

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Vice-Chairperson Terry Presta at 3:40 p.m. on March 13, 1997 in Room 313--S of the Capitol.

All members were present except: Representative Adkins (excused)  
Representative Carmody (excused)  
Representative Kline (excused)  
Representative Wagle (excused)  
Representative Shriver (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department  
Mike Heim, Legislative Research Department  
Jill Wolters, Revisor of Statutes  
Jan Brasher, Committee Secretary

Conferees appearing before the committee: Jim Clark, County and District Attorneys Association  
Steven Obermeir, Assistant District Attorney, Johnson County  
Nanette Kemmerly-Weber, Allen County Attorney  
Pam Moses, Clerk of the District Court, Reno County  
Paul Shelby, Assistant Judicial Administrator, Office of Judicial Administration  
John Peterson, Kansas Land Title Association  
Elwayne Pomeroy, Kansas Credit Attorneys Association

Others attending: See attached list

Vice Chair Representative Presta called the meeting to order at 3:40 p.m.

Representative Mays made a motion to approve the minutes of 2/10, 2/11, 2/12, 2/17, 2/20 and 3/12. Representative Swenson seconded the motion. The motion carries.

HB 2187: Crimes and punishment lesser included crimes.

Mr. Jim Clark, County and District Attorneys Association, testified in support of HB 2187. The conferee stated that this bill is the latest effort to find a legislative remedy for the lesser included offense instructions after the morass created by State v. Fike. The conferee stated that this bill will provide that the defense must request the "lesser included" instructions, otherwise that claim is waived. The conferee cited a number of cases to illustrate the problem by citing the Kansas Supreme Court where the allegations in the charge and the evidence also include a lesser included offense. (Attachment 1)

Mr. Steven Obermeir, Assistant District Attorney, Johnson County, testified in support of HB 2187. The conferee referenced a number of cases where convictions were reversed, not because there was insufficient evidence to support it, but because some un-requested lesser included instruction was not given. The conferee stated that HB 2187 closes an appellate loophole by requiring the parties to present the issues to the trial judge at the time of the trial, and not wait to bring the issue up for the first time at an appeal filing. (Attachment 2)

The conferee discussed with Committee members issues concerning the reason the defense should request these instructions and whether this bill will affect the plea bargaining process. The conferee stated that this bill will maintain the conviction unless "clearly erroneous" actions have occurred.

Nanette Kemmerly-Weber, Allen County Attorney, spoke in support of HB 2187. The conferee stated the currently without this bill, the prosecutor has to second guess what is going to happen on appeal. The conferee stated that the passage of this bill will help decrease the appellate docket by eliminating appeals based solely on a claim of error for failure to give a lesser included offense instruction. (Attachment 3)

The Vice Chair closed the hearing on HB 2187.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON Judiciary, Room 313-S Statehouse, at 3:30 p.m. on March 13, 1997.

SB 89:                    Limited actions, approval of judge related to claims for possession of property

Pam Moses, Clerk of the District Court, Reno County, spoke in support of SB 89 on behalf of the Legislative Committee and the Kansas Association of District Court Clerks and Administrators. The conferee stated that this bill is requested to require a judge's signature in lieu of the clerk's signature on K.S.A. 61-2605 forms 11, 20, 22, and 23. The conferee also requested that K.S.A. 61-2401(b) be changed to substitute judge for clerk in the area "if the bond shall be found to be sufficient, etc." (Attachment 4)

Paul Shelby, Assistant Judicial Administrator, Office of Judicial Administration, testified in support of SB 89. The conferee stated that current language has the clerk approving the bond to recover possession of specific personal property. The conferee stated that Office of Judicial Administration feels that the judge should approve the bond and sureties and not the clerk. Mr. Shelby stated that SB 89 will make the forms for executions consistent with 1994 legislation that amended K.S.A. 61-2605. (Attachment 5)

Vice Chairman Presta closed the hearing on SB 89

SB 216:                    Application of code of civil procedure to actions filed under the code of civil procedure for limited actions; renumbering of case.

John Peterson, Kansas Land Title Association testified in support of SB 216. The conferee stated that the purpose of this bill is to be certain that anytime a Chapter 61 proceeding is changed to a Chapter 60 proceeding, that the clerk of the district court will be required to assign the case a new Chapter 60 number. The conferee stated that this requirement is the only way for abstracters/title agents to know that the case is governed by Chapter 60 lis pendens and judgment lien laws. (Attachment 6)

Elwaine Pomeroy, Kansas Credit Attorneys Association testified in support of SB 216 and requested an amendment adding the contents of HB 2206 into SB 216. The conferee referred to K.S.A. 60-2003 and requested adding to the list of items "the mileage and fees of a private process server occurred in the service of process or in effecting any of the provisions or remedies authorized by the chapter." (Attachment 7)

The Vice Chair closed the hearing on SB 216.

