is Helen Stephens, representing the 3,000 members of the Kansas Peace Officers Association.

KPOA supports passage of House Bill No. 2709. These amendments will place drive-by shootings in the felony category and, hopefully will give those involved a message that use of firearms in this manner is no longer a slap on the wrist.

We know of your concerns regarding prison and youth center population, but please bear in mind that a person or persons who involve themselves in this type of activity need special placement away from the community and should complete programs to deter them from further activities of this type.

If not already in, KPOA would like to see this bill incorporated into the guidelines when it comes to your committee.

Thank you for the opportunity to lend our support to this measure.

In Unity There Is Strength

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Attach #1

HOUSE JUDICIARY COMMITTEE
TESTIMONY REGARDING HOUSE BILL 2709
THURSDAY, FEBRUARY 6, 1992

CHAIRMAN SOLBACH, AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE. MY NAME IS CATHY HOLDEMAN, AND I AM THE INTERGOVERNMENTAL RELATIONS DIRECTOR FOR THE CITY OF WICHITA. THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU IN SUPPORT OF HOUSE BILL 2709, WHICH STRENGTHENS THE PENALTIES ASSOCIATED DRIVE-BY SHOOTINGS.

TODAY I WOULD LIKE TO SHARE WITH YOU THE COMPREHENSIVE APPROACH OUR COMMUNITY IS TAKING IN ORDER TO HAVE AN IMPACT ON THE GROWING PROBLEM OF DRUGS AND GANG VIOLENCE. LAST TUESDAY YOU HEARD FROM JIM COPPLE, REPRESENTING PROJECT FREEDOM, WHICH IS A COMMUNITY-WIDE ORGANIZATION TO FIGHT DRUG ABUSE. THIS ORGANIZATION WAS RESPONSIBLE FOR FORMING AN INTER-AGENCY TASK FORCE TO EXAMINE THE GROWING PROBLEM OF GANGS AND DRUG-RELATED VIOLENCE. THE OUTCOME OF THIS TASK FORCE WAS A COMPREHENSIVE STRATEGY TO ADDRESS THIS PROBLEM.

ONE OF PROJECT FREEDOM'S RECOMMENDATIONS WAS FOR THE CITY OF WICHITA TO GET TOUGHER ON DRUG AND GANG RELATED CRIMES BY ADOPTING NEW ORDINANCES. IN OCTOBER OF 1991 THE CITY COUNCIL DID JUST THAT AND ADOPTED FIVE NEW ORDINANCES. ONE ORDINANCE MAKES IT UNLAWFUL FOR A PERSON TO PUT GRAFFITI UPON PUBLIC OR PRIVATE PROPERTY, AND ESTABLISHES A MECHANISM FOR GRAFFITI REMOVAL. A SECOND ORDINANCE CONSOLIDATES CURRENT SECTIONS OF THE CITY CODE PERTAINING TO CONCEALED AND UNCONCEALED WEAPONS INTO ONE ORDINANCE THAT CONFORMS TO STATE LAW. A THIRD RELATES TO UNLAWFUL ASSEMBLY AND RIOTING, AND A FOURTH ESTABLISHES CURFEWS FOR MINOR CHILDREN. FINALLY, THE COUNCIL ADOPTED AN ORDINANCE TO ADDRESS THE NUMEROUS DRIVE-BY SHOOTINGS WHICH PROVIDES FOR MANDATORY FINES AND JAIL TERMS.

WHEN THE DRIVE-BY SHOOTING ORDINANCE WAS ADOPTED BY THE COUNCIL, THE INTENT WAS TO SEEK EVEN STIFFER PENALTIES IN STATE STATUTES. THE GOVERNING BODY UNANIMOUSLY ENDORSED MAKING THIS CRIME A FELONY OFFENSE. WITH THIS AND THE OTHER ORDINANCES, THE IDEA WAS TO MAKE THE STATEMENT TO THOSE PERSONS INVOLVED IN DRUGS AND GANG VIOLENCE ACTIVITIES THAT THIS TYPE OF CRIMINAL BEHAVIOR SIMPLY WILL NOT BE TOLERATED IN OUR COMMUNITY.

ADDITIONALLY, THE CITY OF WICHITA HAS RECOGNIZED THAT MORE LAW ENFORCEMENT EFFORTS ARE NEEDED. FOR THE PAST TWO YEARS THE CITY HAS BEEN SUCCESSFUL IN SECURING FEDERAL DOLLARS (BUREAU OF JUSTICE ADMINISTRATION DOLLARS) ADMINISTERED BY THE GOVERNOR'S OFFICE TO COMBAT STREET LEVEL DRUG AND GANG ACTIVITIES. THESE DOLLARS FUND THE POLICE SCAT PROGRAM WHICH STANDS FOR SPECIAL COMMUNITY ACTION TEAMS. THE WICHITA POLICE DEPARTMENT HAS TWO SUCH TEAMS WHICH CONSIST OF SPECIALLY TRAINED OFFICERS WHO ARE CHARGED WITH EXHIBITING A HIGH LEVEL OF PRESENCE IN DRUG AND GANG INFESTED NEIGHBORHOODS. THEIR PURPOSE IS TO CONCENTRATE EFFORTS ON DISRUPTING AND ELIMINATING DRUG TRAFFICKING AND TO BREAK APART EXISTING GANGS AND DISCOURAGE THE FORMATION OF NEW GANGS. THE CITY HAS FOUND SCAT TEAMS TO BE AN EFFECTIVE MEANS FOR REDUCING THE CONCENTRATION OF DRUG AND GANG ACTIVITIES IN CERTAIN NEIGHBORHOODS.

WHEN DEPUTY CHIEF GOWARD APPEARED BEFORE YOU ON TUESDAY HE WAS ASKED TO PROVIDE FURTHER INFORMATION ON THE NUMBER OF DRIVE-BY SHOOTINGS, INCLUDING ARREST AND AND CONVICTION INFORMATION. UNFORTUNATELY, WE ARE UNABLE TO PROVIDE YOU WITH SPECIFIC DATA. I WAS INFORMED THAT DRIVE-BY SHOOTINGS COULD HAVE BEEN RECORDED AS SIMPLE ASSAULTS, AGGRAVATED ASSAULTS, VANDALISM, MISCELLANEOUS OFFENSES,

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SIMPLE BATTERIES, AND AGGRAVATED BATTERIES. STAFF WOULD HAVE TO EXAMINE EACH ONE OF THESE CASES INDIVIDUALLY TO DETERMINE IF THIS WAS A DRIVE-BY SHOOTING. THE PROBLEM WITH GANGS AND DRUG RELATED CRIMES IS ONE THAT HAS HAD RECENT RECOGNITION BY OUR COMMUNITY. BEFORE THIS TIME THE CITY DID NOT NEED TO TRACK DATA BY THIS SPECIFIC CATEGORY.

HOWEVER, CHIEF GOWARD DID REPORT THAT THE CITY RECORDED 70 DRIVE-BY SHOOTINGS LAST YEAR, AND FIVE ALREADY IN THE MONTH OF JANUARY. POLICE HAVE RECORDED APPROXIMATELY 24 INJURIES OF VARIED SEVERITY IN THE PAST YEAR. WE KNOW THAT LAST YEAR THERE WERE 14 GANG RELATED HOMICIDES, AND ALREADY THIS YEAR THERE HAVE BEEN 3 HOMICIDES. HOWEVER, THESE CAN'T NECESSARILY BE CLASSIFIED AS DRIVE-BY CRIMES BECAUSE IN SEVERAL INSTANCES GANG MEMBERS WALKED UP TO AN INDIVIDUAL AND SHOT THEM.

BECAUSE THE CITY WILL HAVE TO RECONCILE THE CASE DATA, I CANNOT PROVIDE YOU WITH PROSECUTION DATA AT THIS TIME. I CAN TELL YOU THAT THERE HAVE BEEN NO PROSECUTIONS UNDER THE CITY'S NEW DRIVE-BY ORDINANCE TO DATE. THIS CAN BE ATTRIBUTED TO POLICE EFFORTS TO CLASSIFY CASES TO THE MOST SERIOUS OFFENSE POSSIBLE.

IN CLOSING, THE CITY OF WICHITA DOES SEE THIS BILL AS A NECESSARY TOOL IN OUR COMMUNITY'S COMPREHENSIVE APPROACH TO FIGHT THE WAR ON DRUGS AND GANG VIOLENCE. WE HAVE TAKEN A NUMBER OF ACTIONS, BUT WE WILL NEED TO TAKE MORE TO CONTROL AND HOPEFULLY ELIMINATE THIS PROBLEM.

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Inter-Agency Task Force on Gangs and Drug Related Violence

**A COMMUNITY COMPREHENSIVE PLAN TO ADDRESS
THE EMERGING PRESENCE OF GANGS AND GANG
RELATED ACTIVITY IN WICHITA/SEDGWICK COUNTY**

June, 1991

**The Inter-Agency Task Force and its Community Plan was
Facilitated and Coordinated by Project Freedom.**

**For More Information Contact
Project Freedom
428 S. Broadway
Wichita, KS 67202**

(316) 833-4630

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Inter-Agency Task Force on Gangs and Drug Related Violence

Executive Summary of Comprehensive Community Plan

The Inter-Agency Task Force on Gangs and Drug Related Violence has been meeting since October of 1990. Representatives from diverse agencies and community groups have met on the first and third Wednesdays of every month to develop a strategy that would combat our community's emerging gang presence. The Task Force has held eighteen public community meetings and met with representatives from the public and private sector. The Comprehensive Community Plan, if implemented, will reduce gang presence and the impact of that presence through a coordinated program of **prevention, intervention, and suppression**. The plan reflects two major initiatives: (1) The plan addresses community needs, barriers, and solutions that will reduce gang presence in our neighborhoods and schools; (2) The plan addresses agency needs, barriers, and solutions that will enable representatives of those organizations to deliver services that will limit the impact of gang and drug related activity.

The entire community plan contains over 40 separate objectives that reflect community and agency interests. The plan contains timelines and identifies individuals, groups, or organizations responsible for implementing the specific objective. Any implementation plan will require political and social resolve as well as the necessary and appropriate resources. Throughout the next year, the Task Force will meet regularly to monitor progress and to assess ways to acquire alternative funding through grants from the private and public sector. Program components of the community plan include the following areas and should be viewed as a community priority.

PREVENTION

Prevention activities remain the single most important activity of the Task Force and community. Prevention strategies will be designed to educate, inform and assist in recognizing the hazards involved with gang and drug related activity. Prevention activities include the following:

- After school and summer recreational programs.
- School curriculum that emphasizes self-esteem and positive community role models.
- Job training programs for youth seeking meaningful employment.
- Education programs that teach parenting and provides positive parental intervention.
- Informing and educating the community about our emerging gang presence and ways parents, employers and schools can identify gang or drug related behaviors among children and employees.

