Approved: 2-21-002
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Vice Chairperson Ward Loyd at 3:30 p.m. on February 4, 2002 in Room 313-S of the Capitol.

All members were present except:
Representative Judy Morrison - Excused
Representative Michael O'Neal - Excused

Committee staff present:
Jerry Ann Donaldson, Department of Legislative Research
Jill Wolters, Department of Revisor of Statutes
Sherman Parks, Department of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Bob Claus, Deputy Attorney General, Criminal Division Office of Attorney General
Chris Biggs, Geary County Attorney
Jerry Borman, Assistant District Attorney, Wyandotte County
Ed Collister, Kansas Bar Association
Martha Coffman, Self, Topeka, Kansas
Representative Lana Gordon
Michelle Smith, Jayhawk Pharmacy
Walker Hendrix, Citizens Utility Ratepayer Board
John Reinhart, AARP
Mike Murray, Sprint
Lisa Creighton-Hendricks - Senior Attorney, Sprint Corporation
Colleen Harrell, Attorney, Kansas Corporation Commission

Bob Claus, Deputy Attorney General, appeared before the committee to request an anti-terrorism bill. (Attachment 1)

Representative Long made the motion to have the request introduced as a committee bill. Representative Owens seconded the motion. The motion carried.

Representative Owens requested a bill that would clarify venue in adoption cases. He made the motion to have the request introduced as a committee bill. Representative Long seconded the motion. The motion carried.

Hearings on **HB 2138 -One year time limitation on writs of habeas corpus**, were opened.

Chris Biggs, Geary County Attorney, appeared as a proponent of the bill. He stated that it would not interfere with any direct appeal rights but would limit the time following a direct appeal to challenge a conviction by a separate lawsuit. His written testimony provided the committee with some examples of 60-1507's that have been filed. The influx of 60-1507 filings have been attributed to sentencing guidelines but they are not the ones that are actually cause the problems. Those are cases that are years old and may of the witnesses can not be located and paperwork is no longer available to review.(Attachment 2)

Jerry Borman, Assistant District Attorney, Wyandotte County, told the committee about a case that started in 1977 and the perportrators filed a 60-1507 in 1997. All the victims were deceased and the records in the case were destroyed by water that had gotten into the courthouse.

Donna Heintze did not appear before the committee but requested that her written testimony in support of the bill be included in the minutes. (Attachment 3)

Ed Collister, Kansas Bar Association, appeared in opposition to limiting the time an appeal can be filed because of the fear that courts would rush into judgements without serious consideration of the appeal. He believes that the workload of the courts will rise and that anytime there is a change in criminal law there are more 1507's filed. He stated that Supreme Court Rule 183 directs the judges on how to handle 1507 cases

and give them the ability to decide if there is something to the appeal and helps limit frivolous appeals. (Attachment 4)

Martha Coffman, Self, Topeka, Kansas, informed the committee that the increase in 1507's are directly related to sentencing guidelines and ineffective assistance of counsel claims. (Attachment 5)

Judge Steve Leben did not appear before the committee but provided written testimony in opposition to the bill. (Attachment 6)

Hearings on **HB 2138** were closed.

Hearings on **HB 2606 - Telecommunications service abuse,** were opened.

Representative Lana Gordon appeared as the sponsor of the bill which would limit the liability of the consumer/business to $50 per occurrence of fraudulent use of phone lines. (Attachment 7)

Michelle Smith, Jayhawk Pharmacy, relayed her story as to how the Jayhawk Pharmacy was a victim of a phone scam in which they were billed $2768.00. She had contacted Sprint Corporate Offices and went thru the chain of command to try and get that amount withdraw from their phone bill. While the pharmacy wanted the total amount of the bill removed, Sprint offered to write-off 50 percent of the charges to which the pharmacy declined to accept. (Attachment 8)

Walker Hendrix, Citizens Utility Ratepayer Board, likened telecommunications fraud to credit card fraud. He suggested that if the credit card industry can protect their customers against fraud and only require them to be responsible for a small dollar amount then other companies should be able to do the same. (Attachment 9)

