

Approved 4-30-92
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Rep. John Solbach at
Chairperson

3:30 ~~a.m.~~/p.m. on March 25, 1992 in room 313-S of the Capitol.

All members were present ~~except~~

Committee staff present:

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

Conferees appearing before the committee:

Suzanne James, Topeka, KS
State Representative Ruth Ann Hackler
Edwin Van Petten, Assistant Attorney General
Eugene Hackler, Attorney
Matt Lynch, Judicial Council
Ben Coates, Kansas Sentencing Commission
Franklin Theis, District Judge

The chairman called the meeting to order.

Testimony on SB 479 was given by Suzanne James. (Attachment #1) She is opposed to SB 479.

Hearing was opened on HB 2973, natural death act procedures in absence of a declaration. Ruth Ann Hackler testified in favor of HB 2973. (Attachment #2) She also presented testimony from John Holmgren, Catholic Health Association of Kansas, in favor of HB 2973. (Attachment #3)

Eugene Hackler, Attorney, testified in favor of HB 2973. (Attachment #5) He said he represents over 60 nursing homes. He answered committee members questions.

Edwin VanPetten, Assistant Attorney General, testified that he wanted SB 595 amended into SB 358. (Attachment #4) He wanted an additional amendment on page 2 of SB 595, lines 13-15 to change "\$5,000 to \$1,000".

Hearing on SB 358 resumed.

Matt Lynch, Judicial Council, said that the Judicial Council has been working on SB 358 for approximately three years.

Representative Vancrum expressed concern that penalties for certain sex crimes seem to be reduced in SB 358. It was pointed out that these were restructured. Discussion followed.

Ben Coates, Kansas Sentencing Commission, said if SB 479 were passed he is prepared to merge the penalties into SB 358.

The committee returned to testimony on SB 479. Franklin Theis, District Judge, testified he did not agree with the sentencing guidelines as set forth in SB 479. His concern is that the areas for departure are too narrow. He said the guidelines are crime-oriented, not offender oriented. He said evidence at a sentencing hearing would no longer be used if this bill were passed. The burden is on the State to present evidence at a sentencing hearing, and if they do not do this effectively, a judge would have no recourse. He thought that departure appeals would be substantial. He felt it would be reasonable to have a safety valve for judges departure for indeterminate sentences. He felt the provision for substantial and compelling is too hard to get over.

Meeting adjourned at 5:08 P.M. Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

GUEST LIST

COMMITTEE: House Judiciary

DATE: 3-26-92

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Brandon Myers	Landon St. Off. Bldg	K-HRC
Michael J. BRUNGAUPT	Landon S. Bldg	K-HRC
Don Horton	1100 Bank St Topeka	Delta Dental
Sara F. Ullmann	Olathe, KS	Reg. of Deeds Assn
Ginda Finckam	Marysville, KS	Reg. of Deeds Assn
Jusie Farmer	Lead, KS	Reg. of Deeds Assn
Jacqueline Cortright	Topeka KS	KS Sent. Comm.
Blaine Carter	Topeka	K.S.C.
Joseph Kraling	Topeka	LWV/KS
Paul Hugg	20995 Walker Rd Spring Hill KS 66083	SHHS
Steve Hatt	SPRING HILL	SHHS
Jim Clark	Topeka	KCPAA
Jeff McCroffemeier	"	H&A
ALAN COBB	Wichita	Delta Dental
Mary Ellen Conlee	Wichita	Delta Dental
LARRY MAGILL	TOPEKA	IND. INS. AGENTS
Thomas M. Tuggh	Concordia	Dist. Mag. Judge
Kathryn Carter	Jamestown	Dist. Mag. Judge
Lawrence H. Peterson	Gove	Dist. Mag. Judge
Jerry Carter	Topeka	Div. of Arch. Serv
Martha Gebhart	Topeka	KDHR/CDC
Richard M. DeBour's DM	Manhattan	Kansas State U.
Russ FREY	Topeka	KS Vet Med Assoc
Mark A. Thompson	Manhattan	KSU
ESSEN PETERSON	Manhattan	KANSAS STATE UNIVERSITY