The Vice Chair adjourned the meeting at 4:45 p.m.

The next meeting is scheduled for March 17, 1997.



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## Kansas County & District Attorneys Association

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### Testimony in Support of HOUSE BILL NO. 2187

House Bill 2187 is the latest effort (See SB 298, 1995 Session) to find a legislative remedy for the lesser included offense instructions after the morass created by State v. Fike, 243 Kan. 365, 757 P.2d 724 (6/14/88). In that case, the Supreme Court of Kansas held that instructions on lesser included offenses are required when: 1) there is an identity of elements; or 2) the allegations in the charge and the evidence also include a lesser included offense. This second prong has made nearly every criminal conviction suspect on appeal, as it not only requires the trial court to make a factual determination: whether the evidence establishes a lesser included offense; but also allows the appellate court to second-guess that factual determination. The following cases illustrate the problematic application of the second prong:

State v. Burgess, 62263, FR, 2/17/89, a conviction for voluntary manslaughter was reversed, the Court of Appeals finding that since there was some evidence of self defense, a jury could have found lawful conduct done in an unlawful manner, and it was error not to instruct on the lesser included offense of involuntary manslaughter.

State v. Ishman, 61992, SN 5/12/89, defendant convicted of lesser included offense of voluntary manslaughter appeals because his counsel objected to the instruction. The Court of Appeals held a defendant cannot control the giving of instructions as required in KSA 21-3701, in effect "go for broke" to either be convicted of the higher offense or acquitted. While the statute requires defendant to waive error if he fails to object, and the instruction is not given, where his objection is overruled and the instruction given, there is no error.

State v. Martinez, 62813, SG 9/8/89, a battery conviction was reversed as it was not a lesser included offense of aggravated battery, and the lesser included offense instruction should not have been given. The Court of Appeals held that where a shooting was involved, the only question was whether defendant did it intentionally or accidentally. If the latter, acquittal required. (Both the State and defendant objected to the instruction on those same grounds).

State v. Summers, 63348, NO 1/26/90, conviction for aggravated sexual battery reversed, not a lesser included offense of indecent liberties with a child. Trial court lacked jurisdiction over the lower offense, even where defense counsel requested the instruction.

State v. Smith, 68188, AT 7/2/93, defendant requested instruction on conspiracy as lesser included offense of aiding and abetting a burglary, the trial court granted request, and Court of Appeals reversed, holding it was not a lesser included offense, hence no jurisdiction.

State v. Ponds, 18 KA 2d 231 (4/9/93), the failure to instruct on criminal trespass as a lesser included offense of burglary was error, burglary conviction reversed.

House Judiciary  
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State v. Rush, 18 KA 2d 694 (8/27/93), a different panel of the Court of Appeals held criminal trespass not a lesser included offense of burglary.

State v. Embray, 69387, SG 5/6/94, the Court of Appeals holds that where the victim and defendant's testimony was contradictory, attempted rape conviction reversed for failure to instruct on battery. The Court acknowledged that State v. Arnold, 223 Kan. 715, held battery not a lesser included offense of rape, but that decision was 10 years before Fike.

State v. Rush, 255 Kan. 672 (7/8/94), the Supreme Court finally resolves the conflicting opinions of the Court of Appeals and holds that criminal trespass is not a lesser included offense of burglary. In so doing it attempts to clarify the second prong of Fike, it limits it to what the State is required to prove, not what it may prove.

State v. Diggs, 70632, WY 8/5/94, defense counsel did not object to instruction on criminal trespass as a lesser included offense of burglary, and even stated he wanted it. Criminal trespass conviction reversed for lack of jurisdiction, as no longer a lesser included offense of burglary.

State v. Rader, 256 Kan. 364, the Supreme Court finally holds theft by threat is not a lesser included offense of robbery.

State v. Horn, 20 KA 2d 689 (3/24/95), even though requested by defense counsel, instruction on aggravated sexual battery was error, as it is not a lesser included offense of aggravated sodomy, and conviction reversed. After noting the numerous appeals based on lesser included offense instructions, even those requested by defense counsel, the Court of Appeals states "Common sense tells us some remedy is needed. We believe most of the dense legal fog which shrouds claims of trial court errors based upon failure to instruct on lesser included crimes would diminish if our legislature would promulgate a statutory list of lesser included crimes for each felony crime found in our criminal code."