John Reinhart, AARP, appeared in support of the proposed legislation. He requested two amendments: placing limits on liability to $50 dollars to the consumer; removal of the 90-day reporting period. (Attachment 10)

Written testimony in support of the bill was provided by Super Chief Credit Union and Jayhawk Pharmacy. (Attachments 11 & 12)

Mike Murray, Sprint Corporation, commented that they are also a victim by suffering financial harm. However, phone scams represents a multi-million dollar loss annually. He explained that Sprint monitors their international fiber optic network for abnormalities in international callings and makes sure to contact the customer if something does not appear normal. (Attachment 13)

Lisa Creighton-Hendricks, Senior Attorney, Sprint Corporation, stated that the Federal Corporation Commission (FCC) has exclusive jurisdiction in regulating the intrastate and foreign telephone calls. Therefore it is inappropriate for the state to pass such legislation. The FCC has ruled that the liability rests with the party that was in the best position to prevent the scam.

Committee members were concerned if the FCC regulations & rules were exclusive. Colleen Harrell, Attorney, Kansas Corporation Commission, responded that Kansas would not have any jurisdiction over such calls and doesn't believe they could develop rules and regulations since they would not have jurisdiction.

Hearings on **HB 2606** were closed.

The committee meeting adjourned at 6:10 p.m. The next meeting was scheduled for February 5, 2002.

State of Kansas
Office of the Attorney General
120 S.W. 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597

Carla J. Stovall
Attorney General

Main Phone: (785) 296-2215
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Robert Claus, Deputy Attorney General
Office of Attorney General Carla J. Stovall
Before the House Judiciary Committee
Re: Bill Introduction
February 4, 2002

Chairperson O'Neal and Members of the Committee:

Thank you for the opportunity to appear on behalf of Attorney General Carla J. Stovall today to introduce a bill for your consideration. My name is Robert Claus and I am the Deputy Attorney General for the Criminal Division of the Office of the Attorney General.

Since September 11th we have all been forced to take a hard look at the threat posed to our nation by certain extremist factions. The bill presented today addresses those provisions of Kansas law that necessarily must be updated and strengthened to provide Kansas law enforcement authorities with the tools required to deal with potential terrorist activities in our state. Each state has an obligation to adequately address those criminal activities and issues that arise within their jurisdiction. Relying solely upon the federal government is not the appropriate solution, however, cooperation between federal, state and local law enforcement agencies is essential. Attorney General Stovall's legislative proposals will allow us to be more effective partners with federal law enforcement agencies. In addition to the sections of the bill dealing directly with law enforcement, Attorney General Stovall proposes three insurance related provisions aimed at providing assistance to victims of terrorist attacks. Finally, in recognition of the critical nature of the duties of the position, the bill statutorily designates the Adjutant General as a member of the Governor's Cabinet.

I have attached a summary of the provisions of the bill for your review, and would be happy to answer your questions. Thank you.

House Judiciary
Attachment 1
2-4-02

ATTORNEY GENERAL'S ANTI-TERRORISM
LEGISLATIVE PROPOSALS
SYNOPSIS

We have learned a lifetime of lessons since September 11th - as individuals, as a government, and as law enforcement officers and prosecutors. Think how different our world would be had we intercepted specific and verifiable information that warned of the insidious plans of al Qaeda. No one is to blame that the information was not garnered in a more timely fashion - but the lesson for us is that we should have laws in place that facilitate information gathering and that does not unnecessarily prohibit it.

Each state has an obligation to adequately address the issues that arise within their jurisdiction. Relying solely upon the federal government is not the appropriate solution although working cooperatively with them is essential. My legislative proposals will allow us to be more effective partners with the federal law enforcement agencies and to assist when and how we can.

New Crime of Terrorism

Sec. 1. For the first time this section would create a crime of "terrorism" under the Kansas code. As evidenced by the use of hijacked planes on September 11, this crime must be broadly defined to cover unexpected means of spreading terror.