TESTIMONY IN OPPOSITION TO S. B. 479

My name is Suzanne James, and I live here in Topeka. I am here today, not to oppose the concept of sentencing guidelines, but to oppose some of the guidelines as outlined in the bill under current consideration. The bill in front of you is like the camel - a horse put together by committee. Many portions of this bill are designed to appease various special interest groups and as such are merely 'quick fixes' which are not, in my judgement, in the public interest nor would some of these proposed guidelines do much more than shift the power of sentence determination from courts to district and county attorneys. In short, I do not believe that these guidelines as written would solve the problems they were intended to and could very well worsen them. In principle, I favor sentencing guidelines especially those which would incarcerate violent offenders for longer periods, but I cannot support this bill in its present form.

That sentencing inequities exist between metropolitan counties and less populated counties cannot be denied, but these statistics do not consider the fact that many defendants receive longer sentences because they are repeat offenders whom courts have seen many, many times. In my opinion, these recidivistic defendants should receive longer sentences in the interests of public safety regardless of their race. Each of you knows that statistics can be manipulated to prove just about any preconceived hypothesis, and these statistics are deceiving.

I have four strong objections to this bill in its current form:

1. Nearly all discretion currently shared by courts and district attorneys in sentencing would be transferred solely to district attorneys. Our system works best when checks and balances exist. No checks and balances are written into this bill, and the abuse potential by means of discrimina-

HJC
3-25-92
Attach #1
108

tory and arbitrary plea bargains could be greater than already exists in the absence of checks and balances.

I believe I have a unique perspective about the abuse potential already in the hands of district attorneys, and I find the prospect that they could have even more authority under these guidelines truly a terrifying prospect. In December of 1989 my parents, Nancy and Lester Haley and their neighbor, Ida Mae Dougherty, were brutally murdered by Tyrone Baker during what has been called the worst crime spree in the history of Shawnee County. The Shawnee County District Attorney's Office wanted to plea away 1 first-degree murder charge, 5 aggravated kidnappings, and numerous lesser charges in exchange for a guilty plea to 2 first-degree murders. We were told that no judge in Eastern Kansas would sentence Baker to a longer period of incarceration. We, the surviving family members, felt differently, hired an attorney to stop the plea bargain and assist in Baker's prosecution. In two different trials during a two year period, Baker received consecutive sentencing on each count for which he was charged. He will not be parole eligible until the year 2088, substantially more than time than he would have served under the Shawnee County District Attorney's ludicrously generous plea bargain.

When we opposed and exposed the plea bargain publicly, no one in the District Attorney's Office would return calls. When I publicly spoke out about the fact the District Attorney asked family members of the murder victims to pay for a portion of Baker's trial, the District Attorney called me a 'professional victim' in print. When I objected to some questionable tactics used by Baker's attorney, I was labeled a "loose cannon cannon on the deck of justice" in a Baker pre-trial motion.

In the Game known as the criminal justice system, if the oppos-

HJC
3-25-92
Attach #1
204

attorneys played Officers of the Court, these sentencing guidelines would probably be acceptable. But opposing attorneys play the Game only to win. Truth is only a secondary consideration and crime victims are inconvenient nuisances representing obstacles in clearing court calendars.

Weapons used to kill and maim often disappear in a plea bargain allowing dangerous criminals to leave prison much earlier. Callous, brutal murders are routinely pled down and magically transformed into, what on paper at least, resemble a fistfight rather than the brutal crime murder is.

2. The framers of our Constitution knew and understood the necessity of checks and balances to preserve a free and democratic society. Such checks and balances are absent in this bill as it is currently structured. Their absence must inevitably lead to abuse.
3. To label this bill "Truth in Sentencing" is grossly deceptive. So-called 'good time' is still present, and in fact, inmates may not not have to serve their complete sentence.