INTERVENTION

Intervention strategies deter future association with gangs once a youth exhibits gang behaviors. Intervention is a process that enables an agency or individual to interrupt behavior that is self-destructive and counter-productive to the welfare of an adolescent. Intervention strategies include some of the following activities:

- Require frequent and random drug testing as a condition of probation and provide for on-site drug testing programs.
- Identify and enhance community crime prevention programs such as Neighborhood Watch, Recreation Centers, and Civic Organizations.
- Expand the *Turn-Around Project* to add intervention programming among current gang members and high risk youth.
- Provide catalogs of service to support groups, agencies, courts, and schools to assist in channeling youth into intervention programs.

SUPPRESSION

Suppression strategies involve programs utilized by law enforcement agencies and prosecutors to deal with street level gang and drug related offenders. Strong suppression has already disrupted a number of area gangs. Suppression programs have bought our community needed time to implement appropriate prevention and intervention programs. Suppression priorities include the following:

- Develop inter-agency data base that networks information about serious habitual offenders, and known offenders; creation of a street intelligence program; and identification of known offenders returning to the community after incarceration.
- Maintain current levels of support for the Special Community Action Teams (SCAT) and Gang Prosecution Unit of the District Attorney's Office.
- City and County-wide Graffiti removal plan or protocol.
- Develop legislative initiatives for victim and witness protection programs.

Please consult the complete Comprehensive Community Plan for details of program implementation. For a copy of the Comprehensive Community Plan, contact Project Freedom, 833-4630.

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INTER-AGENCY TASK FORCE ON GANGS AND DRUG RELATED VIOLENCE

A Comprehensive Community Plan adopted by the Inter-Agency Task Force on Gangs and Drug-Related Violence May 22, 1991

Since October of 1990, representatives of the Inter-Agency Task Force on Gangs and Drug Related Violence have met on the first and third Wednesday of each month to develop a comprehensive plan to address an emerging gang presence in Wichita/Sedgwick County. The Task Force consisted of representatives from USD 259, City Council of Wichita, SRS, 18th Judicial District Juvenile Department, the Wichita Crime Commission, Wichita Police Department, the Sedgwick County Sheriff's Office, the Sedgwick County District Attorney's Office, Wichita Area Chamber of Commerce, NAACP, Hispanic Community representatives, the Advertising Federation of Wichita, Halfway House for Adults, at-large community representatives, the U.S. Attorney's Office and Project Freedom.

The task of putting together a comprehensive plan has been long, difficult, and challenging. Task Force members were concerned from the beginning that the process be thorough and include the ideas of Sedgwick County's diverse community. To that end, the Task Force, since October, has conducted eighteen public meetings in different quadrants of Wichita/Sedgwick County. At each meeting we encouraged community input and reaction to help develop programs of prevention, intervention, and where appropriate, suppression. The ideas and suggestions brought to the town meetings are incorporated into every component of the Task Force's plan.

What follows is a plan that will, if implemented, reduce gang presence and the impact of that presence through a coordinated program of prevention, intervention, and suppression. The plan reflects two major initiatives: (1) The plan addresses community needs, barriers, and solutions that will reduce gang presence in our neighborhoods and schools; (2) The plan addresses agency needs, barriers, and solutions that will enable representatives of those agencies to deliver services that will limit the impact of gang and drug-related activity. The first program initiative is community based and the second is agency or institutional based. Both initiatives are essential to any comprehensive community plan. The Task Force will continue to monitor the progress of the implementation and will modify program objectives as community needs change.

A review of the plan will reveal that many of the gang related problems facing our community require solutions that will demand resources not currently available in Wichita/Sedgwick County. Many difficult and challenging decisions must be made by elected officials. The Task Force is committed to working with elected officials to acquire support for the plan's initiatives. Furthermore, Project Freedom will work to acquire additional funding from Federal, State and Foundation grants to assist in the implementation of the plan. While funding limitations are the reality before us, the lack of resources must not deter our efforts to achieve a community free of gang and drug related violence. To ignore this issue is to compound the problem and exacerbate the limited resources we currently possess.

There are many large or global social and economic issues facing a community the size of Wichita. Many of these issues must be addressed if we are to be effective in implementing a comprehensive plan. The issues of youth unemployment, racial prejudice, re-directing community resources to neighborhoods, and neighborhood access to agencies or institutions must be addressed if we are to be successful in combating our emerging gang presence. It took years to create these problems and it will take years to solve many of the issues before us. The Inter-Agency Task Force cannot fix all of the problems, but the Task Force recognizes that we must begin the dialogue between neighborhoods, government, and business if we are to ultimately succeed. The global character of these issues did not inhibit or thwart our efforts to propose programs that could be immediately implemented. These programs are balanced between prevention, intervention, and suppression. Each component will require us to evaluate our

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resources and target our limited resources toward areas that produce the most enduring results. We will need significant social and political will to achieve our objectives. How and if we achieve these objectives, will in the end, determine how much gang and drug related violence we will tolerate.

Before presenting the details of the Inter-Agency Task Force plan, it is essential that the community understand our definitions and working understanding of gangs and gangs in Wichita. The following description is designed to clarify gang composition and to assist the reader in understanding the extent of our community's problem.

Gangs

Street gangs can be described as a group of people who form an allegiance for a common purpose and engage in violent, unlawful, or criminal activity. They often claim control over certain territory in the community. Gangs are usually comprised of males and females ranging from 11 to 28 years of age. Members represent all racial and ethnic groups and are predominantly from lower income levels. *It is important to note, that gangs in Wichita are not restricted to any one or any particular racial or ethnic group. It is also important to note that gangs in Wichita are not restricted to any one or any particular neighborhood. THE EMERGING PRESENCE OF GANGS IN WICHITA ARE A COMMUNITY PROBLEM AND WILL REQUIRE COMMUNITY SOLUTIONS.* Most gang members freely admit to gang membership, even to law enforcement officers. Many openly display tattoos and dress in a style identifying their particular gang's colors and style of dress. Many "shoot signs" or make gestures with their hands and fingers which identify their gang. Members often answer to nicknames given when recruited into the gang, which becomes their new identity. While wearing "colors", dressing a certain way or other stereotypical elements may be a clue to gang membership, no single criterion alone indicates gang membership.

The emergence of violent street gangs in Wichita has been linked to Los Angeles-based gangs. With over 100,000 gang members in Los Angeles, established gang members were sent to less gang-saturated communities, including Wichita, to create new opportunities for drug trafficking. The majority of gangs in Wichita are directly affiliated with California gangs. Other gangs in Wichita were formed to compete with the influx of California gangs. There is increasing competition for the sale of drugs, causing territorial disputes and gang-related crimes.

A thorough and comprehensive intelligence program conducted by the Wichita Police Department has identified over 600 known gang members and over 20 different gangs in the City of Wichita. Gang activity has been reported in all quadrants of the City as well as surrounding communities. The number of reported gang and drug-related crimes continues to surge. The gang problem in Wichita is characterized as still "emerging".

I. Community Initiatives

The Task Force heard from many community representatives, parents, local businesses, and educators. The need for information about gang behavior, gang composition, and gang prevention programs was consistently present in all town meetings and related community meetings. Providing the community with information about the current gang situation in Wichita was vital to the development of a community response.

Prevention and Education

1. Distribute Free Streets brochure to neighborhood organizations, churches, schools, PTOs, and local neighborhood businesses.

Timeline: Throughout the Spring and Summer of 1991.

Accountability: Project Freedom, Ministerial Associations, Chamber of Commerce, Schools (public and private), and other appropriate community organizations.

2. Conduct information or educational meetings in schools, churches and neighborhoods to provide information about gang presence and gang composition throughout Sedgwick County.

Timeline: Spring and Summer of 1991.

Accountability: USD 259 Substance Abuse Prevention and Intervention Office (SAPI), Police/School Liaison Program, Regional Prevention Center, SCAT Teams, Project Freedom, Sedgwick County Sheriff's Department and other appropriate community organizations.

3. Develop school assembly programs (K-12) designed to inform students about the dangers of gang or drug-related activities and to provide resistance skills when confronted with drug dealers or gang members.

Timeline: Spring and Fall of 1991.

Accountability: Wichita Police Department, Police/School Liaison Program, Sheriff's Department, Advertising Federation and other appropriate community organizations.

4. Develop and distribute gang education video-tape for use by community groups or organizations, businesses, and churches.

Timeline: Spring of 1991.

Accountability: Advertising Federation of Wichita, Chamber of Commerce, NAACP, representatives of local media, and other appropriate organizations.

5. Develop realistic, effective programs to involve the community in prevention and intervention activities.

Timeline: Fall of 1991.

Accountability: Community Organizations and Individuals, Parents As Teachers, and SRS

6. Employ a liaison to link the Inter-Agency Task Force and the under-represented communities within Sedgwick County (ethnically and geographically).

Timeline: Spring of 1991.

Accountability: Project Freedom

7. Fund community initiatives to allow for community-based leadership in prevention activities such as MAD DADS, neighborhood education programs, etc.

Timeline: By Spring of 1992.

Accountability: Cultural-Specific Committee of Project Freedom, Corporate support, and appropriate community organizations.

8. Fund before and after-school programs for youth in churches, temples, etc.

Timeline: By Summer of 1991, ongoing

Accountability: Mini-grant program of Project Freedom, various Foundations, corporate support, and other appropriate community organizations.

9. Train local trainers to offer Effective Black Parenting classes, Effective Hispanic Parenting Classes. Asian parenting curricula will be developed or located with four trainers being trained to teach classes locally.

Timeline: By Spring of 1992.

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Accountability: Kansas Child Abuse Prevention Council, Drug/Alcohol Abuse Prevention Center, UKSM-W, other parenting skills providers, and other appropriate community organizations.

10. Establish who will assume responsibility for a centralized Parenting Skills Clearinghouse/Information function for Wichita/Sedgwick County.

Timeline: Spring of 1993.

Accountability: Parenting skills providers in Wichita/Sedgwick County.

11. Adequate city lighting in defined high crime areas will be increased by 20%.

Timeline: Spring of 1994.

Accountability: City of Wichita Public Works Department and KG&E.

12. Televised parenting skills training.

Timeline: At least four sessions aired each calendar year.

Accountability: Leadership from Project Freedom, General Managers of KSN-W, KAKE, KWCH, parenting skills providers in Wichita and Sedgwick County, and other appropriate community organizations.

13. Waive fees or establish a voucher system for at-risk youth wishing to utilize Park Board facilities, YMCA, YWCA facilities, etc.

Timeline: By Summer of 1992.