New Crimes involving Weapons of Mass Destruction

Sec. 2. This section defines the term "weapon of mass destruction" to include nuclear, radiological, biological and chemical weapons capable of causing death or serious injury. It also creates a new severity level 1, person felony crime to manufacture/possess/deliver such weapons.

Sec. 3. Creates four new Kansas felony crimes related to the actual use of weapons of mass destruction:

1.1 If a weapon of mass destruction is actually used to injure a person then it is an off-grid felony resulting in life in prison without parole.

1.2 If a weapon of mass destruction is intentionally used to kill a person then the crime is Capital Murder.

1.3 Any attempt, solicitation or conspiracy to injure another by use of a weapon of mass destruction is a severity level 1, person felony.

1.4 Placing a weapon of mass destruction in public or private mail or parcel service is a severity level 1, person felony.

Sec. 4. Creates a new crime regarding the making of a false terroristic threat. Making a false report or communication that causes a person to believe a weapon of mass destruction is located at any place or structure would be a severity level 3, person felony.

Sec. 5. As we learned in the anthrax scare, some people are willing to exploit such tragedies by imitating true terroristic activities. This section creates a new crime of perpetrating a hoax regarding a weapon of mass destruction. It would be a severity level 3, person felony. Plus, the court may order restitution including costs of all consequential damages from a hoax (i.e. lost earnings, cost for emergency services responding, etc.)

DNA Databank

Sec. 6. As has been done federally, modern technology will be used to track persons convicted of such as crimes as they will be required to submit DNA samples to be registered with the national CODIS databank.

Statute of Limitations

Sec. 7. Like murder, this section would establish that there is no statute of limitation for prosecuting the new crime of terrorism.

Search Warrant Updates

Sec. 8 and 9. Due to the essential need for quick action, these sections update our statutes on search warrants to allow for the use of electronic communication, such as e-mail and satellite transmissions.

Prosecutor Subpoena Power

Sec. 10. To expedite the investigation of suspected terrorist activities, and hopefully prevent them, Kansas prosecutors would be given the same subpoena authority to investigate crimes of terrorism as they currently have in narcotic cases.

Money Laundering

Sec. 11. Expands the crime of money laundering to include crimes of terrorism. This would allow the financial infrastructure of such organizations to be discovered and accounts "frozen."

Pen Registers and Trap and Trace Orders

These sections adapt and incorporate changes made in the federal anti-terrorism legislation (PATRIOT Act) to update these investigative tools for use against terrorism.

Sec. 12 and Sec. 13. Expands the current pen register language to include newer technology such as cellular telephones and networks. Also authorizes cellular telephone companies and other communication providers to assist with pen registers/trap trace activities.

Sec. 14. Allows for the emergency use of a pen register or trap and trace device by law enforcement officials when there is not time to acquire a regular court order and the emergency situation involves the immediate danger of death or serious bodily injury to a person or organized crime activities. Among other restrictions, retroactive approval must be requested within 48 hours.

Sec. 15. Clarifies the definition of "pen register" and "trap and trace device" in light of new technology.

Electronic Surveillance

As above, these sections incorporate changes made in the federal law on electronic surveillance by the federal anti-terrorism legislation.

Sec. 16. Amends definitions statute for criminal procedure related to obtaining a court authorized wiretap.

Sec. 17. Adopts federal language to protect privacy by creating an offense for the unlawful interception or disclosure of intercepted information. Also clarifies exceptions for business and law enforcement authorities as to what are covered activities.

Sec. 18. Adds the crimes of terrorism, possession or use of weapons of mass destruction and computer crime to the lists of crimes for which a court may approve a wiretap.

Sec. 19. Allows law enforcement authorities to target with a court order the individual committing the crimes, not just a particular phone. This will negate efforts by terrorists to use multiple phones to avoid detection.

Sec. 20. Adds a provision to current law specifying that individuals who furnish good faith information or assistance to authorities conducting a wiretap in accordance with a court order or request for emergency assistance shall not be held civilly liable for providing the information or assistance.