State v. Ochoa, 20 KA 2d 1014 (4/28/95) level 4 aggravated battery reversed for failure to instruct on levels 5, 7, and 8, indicating the addition of severity levels has exacerbated the instruction problem.

State v. Shannon, 258 Kan 425 (10/27/95) New test: lesser included offense instruction viewed in light most favorable to defendant.

State v. Faust, 73105, DK 2/16/96, defendant kicked baby sitter in face and ribs, resulting in loss of teeth. Aggravated battery conviction reversed for failure to instruct on battery, even though no request by defense counsel, since defendant testified she wasn't intending to hurt the victim.

State v. Kiser, 72046, RN 2/23/96, defendant charged with four counts of first degree murder, convicted of two second degree murders and two voluntary manslaughters, complains that voluntary manslaughter should not have been instructed as a lesser included offense as no evidence of heat of passion. The Court of Appeals finds that where defendant requested the instruction, actually benefitted by it, it was invited error.

## OFFICE OF DISTRICT ATTORNEY

PAUL J. MORRISON, DISTRICT ATTORNEY  
Steven J. Obermeier, Assistant District Attorney

March 13, 1997

### COMMENTS IN SUPPORT OF HOUSE BILL 2187

#### I. IDENTIFYING THE PROBLEM

Generally, an issue not presented to the trial court will not be considered by the appellate courts. K.S.A. 22-3414 provides no party may assign as error the giving or failure to give an instruction unless he objects thereto, unless the instruction is clearly erroneous. One of the few exceptions to this is the trial court's failure to give unrequested lesser instructions.

As a result, convictions are reversed, not because there was insufficient evidence to support it, not because the jury did not do its job, but because some unrequested lesser instruction was not given. The irony is that the jury should not even consider the lesser instructions unless it had a reasonable doubt as to the greater offense charged.

#### II. REASONS FOR LEGISLATIVE ACTION.

Sometimes the appellate courts can even disagree on what constitutes lesser offenses.

##### A. Robbery & Aggravated Robbery Cases

After State v. Blockman, 19 Kan. App. 2d 56 (1993) other aggravated robbery and robbery convictions were reversed; the Supreme Court eventually reversed the Court of Appeals on this issue [State v. Blockman, 255 Kan. 953 (1994)], but other robbery convictions were subject to reversal in the interim because of a lesser offense that was never requested.

##### B. Burglary & Aggravated Burglary Cases

Whether criminal trespass is a lesser included offense of aggravated burglary was the subject of opposite conclusions by separate Court of Appeals panels in State v. Ponds, 18 Kan. App. 2d 231 (1993) [finding it is a lesser included offense] and State v. Rush, 18 Kan. App. 2d 694 (1993) [finding it is not a lesser included offense]. The conflict between the two Court of Appeals decisions was resolved by the Kansas Supreme Court in State v. Rush, 255 Kan. 672 (1994).

##### C. Child Abuse Cases

State v. Allison, 16 Kan. App. 2d 321 (1991) [child abuse conviction reversed because unrequested lesser included offense battery was not given].

#### III. THE SOLUTION TO THE PROBLEM.

HB 2187 closes this appellate loophole by requiring the defendant or his attorney to propose the lesser instruction to the trial court at the time of the jury trial, and not for the first time after conviction while the case is on appeal.

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#3  
CERS

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## Kansas County & District Attorneys Association

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

March 13, 1997

House Judiciary Committee  
Kansas Statehouse  
Topeka, KS

Re: House Bill 2187

To Members of the Committee:

I speak to you in support of this bill as a prosecutor who has been the Allen County Attorney since 1984 and on behalf of the Kansas County & District Attorney's Association.

Every prosecutor, including myself, has horror stories regarding the problem of jury instructions regarding lesser included offenses. As the law currently stands, cases can be reversed by the Appellate Courts if the trial judge failed to give a lesser included instruction that the **appellate judges** think should have been given, even though the defendant's attorney didn't request it. Furthermore, the appellate courts have not been consistent in their decisions, which creates confusion among the attorneys and judges "in the trenches" and leads to further appeals and further confusion.