Accountability: Board of Park Commissioners, YWCA, YMCA, corporate sponsors, Project Freedom taking the lead. Appropriate community organizations will be requested to help subsidize programs.

14. Assemble and distribute directories of parenting skills trainings and youth services available in Wichita and Sedgwick County.

Timeline: By Summer of 1992.

Accountability: Parenting skills providers in Wichita and Sedgwick County, SRS Youth Subcommittee, Project Freedom, Sedgwick County Adolescent Pregnancy Network, Sedgwick County Medical Society Auxiliary, and other appropriate community organizations.

15. Funding for All Programs

Timeline: Upon Implementation

Accountability: All Federal, State, City, and County, agencies and Project Freedom for purposes of developing alternative sources of funding.

Intervention

1. Establish and publicize a central telephone number for youth crisis services.

Timeline: By Spring of 1992.

Accountability: Kansas Children's Service League, Wichita Guidance Center, Wichita Advertising Federation, Project Freedom, and other appropriate community organizations.

2. Establish community service and other alternatives to suspension and expulsion for students and for juvenile probationers.

Timeline: By Summer of 1992.

Accountability: Project Freedom, Juvenile Probation Department of Juvenile Court, USD 259 and other public and private schools, American Red Cross, and other appropriate community organizations.

3. Update and distribute a catalogue of services available at each school specifying support groups, activities appropriate for at-risk and juvenile offenders in order to enable the courts, the District Attorney's Office and SRS to require participation where appropriate.

Timeline: By Fall of 1992.

Accountability: Public and private schools throughout Wichita and Sedgwick County. Distribution of catalogue coordinated through Project Freedom with the help of appropriate community organizations.

4. Fortify the Neighborhood Watch Program focusing on:
 - a) education of the elderly
 - b) education of tenants
 - c) training of volunteers in drug awareness to expand program, and to conduct follow-up and facilitation to existing Neighborhood Watch Programs.

Timeline: By Spring 1992

Accountability: Wichita Police Department, Sedgwick County Sheriff's Department, Citizen Participation Organization, Apartment Management Associations, and other appropriate community organizations.

5. Increase the enforcement of and publicize Wichita and Sedgwick County's curfew laws.

Timeline: Summer of 1991.

Accountability: Wichita Police Department, Sedgwick County Sheriff's Office, Wichita Advertising Federation, General Managers of KWCH, KSN-W, KAKE, Project Freedom, and other appropriate community organizations.

6. Funding for All Programs.

Timeline: Upon Implementation

Accountability: All Federal, State, City, and County, agencies and Project Freedom for purposes of developing alternative sources of funding.

Suppression

1. Place an appropriate law enforcement presence at the neighborhood level.

Timeline: Spring of 1993.

Accountability: Wichita Police Department, Sedgwick County Sheriff's Office, various Apartment Management Associations, Neighborhood Watch Programs, Citizen Participation Organization and other appropriate community organizations.

2. Utilize current African-American, Hispanic and Asian police officers and other minority community role models to recruit additional officers from under-represented populations.

Timeline: By Fall of 1993.

Accountability: Wichita Police Department, Sedgwick County Sheriff's Office and other appropriate community organizations such as NAACP and the Cultural Specific Committee of Project Freedom.

3. Educate the community regarding the need to cooperate and inform law enforcement about gang and drug-related violence, taking into account special ethnic, cultural and geographic populations.

Timeline: By Fall of 1991, ongoing.

Accountability: Wichita Police Department, Sedgwick County Sheriff's Department and other appropriate community organizations such as NAACP and the Cultural Specific Committee of Project Freedom.

4. Provide law enforcement officers cross-cultural training.

Timeline: Beginning by Spring of 1992, ongoing.

Accountability: Cultural Specific Committee of Project Freedom, and other appropriate community organizations.

5. Funding for All Programs.

Timeline: Upon Implementation

Accountability: All Federal, State, City and County, agencies and Project Freedom for purposes of developing alternative sources of funding.

II. Agency Initiatives

The various member organizations of the Inter-Agency Task Force on Gangs and Drug Related Violence launched an intra-agency process to evaluate current programs related to gangs and drug related violence. Each agency completed a needs assessment, identified barriers to program implementation and then established specific program solutions to be addressed within their respective agencies. What follows represents the various agency initiatives to address Wichita/Sedgwick County's emerging gang problem.

Prevention Initiatives

1. Develop and increase after-school, non-school attendance days, evening and weekend summer activities for youth in Wichita and Sedgwick County.

Timeline: Additional programs to be begun by June 1, 1991 with ongoing efforts year round.

Accountability: Public and private schools, churches, City/County Parks and Recreation Department, YMCA, YWCA, American Red Cross, all agencies participating in the Inter-Agency Task Force on Gangs and Drug-Related Violence.

2. Develop and disseminate information community-wide to increase the level of awareness regarding gang and drug-related violence, criminal activity and the impact of such upon Wichita and Sedgwick County. The informational campaign should target:

- a) the media;
- b) community-based organizations such as Citizen Participation Organizations, Neighborhood Watch Programs and Local Social Service agencies.

Timeline: Media and information campaign plan to be designed by August 1, 1991 and implementation begun by September 30, 1991.

Accountability: All agencies participating in the Inter-Agency Task Force on Gangs and Drug-Related Violence with the Public Awareness Committee of Project Freedom assuming the leadership role in coordinating the campaign.

3. Develop and implement job training programs and placement services for disadvantaged and at-risk youth.

Timeline: Implementation to be complete by November 1, 1993.

Accountability: City of Wichita Department of Human Resources, The Wichita Area Chamber of Commerce, the Wichita Independent Business Association, the USD 259 School/Business Partnership Program, the USD 259 Vocational Education Program, The WISE/BEST of the Wichita Area Chamber of Commerce, and United Way of the Plains.

4. Develop an Inter-Agency resource team for use throughout the city and county for coordination of shared training opportunities, resources, information, etc.

Timeline: Resource team assembled by July 1, 1991. Ongoing evaluation of opportunities for shared trainings, resource and information sharing.

Accountability: All participating agencies in the Inter-Agency Task Force on Gangs and Drug-Related Violence.

5. Develop realistic, effective parent/patron involvement program models to be used throughout Wichita and Sedgwick County.

Timeline: Development of a committee to research realistic, effective models for parent/patron involvement by October 1, 1991. Recommendation of a community-wide model by June 1, 1992.

Accountability: All participating agencies in the Inter-Agency Task Force on Gangs and Drug-Related Violence, PTAs, PTOs, representatives from public schools county-wide. The lead, coordinating role assumed by USD 259.

6. Develop expanded positive adult contacts for youth through opportunities such as mentors, role-modeling, independent living resources for youth, tutoring, exposure to law enforcement personnel, and community service.

Timeline: Formation of a task force to explore program expansion by January 1, 1991. Recommendation of task force by November 30, 1992.

Accountability: All participating agencies in the Inter-Agency Task Force on Gangs and Drug-Related Violence, Big Brothers/Big Sisters, Cities In Schools, various service and fraternal organizations in Wichita and Sedgwick County, The American Red Cross, 4-H Extension Service, public and private schools throughout the City and County.

7. Develop and integrate the use of gang prevention and intervention curriculum in Wichita and Sedgwick County schools.

Timeline: Gang prevention curriculum written by August 1, 1991. Implementation of the curriculum county-wide by August 1, 1992.

Accountability: Lead agency is USD 259. Representatives of all county public schools, PTAs, PTOs, and parenting skills providers throughout Sedgwick County.

8. Design and conduct an educational campaign targeting the business community as to how local business can assist in reducing the impact of gang and drug activity within Wichita and Sedgwick County.

Timeline: Implementation by November 30, 1991.

Accountability: The Wichita Advertising Federation, The Wichita Area Broadcast Council, The Wichita Area Chamber of Commerce, The Wichita Independent Business Association. The Public Awareness Committee of Project Freedom will assume the coordinative role.

9. Design and conduct training programs regarding gang and drug behavior (inclusive of conflict resolution skill training) for all segments of the Wichita/Sedgwick County community.
 - a) personnel and staff of agencies
 - b) community leaders.
 - c) patrons of all public/social services

Timeline: By June 1, 1992.

Accountability: The Inter-Agency Task Force on Gangs and Drug-Related Violence.

10. Locate and coordinate community services in central locations, such as public high schools.

Timeline: By August 1, 1993.

Accountability: USD 259; SRS; Wichita Police Department; Sedgwick County Sheriff's Department; 18th. Judicial District Court, Juvenile Department; Wichita/Sedgwick County Health Department; Cities In Schools; Substance Abuse Treatment Centers; Wichita Food Bank, etc.

11. Funding for All Programs.

Timeline: Upon Implementation

Accountability: All Federal, State, City and County, agencies and Project Freedom for purposes of developing alternative sources of funding.

Intervention Initiatives

1. Develop and employ a common parental notification letter for Schools, Juvenile Department, and law enforcement agencies.

Timeline: July 1, 1991

Accountability: Wichita Police Department, Sedgwick County Sheriff's Office, USD 259, Juvenile Department, and SRS.

2. Develop mediation processes and training to assist youth, parents, and professionals in conflict resolution.

Timeline: August, 1991

Accountability: Office of Substance Abuse Prevention and Intervention, USD 259; Regional Prevention Center; Police/School Liaison Program, Wichita Clergy and Project Freedom.

3. Enhance current Judicial Intervention programs to include court orders that require frequent drug testing, make drug testing a condition of probation and provide for on-site drug testing programs. Program is being funded by a joint grant from Project Freedom and Antoine Carr.

Timeline: July, 1991 and ongoing development of program among Juvenile and Adult Probation.

Accountability: Juvenile and Adult Probation.

4. Identify the need for additional resources for manpower, treatment, counseling, independent living experiences and other out of home placements and to communicate those needs to those in positions to provide such resources.

Timeline: September, 1991 and ongoing development of program.

Accountability: Juvenile Department of the 18th Judicial District, SRS, and Community Corrections.

5. Identify juvenile offenders coming out of treatment and develop after-care programs that include job training, education, recreation, counseling, and outpatient treatment.

Timeline: Begin identification by the summer of 1991 and begin expansion of programs by the fall of 1991.

Accountability: SRS, member agencies of Project Freedom (RSC, NEDARTS, etc.), and Juvenile Department of the 18th Judicial District.

6. Develop and employ gang intervention curriculum in schools throughout Sedgwick County.

Timeline: Spring and fall of 1991.

Accountability: USD 259, County Superintendents, Wichita/Sedgwick County Regional Prevention Center, Police/School Liaison Program.

7. Identify current community crime prevention programs, such as Neighborhood Watch, Recreation Centers, and Civic Organizations, and enhance and/or expand their implementation.

Timeline: Summer of 1991.