Miscellaneous Matters

Sec. 21. Requires waiver of any prior approval procedure, regardless of whether medical treatment is received in the coverage area, in disaster situations resulting from an act of war or an act of terrorism.

Sec.22. Amends K.S.A. 40-420 to provide that, in disaster situations resulting from an act of war or an act of terrorism, a sworn affidavit given by the beneficiary attesting to the fact that the insured has been missing for 30 days and is presumed dead due to such disaster shall be sufficient proof of death for purposes of life insurance coverage.

Sec. 23. Amends K.S.A. 40-447 to include a presumption of death in disaster situations resulting from an act of war or an act of terrorism.

Sec. 24. Amends K.S.A. 48-204 to specify that the Adjutant General for the State of Kansas shall be a member of the Governor's cabinet.

House Judiciary
Testimony 1/30/2002
In Support of House Bill 2138
Kansas County and District Attorneys Association
Chris Biggs
Legislative Chair KCDAA / Geary County Attorney
(785) 232-5822

I would like to thank the Committee for this opportunity on behalf of the KCDAA to support this necessary legislation. HB 2138 proposes a reasonable time limit following direct appeal upon an inmate's opportunity to challenge a conviction by a separate lawsuit under K.S.A. 60-1507. This does not interfere with any direct appeal rights.

TIME LIMITS

Time limits are preferred in the law. They give parties and opportunity to present their case and try contested matters in a timely fashion while evidence is fresh, and witnesses available. For example, the State must file most cases within two years of the act (K.S.A. 21-3106) and must bring a jailed defendant to trial within 90days of arraignment or the defendant will be set free ---regardless of the crime (K.S.A. 22-3402). A defendant must make application for a new trial based on newly discovered evidence within two years of the conviction (K.S.A. 22-3501). Kansas has a 30 day limit on habeas actions (K.S.A. 60-1501). Yet, there is no time limit, at all, on K.S.A. 60-1507 actions.

The time limit proposed in the present bill will start to run after a direct appeal is over, which may last several years in itself. The intent of this bill is to eliminate appeals of the silly and mundane which still require prosecutors to respond with great expenditure of money and effort. The bill also allows the time to be extended in the interest of justice to allow for the truly exceptional cases.

NOTION NOT NOVEL

The notion of such a time limit is not novel. Missouri has a 90 day limit (Rule 29.5) and the United States Government has a one year limit (28 USCA § 2255). Both Iowa and Mississippi have time limitations for filing a collateral attack upon a conviction. I.C.A. § 822.3 and Code 1972, § 99-39-5, Uniform Post-Conviction Collateral Relief Act (UPCCRA). Both statutes have withstood a constitutional challenge to the time limitations. The United States Supreme Court has long recognized that a state may impose time limitations upon assertion of a right. *Brown v. Allen*, 344 U.S. 443, 486 (1953).

PRESENT LAW

Under present law an inmate has the right to a direct appeal through our state appellate courts, and also by application to the United States Supreme Court. After exhausting these remedies, which may take years, and inmate may then file an action under K.S.A. 60-1507, at any time, to challenge the conviction. Common issues raised include ineffectiveness of counsel, challenges to a plea hearing, and technical challenges to the selection of the jury or the charging document.

There is simply no finality to a criminal case in Kansas. No matter how clear the evidence of guilt, a victim's family can never hear that the case is over. Even upon losing a motion under K.S.A. 60-1507, an inmate may then start the appeal process all over again as to the denial of the 60-1507, or file additional such motions.

*In Saline County a defendant successively maintained a 60-1507 and had his guilty plea thrown out ten years after his conviction — not because he claimed he was innocent, but because the judge failed to ask the magic words "how do you plead." The defendant had otherwise been advised of his rights, signed a written agreement, and the intent of the plea was clear from the record. He shot a police officer.

*In Wyandotte County, a defendant has filed 13 actions under K.S.A. 60-1507 to challenge his 1992 conviction.

