

JUDICIARY SUBCOMMITTEE ON CRIMINAL LAW

Senator Jerry Moran, Chairman

February 25, 1992
10:00 a.m.

SB 649 - possession or transportation of incendiary or explosive device to include pipe bombs.

PROPOSERS

James Clark, Kansas County and District Attorneys Association (ATTACHMENT 1)

OPPOSERS

none appeared

SUBCOMMITTEE RECOMMENDATION: to recommend favorable for passage.

SB 650 - escape from custody includes persons committed to state security hospital.

PROPOSERS

James Clark, Kansas County and District Attorneys Association (ATTACHMENT 2)
T. R. Gross, Pawnee County Attorney (ATTACHMENT 3)

OPPOSERS

none appeared

SUBCOMMITTEE RECOMMENDATION: to recommend favorable for passage.

SB 651 notification to victims of application for pardon commutation of sentence.

PROPOSERS

Julienne Maska, Statewide Victims' Rights Coordinator, Office of Attorney General (ATTACHMENTS 4 and 5)
Chris Biggs, Geary County Attorney (ATTACHMENT 6)
James Clark, Kansas County and District Attorneys Association (ATTACHMENT 7)

OPPOSERS

none appeared

SUBCOMMITTEE RECOMMENDATION: amend as suggested by the Attorney General, make effective on publication in the Kansas Register, and to clarify "attempt of notification"; and that the bill be recommended favorable as amended.

SB 648 - creating the crime of abuse of power and authority conferred by a durable power of attorney document.

PROPOSERS

Melanie Jack, Kansas Bureau of Investigation (ATTACHMENT 8)
Arris Johnson, Hays, Speaker of the Kansas Silver Haired Legislature (ATTACHMENT 9)
John Holmgren, Catholic Health Association of Kansas

OPPOSERS

Alice Nida, Kansas Department on Aging (ATTACHMENT 10)

SUBCOMMITTEE RECOMMENDATION: awaiting amendatory language from conferees.

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Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX (913) 357-6352

EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of

SENATE BILL NO. 649

The Kansas County and District Attorneys Association supports SB 649, which amends K.S.A. 21-3732 by expanding the definition of incendiary device to include pipe bombs.

The problem that arises is that the only reported case construing the statute applies the rule of strict construction in criminal cases, and holds that since the device involved was a railroad torpedo, it was not included in the statutory definition of "molotov cocktail", and the statute did not apply. In re D.W.A., 244 Kan. 114, 765 P.2d 704. The Supreme Court clearly limits the statute to a molotov cocktail, and specifically excludes contact explosives. There are no reported cases that make a determination as to other kinds of explosives equipped with a fuse, wick, or any other detonative device as described in the statute (such as a pipe bomb). The Court of Appeals, on the other hand, has upheld the sufficiency of a complaint alleging a violation of the statute which omitted reference to "molotov cocktail". State v. Kirkwood, 62996, an unpublished opinion dated December 22, 1989. But the case actually involved molotov cocktails.

In conclusion, given the more common use of pipe bombs as the explosive of choice, K.S.A. 21-3732 should be amended to specifically include pipe bombs, as the language in SB 649 presently does; or more generally, to include any type of explosive device equipped with a fuse, wick, or any detonative device. This could be accomplished simply by deleting the reference to "molotov cocktail".

*Criminal Law Subcommittee
February 25, 1992
Attachment 1*

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EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of

SENATE BILL NO. 650

The Kansas County and District Attorneys Association supports Senate Bill 650, which amends the statutes dealing with escape from custody to include those persons committed to Larned State Security Hospital after being found not guilty by reason of insanity. As pointed out by the attached statement from T.R. Gross, Pawnee County Attorney, the escape of such persons poses a serious threat to public safety and needs no further elaboration.