Accountability: Wichita Crime Commission, Wichita Area Chamber of Commerce, Wichita Police Department, NAACP, Sedgwick County Sheriff's Department, and member organizations of Project Freedom.

8. Enhance neighborhood and community involvement of religious organizations in developing alternative recreational and social service programming throughout Wichita/Sedgwick County.

Timeline: Begin May of 1991 and implement programs throughout the summer of 1991.

Accountability: Clergy Task Force of Project Freedom, Ministerial Associations in communities throughout Sedgwick County, YMCA and YWCA.

9. Expand *Turn-Around Project* (Formerly Rightrack) to add intervention programming among current gang members and high risk youth.

Timeline: Ongoing Programming with complete funding in place by fall of 1991.

Accountability: Fran Jackson and Youth Development Services, SRS, Cultural Specific Committee of Project Freedom, and relevant organizations within Project Freedom.

10. Funding for All Programs.

Timeline: Upon Implementation

Accountability: All Federal, State, City, and County agencies and Project Freedom for purposes of developing alternative sources of funding.

Suppression Initiatives

1. Develop and Implement Inter-Agency data base. Components of the information sharing will include the following: a) Targeted Offender Program with specific focus on gang membership, serious habitual offenders, and known offenders; b) Creation of a *Street Intelligence Program*; c) Expanded Intelligence section with needed equipment and personnel to implement effective crime analysis; and, c) Identification of offenders returning to community (current criminal status, etc.).

Timeline: Begin April, 1991, with project completion by September, 1991.

Accountability: Wichita Police Department, SRS, USD 259, Sedgwick County Sheriff's Department, 18th District Juvenile Department, Sedgwick County District Attorney's Office, Southwestern Bell Telephone.

2. Continue and maintain programs of the Special Community Action Teams (SCAT).

Timeline: On-going funding and support

Accountability: Wichita Police Department, City Manager, and Outside Funding Sources.

3. Continue Gang Prosecution Unit of the District Attorney's Office.

Timeline: On-going funding and support

Accountability: Sedgwick County District Attorney's Office.

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4. Employ legal advisors for SCAT cases. Legal advisors will work same hours as SCAT teams and will provide legal advice for developing cases. Funding of this program will be explored through new grant initiatives from the Office of Juvenile Justice and Delinquency Prevention.

Timeline: September, 1991

Accountability: Wichita Police Department, and U.S. Attorney's Office.

5. Establish cross-designation of State/Federal Prosecutors for cases related to drugs and violent crimes.

Timeline: September, 1991

Accountability: Sedgwick County District Attorney's Office, and the U.S. Attorney's Office

6. Establish appropriate protocol for filing appropriate cases related to drugs and violent crimes in Federal Court.

Timeline: September, 1991

Accountability: Sedgwick County District Attorney's Office, U.S. Attorney's Office.

7. Identify, develop and adopt new anti-crime ordinances for City and County.

Timeline: By the fall of 1991, appropriate City and County anti-crime Ordinances will be identified and specific legislative proposals will be developed for submission to appropriate governing bodies.

Accountability: All Inter-Agency Task Force Members, City Council, and Sedgwick County Commission.

8. Identify and develop legislative initiatives for programs related to witness and victim protection and victim rights and stiffer penalties/prosecution.

Timeline: By the fall of 1991, appropriate state and federal witness and victim protection issues will be identified. By the January of 1991, appropriate legislation will be introduced.

Accountability: U.S. Attorney's Office, Sedgwick County District Attorney's Office, Sedgwick County Legislative Delegation, and Project Freedom Legislative Committee.

9. City and County-wide Gang Graffiti removal plan or protocol.

Timeline: June, 1991.

Accountability: All agencies affiliated with the Inter-Agency Task Force on Gangs and Drug Related Violence, 18th District Juvenile Department, Public Works Department, City of Wichita, County Public Works Department, and area businesses.

10. Expand the Police/School Liaison Program and the DARE (Drug Awareness Resistance Education) Program.

Timeline: By Fall of 1993.

Accountability: The Wichita Police Department, public and private schools, USD 259, The Sedgwick County Sheriff's Department, various funding sources.

11. Funding for All Programs

Timeline: Upon Implementation

Accountability: All Federal, State, City, and County, agencies and Project Freedom for purposes of developing alternative sources of funding.

The Task Force will assume responsibility for the implementation of the Inter-Agency Plan and its specific components. When specific agencies refuse or cannot cooperate in the implementation of the plan, it will be documented in the ongoing evaluation process to be designed by Project Freedom and the University of Kansas.

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TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
HOUSE BILL No. 2709

Ronald E. Wurtz
Third Judicial District Public Defender
121 East Sixth Street, Suite 6
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(913) 296-1833

House Bill No. 2709 creates a new felony crime severely punishing the discharge of a firearm "at, towards or in the direction of a building or vehicle. I do not believe such a new crime is necessary, but if this committee decides that it is wise to pass such a bill, there are several changes which should be made to the bill as it presently stands.

IS THE BILL NEEDED?

Proponents of the bill claim urge passage of the bill as a needed addition to the prosecutors' arsenal. I suggest that there is ample room in the law to effectively prosecute the acts proscribed by the bill. There are three main statutes which may now be applied: Criminal damage to property, as defined by K.S.A. 21-3720; aggravated assault, as defined by K.S.A. 21-3410; aggravated battery, as defined by K.S.A. 21-3414, aggravated weapons violation, as defined by K.S.A. 21-4202, and unlawful possession of a firearm, as defined by K.S.A. 21-4204(1)(b).

Criminal damage to property. Damage to property in the amount of less than \$500 is a Class A misdemeanor punishable by up to a year in the county jail and a fine not to exceed \$2,500.00. If the damage exceeds \$500 the crime is a Class E felony punishable by not less than one nor more than five years imprisonment and/or a fine not to exceed \$10,000. If no one is injured, most damage would likely not exceed \$500. From this the proponents argue that the punishment is too lenient for the crime and provides no significant deterrent value. This is a question of policy for this legislature to decide, but in my opinion a year in jail is ample punishment to deter such behavior if indeed it can be deterred by any punishment. Most defendants will assert that a year in a jail is much "harder time" than a like or longer time in the custody of the secretary of corrections.

Aggravated assault. To prove this offense the prosecutor must prove the following elements:

1. That the defendant intentionally threatened to do bodily harm to the victim

or

1. That the defendant intentionally attempted to do

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bodily harm to the victim;

2. That the defendant had the apparent ability to cause such bodily harm;

3. That the defendant's conduct resulted in the victim being in immediate apprehension of bodily harm; and

4. That the defendant used a deadly weapon.

No bodily contact is necessary.

Proponents point to a weakness in the use of this statute to prosecute cases in which the victim does not "see it coming." They claim that proof of "immediate apprehension of bodily harm" is difficult to prove unless the victim saw the gun fired. It seems to me that this claim is overstated. It is certainly a problem if the defendant is charged with "threatening" to do bodily harm, but if the prosecutor charges an "attempt to do bodily harm" the problem is virtually eliminated. Let me illustrate. Suppose I am in my living room when a shot is fired through my living room window, breaking the glass and lodging in the opposite wall. What are my feelings? Would not any reasonable person be "in immediate apprehension of bodily harm caused by that attempt to do bodily harm? I know of no law which requires that the apprehension occur before the shot is fired.

Aggravated assault, when committed with a firearm carries a mandatory prison sentence of not less than 2-3 nor more than 5-10 years and a \$10,000 fine.

Aggravated battery. To prove this crime the state must prove:

1. That the defendant touched or applied force to the person of the victim;

2. That it was done with intent to injure the victim or another and

3. That it inflicted great bodily harm upon the victim;

or

That it caused disfigurement to or dismemberment of the victim;

or

That it was done with a deadly weapon;

or

That it was done in a manner whereby great bodily harm, disfigurement, dismemberment or death could have been

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inflicted.

The proponents claim that prosecutors are hamstrung by the requirement that the state prove specific "intent to injure," noting that juries "turn people loose" on the claim that the shooter was only shooting at the building, and had no intention to injure any occupant of that building. Once again, my experience warns that this "problem" is overstated. Jurors use their common sense, and except in unusual circumstances common sense tells us that when someone shoots a firearm at a house there is an intent to injure present. In my experience trial courts will always instruct the jury in the words of PIK Crim 54.01:

"Ordinarily a person intends all of the usual consequences of his voluntary acts. This inference may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met its burden to prove the required criminal intent of the defendant. This burden never shifts to the defendant."

Anyone can see that a modestly skilled prosecutor can point out the obvious to a jury: if someone shoots at an occupied residence a natural and probable consequence is injury to persons inside. In those cases where a defendant convinces a jury that there are circumstances supporting a claim of no intent to injure, the defendant should be acquitted of the aggravated battery and convicted of the crime of criminal damage to property.

Aggravated battery with a firearm is punishable by a mandatory sentence of not less than 3-5 years and not more than 10-20 years confinement and a fine not to exceed \$15,000.

Aggravated weapons violation. This statute prohibits a myriad of weapons violations by a person convicted of a felony. It is a class E felony with a penalty of imprisonment of not less than 1 nor more than 2-5 years imprisonment and a \$10,000 fine. It may be charged in addition to any other crime and its penalty can be run consecutively to any other conviction.

Unlawful possession of a firearm. This crime punished anyone who, within five years previously was convicted of a felony, possesses a firearm with a barrel less than 12" long. Is a class D felony punishable with not less than 1-3 nor more than 5-10. It too may be charged in addition to any other crime and run consecutively to any other crime for which a conviction is obtained.

The latter two offenses give an additional advantage to the prosecution of bringing the defendant's prior record before the jury--a situation dreaded by any defense attorney.

Based on the foregoing, I firmly believe that there are ample laws presently on the books to permit an effective attack on the

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problems this bill seeks to solve.

DEFECTS IN THE BILL AS PROPOSED

If this committee determines that a new crime is necessary to combat the problem of increased shootings at houses and vehicles, please consider some of the effects of the bill as presently proposed.

1. The bill does not require criminal intent. As drafted the bill requires only "unauthorized" discharge. There is no requirement that it be discharged intentionally. I understand that the proponents intended that the definition include a requirement of a willful and malicious discharge. If this suggestion is accepted by the committee, my complaint is satisfied.

2. The meaning of the term "unauthorized" is not clear. The term "unauthorized" is used in our criminal code only in crimes where permission (or lack thereof) is in issue. E.g., burglary, forgery, false writing. It strikes me that the term "unlawful" would say what is meant better than the present wording.

3. The reach of the bill is too broad.

a. The definition of "firearm" presently in use would include a pellet or BB gun powered by a CO₂ cartridge.