* Daniel Remeta pled to 3 counts of murder and filed a 60-1507 action 12 years later to withdraw his plea in an attempt to stay his execution in Florida.

* Sedgwick County is now dealing with a 60-1507 which, if successful, will require re-trial of a 1978 murder.

* Geary County presently had a case where a defendant is appealing a denial of a K.S.A. 60-1507 following a 1992 plea of guilty to murder. He has previously had his sentencing appeal and a prior 60-1507 appeal denied . He complained that his co-defendant was drunk when he made a statement implicating the defendant. This proceeding required hearings, a record, an appeal, briefs, and a written opinion from an appellate court. (Donna Heintze, the mother of the victim, has provided written testimony) The co-defendant recently filed a several hundred page 60-1507 which raises many issues already determined in a prior hearing. Counsel has been appointed, at State expense, to sort through the rambling pleadings.

The Kansas County and District Attorneys Association strongly encourages passage of this bill. It promotes victim interests, finality in criminal proceedings, and is fiscally responsible. It also provides for the inmate with a truly meritorious claim while at the same time it provides a procedure to succinctly eliminate those petitions which are technical, mundane, and ridiculous.

Respectfully,

Chris Biggs
KCDAA Legislative Chair

House Judiciary
Testimony 1-30-2001
In Support of House Bill #2138
Donna Heintze
Mother of Victim

Good afternoon my name is Donna Heintz from Milford, KS. I cannot be here today because I have to work but please consider my comments in support of House Bill #2138. On September 20, 1991, my 20 year old daughter, Cathy, a full-time student at Kansas State University, was working part-time at a convenience store when two men entered the store in full military battle gear. The robbery had been planned like a battle maneuver. Cathy was shot at close range in the head with a rifle containing a magnum shell. The cash register was never opened.

The two men received life in prison and are still there. But over the last nine years our wounds have not been allowed to heal completely. There is no way to explain the feelings that come over you or the ball in the pit of your stomach when you get the call from the county attorney informing you of a K.S.A. 60-1507 action or appeal. Suddenly the life you have worked hard to put back together takes a turn and all the old wounds are opened again-returning all the feelings of that night.

The appeal affects the whole family as they begin the long wait for the ruling to come back. This happens not once or twice, but many many times. The appeals claim that the robbery was excused by the Desert Storm Syndrome; or that his partner had been drinking when he confessed; or that he had to plead guilty to avoid the military death penalty. He has appealed to our Supreme Court three times.

On January 24, 2002, when Chris Biggs called me asking for my comments, I realized that even after ten years my heart still sinks when I hear his voice out of fear of yet another appeal. Just this last year another K.S.A. 60-1507 was filed by one of these men who claims he was promised a five year sentence. It took him ten years to figure this out. I believe it is time to stop the nightmare and let the wounds heal as best as they can for victims. This bill will be a big step in that direction. I pray that none of you will ever have to experience any of this, but if you do, I hope this bill will be in place, so you can have closure, which countless thousands of Kansas victims and their families do not now have.

I would like to take this time to thank you for giving me this opportunity to express my feelings and I hope it will make a difference.

Sincerely,

Donna Heintze

House Judiciary
Attachment 3
2-4-02

TESTIMONY BEFORE
HOUSE JUDICIARY COMMITTEE
Re: House Bill 2138

February 4, 2002

Mr. Chairman, Ladies & Gentlemen:

Thanks for giving me an opportunity to express the views of the Kansas Bar Association on House Bill 2138, which basically establishes a one-year time limit to file a proceeding to challenge the validity of a conviction or sentence as set out in K.S.A. 60-1507.

The Kansas Bar Association has adopted a position opposing any such time limitation, a position that has not changed over the years to my knowledge. Past attempts at comparable changes have failed.

I have enclosed for your interest the testimony of one KBA representative who presented testimony in a previous hearing. John Tillotson, a past president of the KBA, who for many years was a federal magistrate and therefore came in contact with Kansas post-conviction relief cases in that capacity since there has been a requirement for years that a state prisoner exhaust state remedies before moving to the federal court, continues to believe as expressed in his earlier letter, as I verified in a phone call last week.