This bill needs "Truth in Packaging"!

Victims and survivors of crime have struggled for more than a decade to obtain recognition and rights within the criminal justice system. This bill would do more to set back the cause of Victims' Rights than any piece of legislation you are likely to consider. In Kansas, victims and survivors have the right to write a Victim Impact Statement which is read by the judge as part of the pre-sentence investigation. It is abundantly clear that most judges not only read but consider the Victim Impact Statement carefully at sentencing. This bill as it is currently structured would completely negate the impact in the Victim Impact Statement. How the victim or

HSC
3-25-92
#1
394

vivor was affected by the crime would be completely irrelevant to the sentence the defendant receives.

As an advocate of victim's rights, I could only agree to such sentencing guidelines if victims or survivors or their appointed representative had the statutory right to reject any plea bargain under consideration in their case. I believe that judges must also have a greater role in sentencing than this bill allows in order to preserve checks and balances as well as to ensure that victims continue to have a voice in the system.

It is incomprehensible to those of us who have been victims or survivors of crime to understand why this Legislature would be leaning toward the adoption of sentencing guidelines which would strip victims of the only voice we have in the criminal justice system.

Please report this bill out unfavorably unless it is substantially amended to correct its many prima facie flaws.

Thank you for the opportunity to testify today.

Suzanne James
5345 N. W. 33rd Street
Topeka, Kansas 66618

HJC
3-25-92
#1
484

RUTH ANN HACKLER
 REPRESENTATIVE, FIFTEENTH DISTRICT
 JOHNSON COUNTY
 685 WEST CEDAR
 OLATHE, KANSAS 66061
 913-782-0445



TOPEKA

HOUSE OF
 REPRESENTATIVES

HB 2973

COMMITTEE ASSIGNMENTS
 MEMBER: EDUCATION
 PUBLIC HEALTH & WELFARE
 GOVERNMENTAL ORGANIZATION
 ARTS & CULTURAL RESOURCES

STATE CAPITOL BUILDING
 ROOM 112-S
 TOPEKA, KANSAS 66612

Thank you, Chairman Solbach and the Judiciary Committee members, for allowing me to present this bill. HB 2973 is concerned with providing for the withholding or withdrawing life-sustaining procedures in absence of a declaration; amending K.S.A. 65-28,106, 65-28,107 and 65-28,108 and repealing the existing sections.

This bill is based on Iowa law. It provides for priority of persons to make the decision for withholding or withdrawing life-sustaining procedures from a person who is in a terminal condition, who is comatose, incompetent or otherwise physically or mentally incapable of communication and has not made a declaration in accordance with the natural death act. As you know, as of December 1, 1991, all persons entering a health care facility are advised of the option of making such a declaration. Those who entered prior to that time may not have been informed and may not have such a declaration in place.

The priority is as follows:

- 1) The attorney designated to make treatment decisions for the patient diagnosed as suffering from a terminal condition, if the designation is in writing and complies with existing law.
- 2) The guardian of the person if one has been appointed, provided court approval is obtained in accordance with the provisions of the act for obtaining a guardian or conservator, or both.
- 3) The patient's spouse.

HJC
 3-25-92
 Hack #2
 B-7 3

- 4) An adult child of the patient or, if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation.
- 5) A parent of the patient, or parents if both are reasonably available.
- 6) An adult sibling.

The bill further provides for the technicalities of the declaration being drafted.

I am offering an amendment which provides for the formation of an Ethics Committee to advise the family members in the event of a conflict regarding the selection of persons for decisionmaking or regarding the decision to be made. The ethics committee shall be appointed by either the health care facility's administrator, the chairpersons of the health care facility's board of directors or the chief executive officer of the health care facility. The committee shall consist of a physician, the treating nurse, a spiritual advisor and an attorney. The sole function of this committee shall be as an advisory group and shall not be as the final decision maker regarding the withholding of life-sustaining procedures.