The term "firearm" is not defined by statute, but it has been defined by the courts in the context of K.S.A. 21-4618, the mandatory firearms sentencing act. In State v. Davis, 227 Kan. 174, 605 P.2d 572 (1980) the Kansas Supreme Court said:

"For purposes of sentencing under [K.S.A. 21-4618] a 'firearm' is defined as an object having the design or capacity to propel a projectile by force of an explosion, gas or other combustion."

Thus a pump air rifle is not a firearm. State v. Johnson, 8 Kan.App.2d 368, 657 P.2d 1139 (1983)

But a cartridge (CO₂) air rifle is a firearm. State v. Fowler, 238 Kan. 213, 708 P.2d 539 (1985)

An inoperable handgun is a "firearm," State v. Pelzer, 230 Kan. 780, 640 P.2d 1261 (1982), but a starter pistol is not. State v. Davis, supra.

The homeowner who, contrary to local ordinances perhaps, takes his pellet gun to his backyard to shoot a squirrel which is tearing up his lawn, fires, misses and puts a hole in his neighbor's window while the neighbor is home could be prosecuted for a class C felony.

b. Shooting up an unoccupied car by an irate spouse or

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friend would be punishable as a class D felony even though no one was ever endangered. Should you not consider limiting the shooting of vehicles to those that are occupied?

c. It is a class B felony if the firearm discharge results in the "injury" of a person. "Injury" is not used elsewhere in the criminal code. Rather, most statutes speak of "bodily harm" (aggravated kidnapping, K.S.A. 21-3421) or "great bodily harm" (aggravated battery). Is it the intent of his committee that if someone dives to the floor when shots come through the window and skins an elbow the incident is elevated to a class B felony? The terms "bodily harm" and "great bodily harm" have been given definite legal meaning by the courts. It strikes me as wise to use one of those terms instead of the proposed term, "injury."

d. Use of the terms "at," "toward" and "in the direction of" could be redundant, but it is more likely that much time will be spent arguing over their meaning. What is "in the direction of?" If someone shoots "in the direction of" a normally unoccupied structure such as a railroad freight car or an old barn, and the structure happens to be occupied, the offense is an A, B or C felony. If a hunter kicks up quail in an old farmstead, and in shooting at the birds hits the barn, is he/she guilty under the proposed crime? He certainly intentionally shot in the direction of the barn.

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SUMMARY OF TESTIMONY

Before the House Judiciary Committee

February 6, 1992

Presented by the Kansas Highway Patrol

(Captain Terry Scott for Colonel Bert Cantwell)

The Patrol supports passage of HB 2709, the "Drive-by Shooting Bill".

You have heard testimony from Ms. Nola Foulston, from the District Attorney's Office in Sedgwick County; from Mr. Gene Olander, representing the County and District Attorneys Association and from various law enforcement interests in regard to this bill.

The Patrol appears in an effort to inform this committee that this is not simply a metropolitan problem; Wichita, Topeka and Kansas City are not the only areas affected. During the past year, "drive-by" shootings have occurred in Great Bend, Salina and even in the small community of Brookville. Rural residences in Osage County have been the target of this terroristic act. A family of "Career Criminals" in the northeast part of the state uses this tactic to intimidate potential witnesses who might be tempted to testify regarding criminal activity.

The Patrol is often called upon to support local agencies who respond to these incidents and as a law enforcement agency, we do contact perpetrators of all kinds of criminal behavior as a result of traffic stops. Obviously, these people are armed and pose a serious threat to any law enforcement officer who happens to contact them. They have demonstrated their ability and willingness to use force against a person or persons. We consider this bill to be in the best interests of the citizens of Kansas. Whether urban or rural, all citizens have a right to feel secure in their homes. No law can guarantee that security, however, the law can and should provide whatever protection that it can to the citizens it serves.

We believe that HB 2709 is in the best interest of the citizens of Kansas and we ask for your support in passage of this bill.

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TOPEKA

HOUSE OF
 REPRESENTATIVES

COMMITTEE ASSIGNMENTS
 MEMBER: FEDERAL & STATE AFFAIRS
 GOVERNMENTAL ORGANIZATION
 JUDICIARY

February 4, 1992

HOUSE BILL 2724

By Hamilton, Bishop, Cates, Edlund, Everhart, Gilbert, Gomez, Hensley, Johnson, Jones, Lynch, Macy, Reardon, Roy, Sawyer, Smith, M., Turnquist, Wagnon, Watson and White.

Before Judiciary Committee - Hamilton

Thank you for considering this bill that enlarges the authority of the prosecution to charge persons after the crime of Aggravated Battery. This is NOT in conflict with the Wichita delegation Bill that creates new crimes under the criminal law statute of Unlawful Discharge of a Firearm. This bill encompasses a wider range of crimes and their "loopholes".

The added few words to the Aggravated Battery statute are "reasonably foreseeable" injury. Presently our Aggravated Battery statute requires a specific intent to injure that person. This Bill would enlarge the circumstances to include any injury that was "reasonably foreseeable" and to ANY person -- not a certain person. IT WOULD BE A JURY DECISION ALSO.

Examples: Child Abuse (Father - 150 vs. Infant)
 Domestic Violence (Size, acts, circumstances)
 Drive-by Shootings with injury (Saline county)
 Mall shootings (Shawnee County)
 Party shootings (Arrowhead Street - Shawnee)
 Gang activities with injuries (Wichita case, etc.)

We need this bill NOW to address the violent crimes that are going unaccountable by the offenders. By enlarging the present statute of Aggravated Battery, it will not create a new crime law nor have to be examined and inspected by the Sentencing Commission.

We need to take action -- we need to show the offenders that we will NOT tolerate this constant violence on our children, citizens and our public peace.

Please support House Bill 2724.

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THIS IS MY PROPOSAL

Just add to our present Aggravated Battery statute these words:

"or acts that result in injury that is reasonably foreseeable"

These words would be added to the beginning definition of the criminal statute of "Aggravated Battery" after the words "with the intent to injure that person or another" OR ACTS THAT RESULT IN INJURY THAT IS REASONABLY FORESEEABLE.

In support of this, we could use all the Kansas case law cited under the Aggravated Robbery statute, particularly those dealing with First Degree Murder under the felony-murder law.....talking about the "foreseeability of a person getting killed when you rob with a deadly weapon is reasonable", therefore felony-murder law is proper. I think we could easily say:

If you shoot a gun into houses within a residential section of town, it is "reasonably foreseeable" that someone will get shot.

If you shoot a gun in a shopping mall during shopping hours, it is "reasonably foreseeable" that someone will get shot.

If you shoot a gun into a classroom of students and teacher, it is "reasonably foreseeable" that someone will get shot.

THIS LAW WOULD HELP WITH ALL SORTS OF PROBLEMS BESIDES JUST DRIVEBYS, i.e. school violence, gang activities in malls, streets, etc. and walkby shootings.

Another reason I would like to see this statute changed to assist in the problem with the specific intent alone is not just the shooting events, but also child abuse and domestic and/or violent abuse. Let me give you two examples:

1) A child is injured severely by parent and is charged with Aggravated Battery, but then testifies that "yes he hit the child, but he didn't mean to hurt them that much" -- there's a question about the specific intent again. If we have these words put into the statute, it would be a jury question (which it is now, but NOW we give them some guidance and a way to convict with the more serious offense IF the circumstances are there. So if you have a 150 pound father with a one-month old child (who dislocated the brain of the child --- actual case in Topeka), the jury could see that his acts --- EVEN IF ONLY ONE HIT--could have been reasonably foreseeable. Contrary, they may NOT do so if the child is a 16-year-old boy (BUT THEY COULD IF BAD ENOUGH!)

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2) The ex-boyfriend or ex-husband or even present ones who get angry and come to the homes and use force or beat up on their mates, and then cry, "I didn't mean to injure them...", it would allow the jury to decide if the acts caused injury that was reasonably foreseeable. Again, in a case I tried, an ex-boyfriend came over and hit his ex so hard that it broke her nose, blackened her eyes, etc. He then raped her. He admitted he had a large ring on and used that hand. His story was that: He only hit her once and he didn't mean to injure her, he was just angry. He then said he made up with her and they "made love" to prove she had forgiven him. The jury admitted that if they would have had a way to say that it didn't matter what he meant to do but HIS ACTS CAUSED INJURIES THAT WERE FORESEEABLE (weight difference, anger, etc.), they would have done so.

Besides the reasons I've listed above for NOT wanting a new crime created, I believe there will be created problems of defendants claiming "accident". And what about the real "accident" that WAS INNOCENT, i.e. a discharge that injures someone when someone is innocently cleaning a loaded weapon--though it is stupid and negligent to do so, it is NOT criminal. Why create problems with new crimes? Also, when you have to be so WORDY in a crime, listing all the persons who must be excluded from this crime, you lose the impact and purpose of the crime as originated.

Jo*an Hamilton, 51st Representative

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PATTERN INSTRUCTIONS FOR KANSAS

Since all felonies require proof of criminal intent and the same may be established by proof that the conduct was willful, under K.S.A. 21-3201, a jury would more likely understand the term "intentional" than "willful". A definition, then, of malice and the use of the word "intentional" should suffice, and if caution abounds, the trial court may desire to define "intentional" as "willful conduct that is purposeful and not accidental."

The definition of "death" as set out in K.S.A. 77-202 applies in criminal cases. *State v. Shaffer*, 223 Kan. 244, 574 P.2d 205 (1977).

It is the duty of the trial court to instruct the jury not only as to the offense charged, but as to all lesser offenses of which the accused might be found guilty under the charge and on the evidence adduced, even though the court may deem the evidence supporting the lesser offense to be weak and inconclusive. For a thorough analysis on lesser included offenses see *State v. Seelke*, 221 Kan. 672, 561 P.2d 869 (1977). See also, Barbara, *Kansas Criminal Law Handbook* (1974).

The duty only arises when the evidence and trial would support a conviction of the lesser offense. *State v. Yarrington*, 238 Kan. 141, 143, 708 P.2d 524 (1985).

This instruction, as well as PIK 2d 56.03, 56.04 and 56.05, covering second degree murder, voluntary manslaughter and homicide definitions, were all approved in *State v. Miller*, 222 Kan. 405, 414, 565 P.2d 228 (1977).

PATTERN INSTRUCTIONS FOR KANSAS

56.01 MURDER IN THE FIRST DEGREE

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed _____;
2. That such killing was done maliciously;
3. That it was done deliberately and with premeditation; and
4. That this act occurred on or about the _____ day of _____, 19 __, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3401. Murder in the first degree is a class A felony. For felony murder see PIK 2d 56.02, Murder in the First Degree—Felony Murder. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment in PIK 2d 56.02, for authority to instruct on both theories.

Instructions on definitions of terms should be given as defined in PIK 2d 56.04, Homicide Definitions.