House Judiciary
Attachment 4
2-4-02

Please consider the following:

The ability to challenge deprivation of freedom and liberty (by criminal conviction for example) is found in the so-called Great Writ - Habeas Corpus. The right is so significant that those who wrote the Kansas Constitution specifically included it in the Kansas Bill of Rights to our Kansas Constitution. It is found at Section 8 of the Bill of Rights:

> "Habeas corpus. The right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or of rebellion."

On its face the current bill proposes to suspend the right after a year. If that is the objective, it violates the Kansas Constitution.

Habeas corpus protection for individual citizens is of ancient derivation, having existed in English common law years before it was first enacted by the Habeas Corpus Act in England in 1679. It is the method by which any citizen can challenge the validity of any restraint, which includes imprisonment by a government.

In 1776, our forefathers, prior to establishing our constitution, published their thoughts on individual rights. They stated in part:

> "We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

To protect these rights they adopted, among other protections, Article I, Section 9 of the Federal Constitution. In that section the Habeas Corpus remedy was preserved.

The Kansas constitutional expression of the writ of habeas corpus protects liberty. While it is true that unfortunately some forfeit the right to liberty by their conduct, our justification for declaring that forfeiture is that the rule of law was followed in a criminal case. Surely if the rule of law is not followed to obtain conviction, the forfeiture was not justly obtained. Our system for enforcing the law is not perfect. Maybe it can never be perfect. The ability to determine whether a conviction is valid or not, should not depend on a one-year time limitation. Such a limitation would only say that if one's liberty is unjustly taken, one can get relief only by meeting a one-year limitation to do so. That just minimizes into potential non-existence the great writ. Philosophically, the time limitation concept is a bad concept. It is inconsistent with centuries of tradition concerning this particular rule of law.

60-1507 motions.

A motion pursuant to K.S.A. 60-1507 was a procedural device added to make use of the habeas corpus writ ordained by the Kansas Constitution, practical and more efficient. Prior to 1963 when the motion procedure currently in legislative form was adopted, all challenges to conviction or sentence validity were made in the county where the petitioner was confined. Such was required by existing rules of substantive jurisdiction and venue. The 60-1507 motion

procedure was adopted to spread the cases out to the District Courts where the sentence and confinement were imposed, and relieve the two-fold burden on Leavenworth and Reno counties to obtain records from other counties and consider all of the challenges filed at that time. The theory in adopting a 1507 motion procedure was that the District Court which had imposed the sentence following a conviction would have records concerning the conviction handy and would be the more practical and efficient place to consider the merits of the argument. The process has worked well with that modernization. But, that change did not limit the constitutional right in any way. If K.S.A. 60-1507 were abolished today, the result would revert to the pre-1963 procedure. If 60-1507 proceedings were time barred, arguably a habeas corpus remedy would still be available.

I have tried to read all the complaints about 1507s that one can find. There does not appear to be any pressing problem created by the existence of the statute in its current form. OJA records indicate 260 1507-motions were filed in fiscal 2000, 289 in fiscal 2001. There is no indication why there has been no demonstrated problem created by the existence of those 1507 motions. And, as a matter of fact, many of the motions are generated by the fact that this legislature over the years has changed the substantative and procedural law resulting in challenges to the validity of existing convictions and sentences.

The process from arrest to incarceration is much more complicated today than it used to be. As I am sure the committee members are aware, in recent

history representatives of the court system and representatives of the Bar Association have repeatedly pled for more money resources for the court system to handle its ever expanding work load. That money was for more judges, more nonjudicial personnel, more facilities, more technical tools to get the work done in a more expeditious fashion. The pleas were made because the ability to get the results done and done correctly, was succumbing to the absolute press of business.