John Holmgren, Executive Director of Catholic Health Association of Kansas supports this bill and asked me to present you with his testimony. He is meeting with his Board of Directors and could not be here today.

I would like to introduce my in-house counsel and husband, Eugene Hackler, who spends most of his waking hours in the health care field addressing concerns of the elderly. He will also give testimony concerning this bill and will stand for questions.

Thank you for your support of this bill.

Kath Ann Hackler

*HJC
3-25-92
A Hack #2
2 of 3*

Proposed Amendment to HB 2973

On page 1, after line 40, by inserting a new subsection as follows:

"(b) In the event that there is a conflict regarding the selection of persons for decisionmaking or regarding the decision to be made and the patient is in a health care facility, the parties may consult an ethics committee of the health care facility for advice in resolving the dispute. The ethics committee shall be appointed by either the health care facility's administrator, the chairperson of the health care facility's board of directors or the chief executive officer of the health care facility. The membership of the ethics committee shall include a physician, the treating nurse, a spiritual advisor and an attorney. If an ethics committee has not been previously appointed, the health care facility administrator shall appoint a committee to address the present dispute. The sole function of the ethics committee shall be as an advisory group and shall not be as the final decisionmaker regarding the withholding of life-sustaining procedures. As used in this subsection, a "health care facility" means a facility which is organized to provide health care for patients or residents of the facility.";

In line 41, by striking "(b)" and inserting "(c)";

On page 2, in line 1, by striking "(c)" and inserting "(d)"; also in line 1, by striking "and (b)" and inserting in lieu thereof ", (b) and (c)"; in line 8, by striking "(d)" and inserting "(e)";

HJC
3-25-92
Att #2
303



Catholic Health Association of Kansas

John H. Holmgren • Executive Director
Jayhawk Tower, 700 Jackson, Suite 801 / Topeka, KS 66603 / (913) 232-6597

TESTIMONY

March 25, 1992

CATHOLIC HEALTH ASSOCIATION OF KANSAS

REFERENCE: HOUSE BILL 2973: SUPPORT

JUDICIARY COMMITTEE

Repr: John Solback, Chairperson
Repr: Denise Everhart, Vice Chairperson
Repr: Jim D. Garner, Vice Chairperson

The Catholic Health Association's members include hospitals, nursing homes, and charitable clinics. We are and have been supportive of advance directives for persons entering our institutions not only because of federal and state mandates relating to the need to inform patients of this protocol before or while in an institution, but also because of the need in relation to the wishes of the dying, and the concurrence of their guardians and loved ones relating to advance directives.

HB 2973 is supported for number of valid reasons, either in its present form, or as an amendment to the existing Natural Death Act.

1. This bill provides for the withholding of life-sustaining procedures from a patient who is in a terminal condition, where no declaration of intent is present or known, - then such declaration may be guided by a priority list of guardians, a spouse, adult children, a parent or parents, or an adult sibling. This protocol has been realistically followed in the past in hospitals and nursing homes, in the absence of a statutory right to do so, and is a part of our cultural heritage;

2. The bill provides for a witness to the withholding or withdrawing of life support; this is a further safeguard;

HJC
3-25-92
Attach #3
1 of 2

3. The act provides for an exemption from the provisions of the bill in the case of a pregnant woman where the fetus could develop to the point of live birth;

4. The act provides for immunity from criminal or civil liability for actions of those listed in the priority listing, where they follow the "express or implied" intentions of the patient."

5. HB 2973 covers criminal intent for falsifying or forging the wishes of the patient, and the punishment thereto;

Other provisions cover the fact that no one should be required to effect a declaration in order to obtain insurance, or effect an existing policy, nor shall the act in any way be considered as encouraging the act of suicide.

We would add the need to provide for an Ethics Committee to review and make a recommendation for any situation involving a dispute between the parties listed in Section 1, (a) 1 to 6, not a binding one. If an Ethics Committee does not exist, then the Chairman of the Board of Trustees, or the Administrator of the institution should appoint such a Committee, made up of a physician, the Administrator, a spiritual advisor, and a healing nurse, to review the situation and make a non-binding recommendation to the appropriate guardian or relatives.