There are two other concerns that the bill raises:

1. Making a crime out of what is basically a civil commitment. This issue has been considered and decided in favor of the public safety in K.S.A. 21-3611, aggravated juvenile delinquency, which among other acts, makes it a class E felony the second time a juvenile runs away from an SRS institution after having been declared a juvenile offender, which is a civil proceeding.
2. The possible impact on the criminal justice system. Such instances described are rare, after all it is a security hospital. Further, actual convictions may be difficult, as a defendant will surely raise the defense of insanity. The real purpose behind SB 650 is to allow rapid detection and apprehension through entry into NCIC and coverage by extradition proceedings, and not to further punish the offender.

Criminal Law Subcommittee
February 25, 1992
Attachment 2



I. R. GROSS, Pawnee County Attorney

(316) 285-2139 • Pawnee County Courthouse, Larned, Kansas 67550

February 24, 1992

Committee Members
Senate Judiciary Committee

RE: Senate Bill #650

It was at my request that Senator Moran has introduced the above captioned legislation. Since Pawnee County houses the only State Security Hospital in Kansas, these changes are almost entirely directed toward my jurisdiction. I would like to try to express how vital these changes are to the safety of the people of the State of Kansas and elsewhere.

When a person is committed to State Security Hospital by a plea of not guilty by reason of insanity under K.S.A. 22-3428, they are found to have committed the alleged crimes, but not had the ability to form the criminal intent necessary for a criminal conviction due to mental problems. These persons are usually involved in some of the most violent and public cases in our state. As our laws now provide, if a person committed under K.S.A. 22-3428 escapes from the custody of State Security Hospital he cannot be charged with the crime of escape from custody. To establish that crime he must be held under a charge or conviction. The recourse is to hold him in contempt of court for violating his commitment. His name cannot be entered in the crime computer and since it is a civil matter, he cannot be extradited. This means that some of the most dangerous persons in our state could conceivably be loosed upon our community to wreck havoc, without legal recourse.

This problem surfaced recently when an individual at State Security Hospital held under K.S.A. 22-3428, attempted to escape. He had in the past plea not guilty by reason of insanity to crimes of kidnapping, rape, and aggravated battery. He is considered to be very dangerous at this time. If he had succeeded to escape, he planned on hiding out in Topeka. This would have put innocent Kansans at risk of being victims of violent crime.

In closing, I sincerely wish that each of you strongly back these changes. I am sorry that I am unable to personally argue my cause, however I cannot escape from my duties as County Attorney at this time.

Criminal Law Subcommittee
February 25, 1992
Attachment 3 1/2

If any of you have questions, please feel free to contact me.

Sincerely,

T.R. Gross

T.R. Gross
Pawnee County Attorney



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

Testimony of
Juliene A. Maska
Statewide Victims' Rights Coordinator
Before the Senate Judiciary Sub-Committee on Criminal Law
RE: Senate Bill 651
February 25, 1992

On behalf of Attorney General Bob Stephan and his
Victims' Rights Task Force, I encourage your support for
Senate Bill 651.

Our office has received complaints from victims and
victims' family members about not being notified of pardons or
commutation of sentences of inmates. We received one letter
from a woman who stated her mother had been stabbed to death
in 1982. The daughter was very upset to learn by reading it
in the newspaper and hearing on TV that the offender had
applied for clemency. This is not right!

Senate Bill 651 would require victims or victims' family
members to be notified by the Department of Corrections when
an offender has applied for a pardon or commutation of their
sentence. The notification program that has been established
by the Department of Corrections would be able to provide for
this notice to victims or victims' family members.

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Attachment 4*

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Since the Department of Corrections would be the first agency to know that an inmate has submitted an application for a pardon or commutation of their sentence, they should be the agency to do the notification to victims or victims' family members. This notification process would also correspond to the notice given to the prosecuting attorney and the judge of the court in which the defendant was convicted.

Senate Bill 651 would strengthen the rights of crime victims and I ask for your support. Thank you.

4-7/2

FEB 28 1992

SBB51



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 27, 1992

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

Senator Jerry Moran
State Capitol, Room 143-N
Topeka, Kansas 66612

RE: Senate Bill 651

Dear Senator Moran:

As per your request, Roger Werholz, Department of Corrections; Gordon Self, Revisor's Office; and myself discussed language which needed to be added to Senate Bill 651:

"Notification shall be made to any victim of the crime who is alive and whose address is known to the secretary of corrections or, if the victim is deceased, to the victim's family if the family's address is known to the secretary of corrections."