Comment

"In a homicide case, the corpus delicti is the body or substance of the crime which consists of the killing of the decedent by some criminal agency, and is established by proof of two facts, that one person was killed, and that another person killed him." Such may be proved by circumstantial evidence. *State v. Doyle*, 201 Kan. 469, 441 P.2d 846 (1986).

A helpful discussion of murder and manslaughter is found in *State v. Jensen*, 197 Kan. 427, 417 P.2d 273 (1966). There it is said, "At the common law, homicides were of two classes only; those done with malice aforethought, either express or implied and called murder, and those done without malice aforethought and called manslaughter." This distinction is retained in the present Kansas Criminal Code.

The words "maliciously" and "premeditation" are not defined in the code, but are to be given the meaning established by the decisions of the Supreme Court of Kansas.

The Committee has inserted the word "intentionally" in paragraph one of the elements. K.S.A. 21-3401 defines murder in the first degree as the ". . . killing of a human being committed maliciously, willfully, deliberately and with premeditation. . . ." The term "maliciously" is defined in PIK 2d 56.04 as ". . . willfully doing a wrongful act without just cause or excuse." It would appear redundant to state an element of willfulness and one of malice and then define malice as willful conduct.

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PATTERN INSTRUCTIONS FOR KANSAS

**56.02 MURDER IN THE FIRST DEGREE—FELONY
MURDER**

The defendant is charged with the crime of murder in the first degree. The defendant pleads not guilty.

To establish this charge each of the following claims must be proved:

1. That the defendant killed _____;
2. That such killing was done while (in the commission of) (attempting to commit) _____, a felony; and
3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

The elements of _____ are (set forth in instruction number _____) (as follows: _____).

Notes on Use

For authority see K.S.A. 21-3401. Felony murder is a class A felony.

In addition to this instruction, the elements of the underlying felony should be set out. Where one count charges premeditated murder and another count charges felony murder for the same homicide, see Comment below for authority to instruct on both theories. The elements of the applicable underlying felony should be set forth either by reference to another instruction which lists them or the elements should be set forth in the concluding portion of this instruction.

Comment

Premeditated murder and felony murder are not separate or different offenses. The statute merely provides alternative methods of proving the deliberation and premeditation which are required for a first degree murder conviction under K.S.A. 21-3401.

A prosecution under this rule merely changes the type of proof necessary to support a conviction. Proof that the homicide was committed in the perpetration of a felony is tantamount to premeditation and deliberation which otherwise would be necessary to constitute murder in the first degree. *State v. McCowan*, 226 Kan. 752, 759, 602 P.2d 1363 (1979).

To apply the felony-murder rule, it is only necessary to establish that the accused committed a felony inherently dangerous to human life and that the killing took place during the commission of the felony. Even an accidental killing is subject to this rule if the participant in the felony could reasonably foresee or expect that a life might be taken in the perpetration of the felony. *State v. Branch and Bussey*, 223 Kan. 381, 573 P.2d 1041 (1978). *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 (1980).

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The State may properly allege premeditated murder and felony murder in separate counts for the commission of a single homicide, and may introduce evidence on both theories but the jury must be instructed to bring in a verdict on one alternative. Conviction on both theories is improper. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

When the murder is committed during the commission of a felony the general rule is that no instructions on lesser included offenses should be given. The felonious conduct is held tantamount to the elements of deliberation and premeditation in first degree murder. But where the evidence of the underlying felony is inconclusive or reasonably in dispute, instructions must be given on lesser included offenses which are supported by the evidence. *State v. Foy*, 224 Kan. 558, 582 P.2d 281 (1978).

The felony-murder doctrine is not applicable in cases of felonious assault resulting in death because the assault merges with the homicide. *State v. Clark*, 214 Kan. 293, 521 P.2d 298 (1974). However, the merger doctrine does not apply where the underlying felony is aggravated burglary based upon an aggravated assault. The burglary, even though based upon the crime of assault, can properly serve as the predicate for a felony-murder conviction. *State v. Foy*, 224 Kan. 558, 582 P.2d 281 (1978). See also *State v. Rupe*, 226 Kan. 474, 601 P.2d 675 (1979).

For a discussion of the merger doctrine see *State v. Rueckert*, 221 Kan. 727, 733, 561 P.2d 850 (1977).

In *State v. Lashley*, 233 Kan. 620, 633, 664 P.2d 1358 (1983), the following crimes were held as not inherently dangerous to human life: theft of loss or mislaid property (21-3703); unlawful deprivation of property (21-3705); obtaining by deception control over property (21-3701[b]); theft by control over stolen property (21-3701[d]).

In *Smith v. State*, 8 Kan. App.2d 684, 688, 666 P.2d 730 (1983), burglary is considered inherently dangerous to human life to support a felony murder conviction (when viewed in the abstract).

The crime of child abuse under K.S.A. 21-3609 did not constitute a merger with the homicide in a felony first-degree murder charge under the facts of the case. Whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder was not decided by the court. *State v. Brown*, 236 Kan. 800, 696 P.2d 954 (1985).

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56.02-A MURDER IN THE FIRST DEGREE AND FELONY
MURDER—ALTERNATIVES

In this case the state has charged the defendant with one offense of murder in the first degree and has introduced evidence on two alternate theories of proving this crime.

The state may prove murder in the first degree by proving beyond a reasonable doubt that the defendant killed _____ and that such killing was done while (in the commission of) (attempting to commit) _____, a felony or in the alternative by proving beyond a reasonable doubt that the defendant killed _____ maliciously and with deliberation and premeditation, as fully set out in these instructions.

Where evidence is presented on the two alternate theories of proving the crime charged, you must consider both in arriving at your verdict.

In instruction _____ the court has set out for your consideration the essential claims which must be proved by the state before you may find the defendant guilty of felony murder, that is the killing of a person (in the commission of) (in an attempt to commit) a felony crime.

In instruction _____ the court has set out for your consideration the essential claims which must be proved by the state before you may find the defendant guilty of premeditated murder.

If you do not have a reasonable doubt from all the evidence that the state has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty.

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree on either theory, then you must enter a verdict of not guilty.]

or

[If you have a reasonable doubt as to the guilt of the defendant as to the crime of murder in the first degree, then you must consider whether the defendant is guilty of (murder in the second degree) (voluntary manslaughter) (involuntary manslaughter)].

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Notes on Use

For authority see K.S.A. 21-3401. This statute establishes but one offense, murder in the first degree, but it provides alternative theories of proving the crime. Where the information and evidence includes both felony-murder and deliberate and premeditated murder, this instruction must be given in addition to PIK 56.01, Murder in the First Degree, and PIK 56.02, Murder in the First Degree—Felony Murder.

Choice of the bracketed paragraphs depends on whether or not there are lesser included offenses. (See PIK 69.01, Murder in the First Degree With Lesser Included Offenses.)

Comment

While K.S.A. 21-3401 establishes but one offense of murder in the first degree, where the evidence supports both theories, one of deliberation and premeditation and one of felony murder, that is a killing occurring during the commission of or an attempt to commit an inherently dangerous felony, the state may proceed on both theories. The defendant is entitled to notice that the state is proceeding under both theories in the filing of the information. *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978). *State v. Wise*, 237 Kan. 117, 123, 697 P.2d 1295 (1985).

Generally, alternate theories would be utilized where the evidence may show that the underlying felony was planned but not a killing, and that the homicide took place during the commission or attempted commission of the felony. A finding by the jury that a killing was committed not with premeditation but actually in the commission of the felony would not be inconsistent. *State v. Wise*, 237 Kan. at 121 and 122. The state is not required to elect between the two theories as long as the defendant is fully apprised of the charges. *State v. Jackson*, 223 Kan. at 557.

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56.06 INVOLUNTARY MANSLAUGHTER

A. (The defendant is charged with the crime of involuntary manslaughter. The defendant pleads not guilty.)

B. (If you cannot agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.)

To establish this charge, each of the following claims must be proved:

1. That the defendant unintentionally killed _____.
2. That it was done while in the commission of
 - (a) (state misdemeanor) in a wanton manner (state allegations constituting wantonness).
 - or
 - (b) A lawful act in an unlawful manner in (state allegations constituting unlawful manner).
 - or
 - (c) A lawful act in a wanton manner in (state allegations constituting wantonness).
3. That this act occurred on or about the _____ day of _____, 19 __, in _____ County, Kansas.

As used in this instruction the word "wantonness" means conduct done under circumstances that show a realization of the imminence of danger to the person of another and of reckless disregard or complete indifference and unconcern for the probable consequences of the conduct.

Notes on Use

For authority see K.S.A. 21-3404. See 21-3201(3) for instruction on wanton conduct. Involuntary manslaughter is a class D felony. If the information charges involuntary manslaughter, omit paragraph B; but if the information charges a higher degree omit paragraph A. See PIK 2d 68.09 and 69.01, lead-in instructions on lesser included offenses. Elements 2(a), 2(b), and 2(c) are alternatives. Element 2(b) should not be used where the instrument of the homicide was a vehicle; use 2(a) or 2(c).

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Comment

A city ordinance prohibiting the discharge of a firearm within the city may be used to define an unlawful act done in a wanton manner. Those ordinances are designed to protect human life or safety, and even an accidental discharge may be within the purview of this instruction where the discharge is alleged to be wanton. *State v. Thomas*, 6 Kan. App.2d 925, 636 P.2d 807 (1981).

See Comment PIK 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

56.07 VEHICULAR HOMICIDE

The defendant is charged with the crime of vehicular homicide.

To establish this charge, each of the following claims must be proved:

1. That _____ was killed by the operation of an (automobile) (airplane) (motorboat) (other motor vehicle);
2. That the defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another; and
3. That the defendant operated the vehicle in a manner which constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances;
4. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3405, where the word "material" was substituted for "substantial."

Where the homicide is unintentional and caused by operation of a motor vehicle, the statute is concurrent with and controls the general statute on involuntary manslaughter (K.S.A. 21-3404). But, where the charge is involuntary manslaughter and the issue is whether or not the conduct of the accused was wanton, vehicular homicide would be a lesser included offense of involuntary manslaughter and the jury should be instructed thereon. *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978). *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). See PIK 2d 56.06, Involuntary Manslaughter.

Vehicular homicide is a class A misdemeanor. This section applies only when death ensues within one year after the injury.

Comment

The gravamen of the offense prior to the 1972 amendment was simple negligence. However, the court in *State v. Gordon*, 219 Kan. 643, 654, 549 P.2d 886 (1976), held that legislative intent contemplated "something more than simple negligence."

The substitution of "material" for "substantial" affected no change as the terms are synonymous. *Ibid*.

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defend-

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ant's conduct was or was not the direct cause of decedent's death. The decedent's negligence may have been such a substantial factor in his death as to be itself the cause. *State v. Gordon*, supra.