Finally, it is noted again that this act would assist the medical facility or other health care provider to obtain a decision in cases where there is no advance directive, as was the situation in the Nancy Cruzan case in Missouri, where prolonged legal problems persisted and where the parents and the patient suffered as a result.

Thank you for your consideration.

John H. Holmgren
(913) 232-6597

#JC
3-25-92
#Hach #3
202



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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TESTIMONY OF
DEPUTY ATTORNEY GENERAL EDWIN A. VAN PETTEN
OFFICE OF THE ATTORNEY GENERAL
BEFORE THE HOUSE JUDICIARY COMMITTEE
MARCH 25, 1992
RE: AMENDMENT TO S.B. 358

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Bob Stephan I appear before you today to ask you to amend into Senate Bill 358 a bill on Construction Fund Fraud, Senate Bill 595. I have attached a copy of the bill to my testimony. I understand that Senate Bill 358 has become somewhat of an omnibus bill and that is why I am asking you to consider amending in Senate Bill 595, a bill that we did not have a hearing on in Senate Judiciary.

This bill addresses a criminal act which has fallen through the cracks of our criminal justice system previously. We believe it is needed now due to changes made in recent years to protect the innocent consumers, which have somewhat restricted suppliers and contractors in their ability to obtain lien protection. The provision will provide assurance that contractors will satisfy obligations from the construction funds, and places the proper burden on the prosecution to prove the intent to defraud, as is

#JC
3-25-92
Attach #4
1083

done with any crime involving a fraudulent act by the perpetrator, and as defined by K.S.A. 21-3110(9). This cause of action can only be brought after payment to the contractor of all funds due.

This bill was requested this year by the Attorney General's Consumer Protection Advisory Council, and it is my understanding that it is supported by the District Attorney's offices that have a division of Consumer Fraud. When the hearing on this bill was scheduled in Senate Judiciary, we also had two consumers who planned to testify to explain why such a bill is necessary. Due to time constraints, the hearing didn't occur.

I would ask for one change in this bill. On page 2, lines 13 and 15, change \$5,000 to \$1,000. This would reduce the threshold for a felony violation. This change is recommended by prosecutors who deal with this issue on a daily basis.

I thank you for your time on hearing this suggested amendment. On behalf of Attorney General Stephan, I ask for your support.

HJC
3-25-92
#Hach #4
28 3

Session of 1992

SENATE BILL No. 595

By Committee on Labor, Industry and Small Business

2-6

8 AN ACT concerning crimes and punishment; relating to deceptive
9 commercial practices; amending K.S.A. 21-4403 and repealing the
10 existing section.

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

12 Section 1. K.S.A. 21-4403 is hereby amended to read as follows:
13 21-4403. (1) A deceptive commercial practice is:

14 (a) The act, use or employment by any person of any deception,
15 fraud, false pretense, false promise, or knowing misrepresentation of
16 a material fact, with the intent that others shall rely thereon in
17 connection with the sale of any merchandise, whether or not any
18 person has in fact been misled, deceived or damaged thereby; or

19 (b) construction fund fraud, as defined in subsection (2)(e).

20 (2) The following definitions shall be applicable to As used
21 in this section:

22 (a) "Merchandise" means any objects, wares, goods, commodities,
23 intangibles, real estate or services.

24 (b) "Person" means any natural person or his such person's legal
25 representative, partnership, corporation (domestic or foreign), com-
26 pany, trust, business entity or association, and any agent, employee,
27 salesman, partner, officer, director, member, stockholder, associate,
28 trustee or cestui que trust thereof.

29 (c) "Sale" means any sale, offer for sale, or attempt to sell any
30 merchandise for any consideration.

31 (d) "Construction funds" means all construction loans or moneys
32 otherwise received for the payment of improvements to real property.