In every jury trial, valuable time is taken up trying to figure which possible lesser included offenses have been proven by the evidence presented, both by the state and the defendant. The time taken for drafting jury instructions is time that the jury spends waiting. These citizens who are doing their civic duty shouldn't left cooling their heels while the judge and attorneys try to second guess what the appellate court might decide if there is an appeal. A statute which clearly states that the failure to request jury instructions on lesser included offenses constitutes waiver would eliminate these long conferences and trials could proceed at an appropriate pace. Further, this statutory change would help decrease the already bloated appellate docket by eliminating appeals based solely on a claim of error for failure to give a lesser included offense instruction.

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K.S.A. 22-3414 is the general statute within the criminal procedure section regarding trials. This statute states that no party may assign as error the failure to give an instruction unless there is an objection which states distinctly the grounds for the objection. This bill would bring K.S.A. 21-3107 into line with 22-3414.

The State and victims are entitled to a fair trial, just the same as a defendant. Juries are entitled to respect for their time while performing their duty. Requiring defendants to make their requests for lesser included instructions known at the trial level is not unfair nor is it an impossible burden. Trial work is hard enough; forcing the attorneys and trial judge to second guess what appellate judges **might do** if there is an appeal, and trying to harmonize the inconsistent opinions is the real burden. You have an opportunity to do something which will make the wheels of justice grind a little faster and fairer.

Respectfully,



Nanette L. Kemmerly-Weber  
Allen County Attorney  
President, KCDA



SENATE BILL 89

Testimony of Pam Moses  
Clerk of the District Court  
Reno County  
Hutchinson, KS

DATED: March 13, 1997

Mr. Chairman and Members of the Committee:

I am here on behalf of the Legislative Committee with the Kansas Association of District Court Clerks and Administrators and appreciate this opportunity to state our views on SB89.

We are requesting K.S.A. 61-2605 forms 11, 20, 22, & 23 to reflect a judges signature in lieu of the clerks signature.

Changing the signature line from the clerk to the judge on Form 11-a "General Execution and Return" and Form 23 an "Execution on Foreclosure of secured Interest and Return" would make these forms parallel to Form 16 that was changed a couple of years ago.

Changing the signature line from the clerk to the judge on Form 20, an "Order for Delivery of Property in Replevin and Return" will conform with 61-2401b stating, "the judge may enter or cause to be entered an order for the delivery of property to the plaintiff".

Changing the signature line from the clerk to the judge on Form 22, an "Order for Possession of Property and Foreclosure of Secured Interest and Return" will conform with 61-2402b stating "a judge may enter or caused to be entered an order for the delivery of the property as provided in subsection (c)".

The changing of these forms 11, 20, 22 and 23 in K.S.A. 61-2605 would be consistent with the statutes and other forms therefore, eliminating confusion of our clerks and the attorneys as to who are to sign these particular forms.

We are also requesting K.S.A. 61-2401b to substitute judge for clerk in the area "if the bond shall be found to be sufficient, the judge shall approve the same and note the judges approval thereon". This is to correspond with other bond approvals by judges such as K.S.A. 61-2402.

Thank you for taking the time to listen to our views on these four forms. If you have any questions, I will be happy to answer them at this time.

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Senate Bill No. 89  
House Judiciary Committee  
March 13, 1997

Testimony of Paul Shelby  
Assistant Judicial Administrator  
Office of Judicial Administration

Mr. Chairman and members of the committee:

We appreciate the opportunity to appear in support of Senate Bill No. 89 which relates to the code of civil procedure for limited actions.

This bill was introduced on behalf of the Kansas Association of District Court Clerks and Administrators.

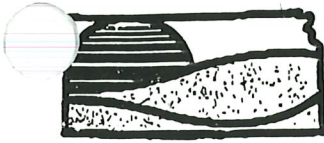
The bill amends K.S.A. 61-2401, which relates to procedures that the plaintiff, in an action to recover possession of specific personal property, files a bond with the clerk of the district court in not less than double the amount of the value of the property as stated in the affidavit or verified petition, or as found by the court at a hearing, with one or more sufficient sureties. Current language has the clerk approving the bond. We feel that the judge should approve the bond and sureties and not the clerk.

This amendment is found on Page 2, line 17.

In 1994, the legislature amended Form 16 of K.S.A. 61-2605 to require a judge's signature for a writ of restitution and execution. Forms 11 and 23 are also executions, but currently the forms provide for the Clerk to sign them. Our amendment would make the forms for executions consistent. The changing of forms 20 and 22 would make them consistent with this proposal.

We urge your favorable consideration for Senate Bill No. 89.