Wanton conduct is defined elsewhere in the Criminal Code. See K.S.A. 21-3201(3). See also PIK 2d 53.00, Wanton defined, and *State v. Makin*, 223 Kan. at 746, for interpretation of "wantonness."

In *State v. Boyston*, 4 Kan. App.2d 540, 609 P.2d 224 (1980), the defendant requested an instruction that a material deviation lies between ordinary negligence and wanton conduct. The court held it was not necessary to define a material deviation. Failure to yield the right of way, or to stop at a stop sign, or reckless driving are not lesser degrees of vehicular homicide as none of these offenses have elements which are necessary elements of this crime.

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56.09 UNINTENDED VICTIM—TRANSFERRED INTENT

When a homicidal act is directed against one other than the person killed, the responsibility of the actor is exactly as it would have been had the act been completed against the intended victim.

Notes on Use

For authority, see *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967).

This instruction should be given in cases where there was an unintended victim, such as in cases of mistaken identity or where a bystander is killed.

Comment

It is no defense to the crime of murder that the defendant may have mistaken the victim for some other person, or that he may have supposed himself wronged by some other person. The fact that the homicidal act was directed against a person other than the person killed does not relieve the slayer of criminal responsibility. *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967). Where a person intends to kill one person but actually kills another, he is just as responsible as if he had killed the person intended.

This principle rests on the basis of "transferred intent," and is equally applicable to prosecutions for assault and battery, notwithstanding a proof of specific intent to injure is required. "The intent follows the bullet." 40 Am. Jur. 2d, Homicide, § 11, pp. 302-303. *State v. Stringfield*, 4 Kan. App.2d 559, 608 P.2d 1041 (1980).

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56.23 TERRORISTIC THREAT

The defendant is charged with the crime of terroristic threat. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant threatened to commit violence;
2. That such threat was communicated with the intent (to terrorize _____) (to cause the evacuation of a [building] [place of assembly] [facility of transportation]);

or

That such threat was communicated in wanton disregard of the risk of causing (terror to _____) (the evacuation of a [building] [place of assembly] [facility of transportation]); and

3. That this act occurred on or about the _____ day of _____, 19____, in _____ County, Kansas.

[Under this instruction, a statement that defendant has already committed violence is the same as a threat to commit violence.]

Notes on Use

For authority, see K.S.A. 1984 Supp. 21-3419.

Terroristic threat is a class E felony.

The last paragraph reflects the 1984 amendment to K.S.A. 21-3419, and should be used only where the defendant communicated a statement of past conduct rather than a threat of future conduct.

Comment

The above instruction, less the last paragraph, was approved in *State v. Knight*, 219 Kan. 863, 867, 549 P.2d 1397 (1976), when the defendant himself did the threatening and communicated the threat. However, if the threat to commit violence is allegedly made by another person and the defendant communicates the threat with the intent to terrorize, the instruction needs to be modified to so state as it is not essential to prove the crime that the defendant threatened to do the acts mentioned in the communication itself. It is sufficient if the defendant communicates the threat made by another person if he does so with the specific intent to terrorize the victim.

For definition of "threat" and "terrorize" see *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972).

The 1984 amendment also added a proscription against threatening to adulterate or contaminate food or drink. Since this new crime requires no specific intent, a separate instruction was deemed necessary. See PIK 2d 56.23-A.

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58.11 ABUSE OF A CHILD

The defendant is charged with the crime of abuse of a child. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant willfully (tortured) (cruelly beat) (inflicted cruel and inhuman bodily punishment upon) a child under the age of eighteen years; and
2. That this act occurred on or about the _____ day of _____, 19 ____, in _____ County, Kansas.

Notes on Use

For authority see K.S.A. 21-3609. Abuse of a child is a class D felony.

Comment

The words torture, beat, abuse, cruel punishment, or inhuman punishment are not so vague or indefinite as to be unenforceable as a penal statute. *State v. Fahy*, 201 Kan. 366, 440 P.2d 566 (1968).

Abuse of a child is not a lesser offense of aggravated battery and both may be separately charged in the same information, even though they arise out of the same episode or transaction. However, when a conviction is set aside, any new trial is limited to the crime originally charged or, if conviction was on a lesser included offense, the included crime of which the defendant was convicted. Other crimes proven in the first trial, and which could have been but were not charged or relied upon, may not be added as new charges in the new trial. A conviction on the lesser offense of criminal injury to persons which is later vacated because of the statute's unconstitutionality is a bar pursuant to K.S.A. 21-3108(2)(a) to a prosecution for abuse of a child. *In re Berkowitz*, 3 Kan. App.2d 726, 602 P.2d 99 (1979).

In a felony murder case, the proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide following *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977). A charge of abuse of a child may meet the *Rueckert* test for merger into a charge of felony first degree murder. In *State v. Brown*, 236 Kan. 800, 803, 696 P.2d 954 (1985), the court stated: "We are not called upon, and do not here decide, whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony murder."

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TO: Chairperson and Representatives of the Kansas House Judiciary Committee

BY: Richard L. Schodorf, Chief Attorney, Consumer Fraud and Economic Crime Division of the Office of the District Attorney, 18th Judicial District, Sedgwick County, Kansas.

RE: House Bill No. 2792 - An act creating the Kansas advertised sales code.

Problem: On March 7th, the District Attorney's Consumer Fraud Division completed an eleven month investigation into advertised sales practices of businesses located in Sedgwick County. This investigation monitored the sales practices of Sedgwick County merchants offering for sale products in the following areas:

1. Jewelry
2. Electronic Equipment
3. Clothing
4. Furniture
5. Automobiles

Twenty merchants were selected at random for the investigation. In two-thirds of the cases, it was found that businesses were conducting sales which were not in compliance with Kansas or Federal law. Violations observed can be summarized as follows:

1. Cases where advertised bargains were on sale 60 to 100 percent of the time.
2. Cases in which the merchant advertised bargains at prices allegedly lower than those being charged by other merchants when, in fact, no one in the trade area was selling the goods at the higher price (false reference pricing).
3. Cases in which the advertisement failed to disclose the true nature or terms of the sale.

The investigation further revealed that the primary reason stated by merchants for the violations was the inability of the businesses to understand the complex web of federal, state, and municipal laws governing advertised sales practices. Also, business leaders stated that they were often only following aggressive tactics used by their competitors.

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In reviewing the cases and the status of the current laws it became obvious that an effort needed to be made to simplify the laws governing advertised sales so that a bright line could be drawn which would allow for free and fair competition in the market place and which would benefit both merchants and consumers.

Solution: In May of 1991, District Attorney Nola Foulston informed a task force to review the advertised sales law for the State of Kansas. Serving on that committee were the following individuals:

Burl Ingle, President of the Better Business Bureau

Tom Ferguson, General Merchandise Manager, JCPenney Co.

Jim Carey, Store Manager, Richmond Gordman

Jack Perrin, President, Holleicke-Perrin Tires

Lou Cohen, President, Shepler's Western Wear

Bernie Kock, Vice-President, Wichita Area Chamber of Commerce

George Scott, General Manager, JCPenney Co.

Gary Bickham, President, Claude Federal Sign

Jim Hattan, President, Don Hattan Chevrolet

Beverly Cole, Vice-President, Roth Heating and Air-Conditioning

LaVonne Pirner, President, The Carpet Centers

Roland D. Smith, Executive Director, Wichita Independent Business Association

This task force met regularly through the summer and drafted the proposed legislation which is attached hereto.

The purpose of the Advertised Sales Code is to provide a statute which clearly sets forth bright lines within which a merchant may easily comply with the law while still being able to profitably conduct business. Rather than going through each of the sections let us give you two examples which address the problems that both merchants and consumers face.

The first example, deals with the concept of what really is a sale. Most advertisers know that the word sale has

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magic connotations to the consuming public. But there are no definitive guidelines on how long a sale should last or even how long the product should be advertised at a certain price before that becomes the regular price. The law merely states a product should be at it's regular price for a reasonably substantial period of time. How long is reasonably substantial? This term might differ from one merchant to another and from one consumer to another. We have some merchants who believe that reasonably substantial means 5% to 10% of the time at regular price. To another merchant it might mean 60% to 70% of the time at regular price and the remaining time on sale. The proposed statute deals with this by stating that the product must be offered at it's regular price at least 51% of the relevant selling period. Setting the figure as a definite percentage allows the merchant to have the bright line within which to operate and feel safe that he will not be sued for running a deceptive sale. It will also give the consumer the understanding that regular price means most of the time and the word sale still has some significance.

The second example deals with going out of business sales. There is currently no Kansas law which governs the practice or conduct of going out of business sales. In the past year, a shoe store in the Wichita area decided to close its stores. But rather than just selling it's current inventory, the company brought in almost \$700,000 worth of additional merchandise from Tulsa and opened up a separate location just to have the going out of business sale. Many of the shoe lines represented in this increased inventory had never been offered for sale in the Wichita area. The company conducted extensive advertising concerning the alleged savings that consumers would received by shopping at their going out of business sale. By conducting the sale in this matter, the consumers were deceived into believing that they would be receiving discounted prices from the stores normally high quality inventory. The words 'going out of business' often act as a magnet to attract consumer's interest and during this going out of business sale other shoe merchants in the Wichita area, who were trying to stay in business, experienced a tremendous drop in sales as the consumers shopped at the phony sale. It is also interesting to note that after the sale all of the unsold inventory was merely returned to the company which had provided it in the first place, so the additional inventory was merely rented and not actually purchased. The proposed statute would deal with this situation by limiting the inventory to be sold in a going out of business sale to the inventory on hand at the time the business decides to cease operation. The statute would also enact several other rules which would

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ensure that going out of business sales would also not be continuous in nature.

The proposed statute also deals with other problems such as:

- a. Comparison with current price of identical merchandise sold by others
- b. Comparison with manufacturers suggested retail or list price
- c. Comparison involving imperfects, irregulars, or seconds
- d. Factory to you, factory direct, wholesale prices, and other terms,
- e. Emergency or distress sales,
- f. "Up To" savings claims, (i.e. "Save Up To 50%")
- g. Price matching and lowest price claims

If all merchants are required to play by the same rules it will produce a more competitive environment for honest businesses to flourish and provide consumers with opportunity to obtain real values.

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TO: Chairperson and Representatives of the Kansas House Judiciary Committee

BY: Richard L. Schodorf, Chief Attorney, Consumer Fraud and Economic Crime Division of the Office of the District, 18th Judicial District, Sedgwick County, Kansas.

RE: House Bill No. 2793 - An act relating to motor vehicles; concerning used vehicle warranties.