33 (e) (i) "Construction fund fraud" is the failure with intent to
34 defraud by an owner, contractor, owner-contractor or subcontractor
35 to pay invoices or contractual obligations within 30 days of final
36 receipt of all construction funds due such owner, contractor, owner-
37 contractor or subcontractor, exposing the property under construc-
38 tion or improvement to the filing of one or more mechanic's liens.

39 (ii) If an owner, contractor, owner-contractor or subcontractor
40 is a corporation or any entity other than an individual, such cor-
41 poration and other entity and its managing officers shall be re-
42 sponsible for adhering to and be subject to the requirements and
43

1 penalty of this section.

2 (iii) Nothing in this section shall replace or in any manner affe-
3 the mechanic's or materialman's lien remedy provided by law and
4 this section shall apply notwithstanding the filing of a lien.

5 (3) This section shall not apply to the owner or publisher of any
6 newspaper, magazine, or other printed matter wherein in which an
7 advertisement appears, or to the owner or operator of a radio or
8 television station which disseminates an advertisement, when such
9 owner, publisher or operator had no knowledge of the intent, design
10 or purpose of the advertisement.

11 (4) A deceptive commercial practice as provided in subsection
12 (1)(a) is a class B misdemeanor. A deceptive commercial practice as
13 contained in subsection (1)(b) in an amount which exceeds \$5,000
14 on any one project is a class D felony. A deceptive commercial
15 practice as defined in subsection (1)(b) in an amount of \$5,000 or
16 less on any one project is a class A misdemeanor.

17 Sec. 2. K.S.A. 21-4403 is hereby repealed.

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

Handwritten notes: HSC 4/24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

**TESTIMONY OF EUGENE T. HACKLER
HOUSE BILL NO. 2973**

My name is Eugene T. Hackler, and my wife is Representative Ruth Ann Hackler. My firm represents about 60 nursing homes. I am one of 15 members of the Ethics Task Force of the American Association of Homes for The Aging which Task Force has published a White Paper on ethics and care treatment issues to its 3,800 members.

Nurses, nursing home administrators and families call us an average of 20 to 30 times each year to help them make decisions on the withdrawing of life-sustaining procedures.

There is a need for this family consent bill because lawyers and health care providers cannot, with certainty, advise their clients who in the family has authority to make treatment decisions.

The Kansas Department of Health and Environment, in its October, 1991 NURSING FACILITIES PROGRAM "FACT SHEET", reports:

"Kansas does not have a specific "family consent" statute. Therefore, the legal authority of family members to consent to admission or treatment in non-emergency situations cannot be stated with certainty. A spouse or adult child does not have clear authority under Kansas law to make treatment decisions. Therefore, any dispute among family members or the need for intrusive procedures in non-emergency situations may require the appointment of a guardian or other legal action. Issues concerning family consent should be carefully reviewed on a case by case basis. The facility may need to seek advice from their legal counsel."

Care givers are timid (as they should be) when making withholding of treatment decisions without knowing who has legal authority when the resident or patient cannot decide and there is

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HJK
3-25-92
Attach #5
1 of 2

no advance directive (medical power of attorney or living will).

Families should not be required to go to court for authority to consent.

This Act supplements the present Natural Death Act.

The person consenting is to be guided by the express or implied intention of the patient.

A witness must be present when the decision is made.

Consent by the family cannot be made if the patient is pregnant.

A proposed amendment to HB2973 should be a part of the bill which provides for an ethics committee, if there is a conflict. That committee can help and must consist of a physician, a treating nurse, a spiritual advisor and an attorney.

This is a good bill and I urge its passage. If you have questions I would be glad to try to answer them now or later. My phone number is (913) 764-8000.

Eugene T. Hackler

HACKLER, LONDERHOLM, HINKLE,
CORDER, MARTIN & HACKLER, Chtd.
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HJC-92
3-25-92
Attach #5
2082