House Judiciary  
Attachment 5  
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# KANSAS LAND TITLE ASSOCIATION

PHR 12



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*Handwritten initials and number 6*

March 13, 1996

To: House Judiciary Committee

Re: Senate Bill 216

From: Kansas Land Title Association

This bill amounts to clean-up legislation to bring K.S.A. 61-1729 in conformity with K.S.A. 60-2418.

The purpose of the legislation is to be certain that anytime a Chapter 61 proceeding is changed to a Chapter 60 proceeding, that the clerk of the district court will be required to assign the case a new Chapter 60 number.

K.S.A. 60-2418 already requires that a Chapter 61 judgment must be assigned a Chapter 60 case number before it becomes a lien on real estate.

However, K.S.A. 61-1729 contains no such requirement for pending Chapter 61 cases that are moved to Chapter 60 proceedings.

Assigning a new Chapter 60 number to a previous Chapter 61 proceeding is the only way for abstracters/title agents to know that the case is governed by Chapter 60 *lis pendens* and judgment lien laws.

Kansas Land Title Association requests your support of Senate Bill 216.

Respectfully submitted,

*Roy H. Worthington*

Roy H. Worthington  
Kansas Land Title Association  
Legislative Committee

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*House Judiciary  
Attachment 6  
3/13/97*

7

REMARKS CONCERNING SENATE BILL 216

HOUSE JUDICIARY COMMITTEE

MARCH 13, 1997

Thank you for giving me the opportunity to appear before your committee on behalf of Kansas Credit Attorneys Association, which is a state-wide organization of attorneys whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

The organizations I represent support SB 216. We believe that it is helpful to have a case renumbered as though it had been filed under Chapter 60 when an order has been entered providing it will be governed by the provisions of Chapter 60. We understand that in some judicial districts, this procedure is presently followed.

We would respectfully request the committee to amend the bill by adding the contents of HB 2206 to SB 216. For your easy reference, I am attaching a copy of HB 2206.

K.S.A. 60-2003 is the statute which enumerates items that are allowable as costs when judgment is rendered. We feel it is appropriate to add to the list of items "the mileage and fees of a private process server occurred in the service of process or in effecting any of the provisions or remedies authorized by the chapter."

The services of a private process server are typically used when there is difficulty in getting service by ordinary methods or in cases when the statute of limitations is about to expire, and it is important to get service quickly.

Sedgwick County, by local court rule or order, presently authorizes the taxing of these items as costs. We believe that that practice should be made uniform throughout the state.

We would urge the Committee to amend the bill as we have requested, and report the bill favorably as amended.

I would be happy to respond to questions from the Committee.

*Clwaine J. Amery*  
House Judiciary  
Attachment 7  
3/13/97

## HOUSE BILL No. 2206

By Committee on Judiciary

2-4

9 AN ACT concerning civil procedure; relating to costs; amending K.S.A.  
10 60-2003 and repealing the existing section.

11

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

13 Section 1. K.S.A. 60-2003 is hereby amended to read as follows: 60-  
14 2003. Items which may be included in the taxation of costs are:

15 (1) The docket fee as provided for by K.S.A. 60-2001, and amend-  
16 ments thereto.

17 (2) The mileage, fees, and other allowable expenses of the sheriff or  
18 other officer incurred in the service of process outside of this state or in  
19 effecting any of the provisional remedies authorized by this chapter.

20 (3) Publisher's charges in effecting any publication of notices author-  
21 ized by law.

22 (4) Statutory fees and mileage of witnesses attending court or the  
23 taking of depositions used as evidence.

24 (5) Reporter's or stenographic charges for the taking of depositions  
25 used as evidence.

26 (6) The postage fees incurred pursuant to K.S.A. 60-303 or subsec-  
27 tion (e) of K.S.A. 60-308, and amendments thereto.

28 (7) Alternative dispute resolution fees shall include fees, expenses  
29 and other costs arising from mediation, conciliation, arbitration, settle-  
30 ment conferences or other alternative dispute resolution means, whether  
31 or not such means were successful in resolving the matter or matters in  
32 dispute, which the court shall have ordered or to which the parties have  
33 agreed.

34 (8) *The mileage and fees of a private process server incurred in the*  
35 *service of process or in effecting any of the provisional remedies author-*  
36 *ized by this chapter.*

37 (9) Such other charges as are by statute authorized to be taxed as  
38 costs.

39 Sec. 2. K.S.A. 60-2003 is hereby repealed.

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