PROBLEM: The District Attorney's Consumer Fraud Division receives over 1,000 consumer complaints each month. Of those complaints, more Sedgwick County residents complained about the mechanical reliability of recently purchased used vehicles, than any other area. The complaints ranged from used vehicles which break down on the way home from car lots, to vehicles which have been severely damaged in the past and inadequately repaired before being resold to the unsuspecting public. Most of the time these vehicles are being purchased by individuals who are least able to cope with the additional expense generated by the poor condition of the vehicle. Middle class and upper class citizens have the luxury of purchasing new cars with long-term comprehensive warranties. However, many citizens can barely afford to purchase these used vehicles much less find the extra money to repair them when they quit running.

The problem begins when an individual brings his or her used car in for a trade on a new vehicle. The dealer often will not check the mechanical condition of the trade-in and will make an offer far in excess of the vehicle's value in order to entice the individual into purchasing a new car. The dealer has an over-valued trade-in which he feels he can not afford to put more money into in order to improve it's mechanical condition. He must sell the car at or near the inflated price that he paid for it or he will end up losing money on the transaction.

Who are these people who buy these mechanically inferior used vehicles? They represent a microcosm of our society. They are they young who are purchasing their first cars and the older adults who are trying to get by on their social security checks. They are single mothers working a third shift at Wesley Hospital and they are young families struggling to get by in economically tough times.

There are no bad guys in this scenario. There is only a system that has the tendency of taking advantage of some citizens for the benefit of those who are more affluent. Under the current used vehicle sales system, the custom in the trade is to give the consumer an express warranty

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covering ten percent of the cost of any repairs. This is a non-existent remedy when there are major problems with the mechanical condition of a particular vehicle. The current law also states that used vehicles sold by dealers are also covered with an implied warranty of merchantability. Merchantability which has been defined as meaning fit for ordinary purposes and has resulted in extensive litigation involving dealers and consumers. This standard is very vague.

Solution: Kansas is not the only state that has been confronted by this problem. A number of states including Rhode Island, Massachusetts, and New York have enacted express warranty statutes. The exact language in each of the statutes vary, however, there exists a common theme which runs through each of them.

Our proposed legislation is attached to this memorandum and is briefly outlined below.

1. The proposed legislation calls for mandatory express warranties to accompany a sale by a dealer of a used motor vehicle. The length of which is set by a sliding scale:
 - (a) The sale of a used motor vehicle with a cash price of \$2,000 to \$3,000 shall include an express warranty for 30 days or 1,000 miles, whichever comes first. There is a \$50 per item deductible.
 - (b) The sale of a used motor vehicle with a cash price of \$3,000 to \$6,000 shall include an express warranty for 60 days or 2,000 miles, whichever comes first. There is a \$50 per item deductible.
 - (c) The sale of a used motor vehicle with a cash price of \$6,000 or more shall include an express warranty for 90 days or 3,000 miles, whichever comes first. There is a \$50 per item deductible.
2. The consumer may waive a warranty required pursuant to this law only as to particular defect in the vehicle which has disclosed to the consumer as being defective and therefore has become part of the basis of the bargain.
3. A used motor vehicle may be sold "as is" by a dealer if it's cash purchase price is less than \$2,000 or if such used vehicle is sold with mileage in excess of 100,000 miles. The "as is" disclaimer or limitation of implied warranties allowed by this

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law will only be enforceable if the dealer clearly discloses this fact in language as set forth in the statute.

There are other provisions in the proposed legislation but the above constitute the most important provisions. We have worked closely with both the Sedgwick County and Kansas Automobile Dealers Associations in preparation of this proposed legislation.

The time when access to an automobile was considered a luxury has long since past. All of us depend upon our cars for transportation to work, driving the kids to school and extracurricular activities, shopping, going to the doctor and countless other daily tasks. The use of an automobile is so important in our society that our citizens should not be penalized merely because they can only afford to purchase a five or six thousand dollar used car.

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Mr. Chairperson, members of the Judiciary Committee:

My name is LaVone J. Pirner

I have been an independent retailer in Kansas for 25 years, and a resident of Kansas all of my life. I'm a past President of the American Floorcovering Association, an affiliation of independent retailers nationwide. I currently serve on the board of directors of Carpet One, America's largest carpet retailer, another affiliation of independent retailers. I'm here to urge support and passage of House Bill 2792 if it is used to define parameters of the Consumer Protection Act. It is my belief that the existing consumer laws on advertising leaves so much to interpretation, and are so vague and contradictory, that something must be done to clarify and simplify the rules.

Stanley Marcus of Neiman Marcus was recently quoted in the Wall Street Journal as saying that, "50% of all independent retailers will disappear from the marketplace by the year 2000". David Glass, the President of Wal Mart, thought the figure was too low, he believes that only 30% to 40% of the existing independent retailer would survive to the year 2000. These independent retailers now serve on their local Chamber of Commerce or numerous other affiliations, and are the backbone of this society. I believe the community will be much weakened without the existence of the local independent retailer.

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I am not a legislator or policymaker and, to the extent HB 2792 further regulates the day-to-day operation of small business, I am opposed to it--but to the extent it clarifies and simplifies interpretation of the Kansas Consumer Protection Act, I support this Bill.

This Bill is probably not the definitive solution to government's overregulation of small business. I think that the overregulation and bad legislation is contributing to the extermination of small businesses. This Bill was prepared with a pure heart by some Sedgwick County retailers and the Sedgwick County District Attorney/s office. Retailers need clarity in the consumer protection area, they have no practical way to challenge their County Attorney over interpretation of consumer law.

The governing bodies and their ambiguous and egregious rules have done enough to bring about the demise of merchants. I urge you to do something to bring clarity and simplification back into the rules of advertising, and I believe that House Bill #2792 takes strong steps in doing this.

Thank you for your time. If you have any questions, I'll be happy to answer them.

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To HOUSE COMMITTEE ON JUDICIARY

From Subject: HOUSE BILL #2793--Concerning Used Vehicle Warranties

From KIADA, Kansas Independent Auto Dealers Association

Mr. Chairman and Members of the Committee,

My name is Lois Cohorst, and I am a board member of Kansas Independent Auto Dealers Association representing over 200 used car dealers.

KIADA is against House Bill #2793 for a number of reasons:

- #1 Bill 2793, should it become law, would raise the cost of a used vehicle sold in Kansas \$500 to \$1000 to furnish warranties and a buy-back reserve account. Low income people will not be able to afford vehicles at all. They have trouble paying for them now.
- #2 The bill will turn used vehicle dealers into assurities for everyone, which is unfair. The dealer will have to warranty the vehicle like the MSO warranty, but without the car manufacturer's backing. And, the dealer will also have to warranty the independent mechanic's work. (These are two departments in which he has no control)
- #3 The bill does not allow for customer trade-in warranty. In a trade, both parties are selling vehicles, but according to this bill, only the dealer is liable.
- #4 Section six allots all rights to the consumer. Should it happen that the consumer imagines a problem, all other systems provide an arbitration board, that is a "qualified" impartial 3rd party. This bill doesn't provide a qualified arbitrator, but gives the consumer all rights and the independent vehicle dealer none.
- #5 Kansas Independent Auto Dealers Association does agree to the "AS IS" section which allows a vehicle under \$2000 and over 100,000 miles to be free of warranty. (It's impossible to out-guess this category of vehicle)
- #6 Section 2 eludes to a warranty with "mechanically operational and sound" wording. "Mechanically operational and sound" covers a lot of territory. Many "consumers" don't even qualify. Does this phrase include the engine, transmission, power seats, power windows, and tires? The wording on this bill is ambiguous and open to controversy.
- #7 The bill will promote consumer fraud. Consumers will legally be able to trade vehicles every three months for free, if a dealer has to refund full purchase price. The consumer will get paid for time and inconvenience, and all on the consumer's word.
- #8 The Kansas Consumer Protection Act already protects consumers from vehicle dealer fraud. We have been in the Auto business for nearly 30 years. We guarantee our vehicles fairly, and have increased return customers yearly. A dealer who is not dealing honestly should not be in business.

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Attach #11



KANSAS INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION



Citizens Bank & Trust Building • 6th & Humboldt • Manhattan, Kansas 66502
Phone: 913-776-0044 FAX: 913-776-7085

TO: House Committee on Judiciary
FROM: Kansas Independent Automobile Dealers Association
DATE: February 6, 1992
SUBJECT: Testimony on HB 2793 -- Concerning Used Car Warranties

Mr. Chairman and Members of the Committee:

I am Dan Carlson, Chairman of the Board of the Kansas Independent Automobile Dealers Association, representing over 200 used car dealers.

We appear today as opponents to House Bill No. 2793. However, on a positive note, there is one part of this bill that our association will support and that is the \$2,000 or less sale price or over 100,000 miles known as the vehicle "As Is" sale. As all other industries have faced price increases, the used automobile market has gone up even more. I am an owner/operator of an Auto Auction, and I have seen many fifteen (15) year old vehicles with over 100,000 miles wholesale for over \$2,000 and are being sold "as is" dealer to dealer. Yet with our present implied warranty system these same vehicles carry warranties when they are retailed to the consumer. I know of some fifteen (15) year old \$100,000 homes that are not subject to the same warranties when sold that apply to automobile dealers.

We have many questions concerning the expressed warranty language in this bill. What does it mean by the motor vehicle being operational and sound? Does this cover the radio, power seats, exhaust, air conditioning, and the four wheel drive and front wheel drive components? Many of these items vary greatly in price in different makes of automobiles. This also raises many gray areas of coverage to both the consumer and the selling dealer.

This leads to the language on consumer misuse. I could see many legal fights over who was responsible for the mechanical failure. Now, with a limited warranty of say 50-50, this gives the consumer a vested interest in the vehicle and discourages misuse.

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Individually we struggle to be heard—Collectively we cannot be ignored.

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According to the language of this bill, a dealer must refund the full purchase price, including sales tax, if the malfunctions or defects cannot be fixed. Is this going to cause a dealer to have a "loss reserve account" or cause a bond to cover any transactions? The dealer could misuse the express warranty to their advantage by selling a great volume of automobiles and then going out of business.

We believe that the expressed warranty language in this bill discriminates against the small independent dealer. Many of the used vehicles that new franchise dealers sell are program cars which are current or one year old model vehicles. These vehicles, in many cases, still have full factory warranties left at little or no cost to the franchise dealer. Small independent dealers are excluded from buying these vehicles at auctions. New franchise dealers could conceivably fix other vehicles at little cost under other warranty programs not available to independent dealers.

In closing, we feel that the expressed warranty language in this bill leaves numerous questions either unanswered or in gray areas concerning the mechanical condition of vehicles. This language could easily lead to widespread misuse of vehicles and customer trust. It will ultimately cause dealers to raise their prices to cover the added cost of doing business and in the end the consumer will pay for it.

Thank you for your time and consideration.

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