Also, "This notice shall be given to the victim or victim's family member if the inmate was convicted of any crime in article 34, 35, or 36 of chapter 21 of the Kansas Statutes Annotated."

If you have further questions, please advise.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL
ROBERT T. STEPHAN

Juliene A. Maska
Juliene A. Maska
Victims' Rights Coordinator

JAM:mr
cc: Senator Oleen
Roger Werholz, DOC
Gordon Self, Revisor

Criminal Law Subcommittee
February 25, 1992
Attachment 5 1/1

SB 651

GEARY COUNTY ATTORNEY

COURTHOUSE
JUNCTION CITY, KANSAS 66441

CHRIS BIGGS - COUNTY ATTORNEY
THOMAS P. ALONGI - ASSISTANT
DAVID R. PLATT - ASSISTANT

(913) 762-4343

Legislative Testimony
February 25, 1992

I have prepared the written testimony for the Committee, because I am unable to rearrange my Court cases for February 25, 1992.

On March 11, 1991, Brenda Lemon asked for clemency for her 1983 conviction for first degree murder. Her parole eligibility date was in July 1998. According to the Governor's office, the files reflect that notice was sent to the Sentencing Judge and his comments making no recommendation were received in March, 1991. Neither the County Attorney's office nor the victim was contacted or notified.

The first knowledge we had of the pending clemency application was in November 1991. The first time we knew anything about her clemency application was when we received a notice from the Clerk that the Governor had commuted the sentence to ten to twenty years. This act made the defendant immediately parole eligible.

We lodged our objections to the Parole Board which ultimately rose to the occasion and denied the parole. However, because of the Governor's action, the defendant must be released in 1993 as that is her conditional release date under the new sentence.

The defendant in this case committed a cold, calculated and premeditated murder. She had her husband killed when he returned from treatment for depression. With one stroke of a pen, the Governor set aside the findings and the intentions of the jury, the victim's family, the legislature, the Appellate Court and the Sentencing Judge. The least that should be required is actual notification to the victim and the prosecution so that objections may be lodged in a timely manner. I would support legislation promoting such notification requirements.

Sincerely yours,


Chris Biggs

Criminal Law Subcommittee

February 25, 1992

Attachment 6 1/1

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EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of

SENATE BILL NO. 651

The Kansas County and District Attorneys Association strongly supports Senate Bill 651, which extends the requirements for notification of crime victims to those instances in which the Governor pardons or commutes a sentence. The bill was introduced at the request of a member of the KCDA Board of Directors, and a similar measure has been introduced in the House at the direct request of KCDA (HB 3062).

The importance of the bill is to establish consistency in victim notification. In 1989 extensive notification requirements were passed establishing that crime victims had the right to be notified of and be present at the critical stages of their assailant's criminal case. Initially, it was thought that the county or district attorney could insure these rights, but we learned that not all the proceedings that affect victims are conducted by the county or district attorney. In 1991, the Legislature added K.S.A. 74-7338, requiring the Secretary of Corrections to give notice of public comment sessions in parole considerations for class A felons. SB 651 merely adds another critical, albeit infrequent, stage of the proceedings in which crime victims rights are recognized.

KCDA urges your favorable consideration of this bill.

Criminal Law Subcommittee
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Attachment 7 7/1



JAMES G. MALSON
DIRECTOR

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL

STATE OF KANSAS

1620 TYLER

TOPEKA, KANSAS 66612-1837

(913) 232-6000



ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY

MELANIE S. JACK, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE SENATE JUDICIARY SUB-COMMITTEE
REGARDING SENATE BILL 648
FEBRUARY 25, 1992

Mr. Chairman and Members of the Committee:

My name is Melanie Jack, I am an Assistant Attorney General assigned to the Kansas Bureau of Investigation, and am here today in support of Senate Bill 648.

Senate Bill 648 will make it clear that an appointment as a power of attorney is no longer a license to steal. In the past six months I have had the opportunity to review several cases involving the misuse of a power of attorney. In each of these cases a family member or family associate had the ability to wrongfully influence an elderly person to obtain the power of attorney. In each of these cases the amount of money misused exceeded \$20,000.

A durable power of attorney is intended to aid the elderly or disabled when they are no longer capable of handling their finances. This bill would protect that group of people who are most vulnerable to overreaching by relatives and others familiar with their financial situation. The potential for abuse of a power of attorney is great and the passage of this bill would allow victims a remedy in criminal court.

I would like to suggest to the committee two definitions to be included within the bill which define a durable power of attorney act and

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the fiduciary duty. Black's Law Dictionary defines a durable power of attorney as "An instrument authorizing another to act as one's agent or attorney. A durable power of attorney exists when a person executes a power of attorney which will become or remain effective in the event he or she should become disabled" (5th Edition). Black's Law Dictionary defines fiduciary as "A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking" (5th Edition).

These definitions would not only allow a clearer definition of the behavior which is prohibited, but would also assist the judge in drafting jury instructions, and in turn would help a jury in determining guilt.

I would be happy to stand for questions.

#069

8-2/2

SENATE BILL No. 648

I am Arris Johnson, Hays, Kansas, Speaker of the Kansas Silver Haired Legislature. I speak in favor of Senate Bill No. 648.

We recognize that the power of attorney is a valuable document in retirement and estate planning and is widely used by the elderly throughout Kansas. We also recognize it as an alternative to court-imposed guardianship and conservatorship and it allows Kansas' older citizens to maintain their independence longer and to a greater degree.

We also recognize that the principal is in a vulnerable position and that the durable power of attorney is open to abuse by unethical and unscrupulous agents as is witnessed by newspaper stories with which we are all familiar. It is another form of elder abuse and thus in violation of public policy in the state of Kansas.

The Kansas Silver Haired Legislature in its session last October voted unanimously in favor of asking you, the Senate of Kansas, to support legislation which will provide criminal penalties for an agent of a durable power of attorney who abuses the power and authority of the instrument. Senate Bill No. 648 provides these penalties and we thank you for this legislation. We support you wholeheartedly in its passage.

Thank you for allowing me to present this support.

*Criminal Law Subcommittee
February 25, 1992
Attachment 9*

Testimony on SB 648
by
Kansas Department on Aging
before
Senate Judiciary Subcommittee on Criminal Law
February 25, 1992

The Kansas Department on Aging supports the concept of recognizing abuse of durable powers of attorney and attempting to implement a statutory process to recover misappropriated funds. We, however, support a civil penalty instead of a criminal penalty.

The Department on Aging and its grantees regularly receive complaints of misuse of durable powers of attorney. Abuse can occur in both the creation of the instrument and in its subsequent misuse. A person can be coerced, intimidated or forced to give another person the durable power of attorney. The agent, who holds the power, can use the power granted to misuse the funds, steal or misappropriate the funds. This is wrong.

But is the criminal penalty the appropriate answer to correct the problem? The criminal penalty will be difficult to prosecute. The criminal penalty requires first a decision to prosecute by the district attorney. Prosecution under theft statutes requires the victim to testify. The case would have to be proven under the higher criminal standard, beyond a reasonable doubt. Court prosecution is more difficult than recovery under the civil process.

We support creation of a private right of action for the victims of abuse. A private right of action, with a broad standing provision, puts the enforcement tools in the hands of those with the will to pursue the case. Standing should extend to the heirs, both testate and intestate, or those upon whom the burden of caring for the incompetent principle, whose assets had been wasted, would fall.

We encourage the legislature not to make the durable power of attorney so complex that individuals will be reluctant to serve as agents. The durable power of attorney is a beneficial legal tool for many families. We do not support using the guardianship process for all incompetent persons.

We would, therefore, encourage legislation to correct the abuses of durable powers of attorney. However, we believe civil sanctions to be preferable to criminal ones.

*Criminal Law Subcommittee
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Attachment 10 1/1*