I can give you examples of sentences recorded in journal entries after pleas which were incorrectly recited because there was not a transcript of the sentencing proceeding at the time the journal entry was crafted, and it was crafted by a prosecutor who did not accurately reflect the court's order, overlooked in the press of time by the overburdened defense system, and signed-off on by the judge who had 100 cases or more pass through his or her docket before the journal entry was presented. But, the results to clients were that they were sentenced to consecutive crimes instead of concurrent crimes according to the journal entry, but had not been so sentenced in fact. It took an appeal and/or post-conviction relief attempt to correct the situation. Or, there are examples where the Department of Corrections has inaccurately computed sentences that supposedly were set by the legislature and the court justifying the release of an inmate who served a sentence. Or, consider the fact that a significant number of persons sentenced to prison, either because of the emotional impact of the incarceration, or their intellectual ability, simply are not capable of protecting

themselves without the assistance or help, perhaps from an attorney. In my experience, it is extremely difficult even for attorneys to communicate with their clients in prison. Sometimes it is years after the fact that discrepancies appear or new witnesses appear or old witnesses recant or transcripts finally reveal that a convicted defendant's liberty was unconstitutionally taken. Rectifying those problems where they exist by the current system does not seem to have posed a great problem resulting in an uproar demanding a change in the law. There is simply no reason to change the law.

Last, the proposed changes give a court at least one, and perhaps two additional tasks to resolve a 1507 motion's issues. And, if the issue is considered in the light of a manifest injustice requirement, the motion must be reviewed on its merits in any event. The proposal before you would add work for the judge.

Concern may be expressed that frivolous motions are filed. In the general practice of law most lawyers are of the opinion that sometimes frivolous lawsuits are filed, even by lawyers, concerning all types of issues. Most 1507s are filed by non-lawyers, some of whom are not well educated. It should not be a surprise if some were in fact frivolous. The ultimate solution to that problem is to provide qualified legal help to prospective movants. That's impractical and will not be done. The real issue is whether there is a method of dealing effectively if a frivolous motion is filed. Since the adoption of Supreme Court Rule 183, frivolous motions are handled in the pleading process, as in all other types of cases. The rule itself is designed, among other things, to weed out frivolous

motions. Further, the proposed time limitation would not address any alleged problems of frivolous motions being filed.

The proposed amendment is not smart, may be unconstitutional or in the alternative merely shift work load to district courts of the institutions' location, and likely would increase judge time if adopted.

Respectfully submitted,

Ed Collister

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April 24, 2000

Re: House Bill 2684

Dear Senators and Representatives:

I understand this bill has been amended into an omnibus crime bill which will be before you for consideration in the final week of the 2000 legislative session. The concept to restrict the use of K.S.A. 60-1507 collateral attacks upon sentence (habeas corpus) is ill-conceived and will not work.

You have previously heard from Ed Collister of Lawrence regarding his experience in the criminal appellate arena. In addition, the memorandum of Martha J. Coffman, who has devoted much time and thought to consideration of habeas corpus remedies and their effect on the entire system, is appended to this letter. No one in Kansas enjoys greater respect for scholarship and clear thinking with respect to these issues than Ms. Coffman. Her views are due great deference.

In commending the Collister and Coffman views to you, I would like to chime in with respect to my nineteen years of experience as a United States Magistrate in Kansas. During this time, my job was almost exclusively to handle post-conviction proceedings by state and federal prisoners in the federal courts. I lost track of the number of these cases that I considered when the number passed 900. Nevertheless, the question in all of the cases in which the "legality" of the petitioner's custody was in question was whether, as a matter of federal comity, the petitioner had given the state of Kansas an adequate opportunity to address the alleged wrong before seeking relief in federal court. Where the federal petition revealed that an adequate state remedy had not been properly invoked, the petition was consistently dismissed in deference to the state having the primary opportunity to address the legality of the prisoner's custody. I point this out because most students of our constitutional system believe that principles of federalism require that the states first have the opportunity to provide and protect for constitutional rights of our citizens. Only if the states make inadequate provisions do the federal courts intervene.

My federal experience also taught me that it is easy to deal with the obviously frivolous and repetitive claims. First, I don't believe I had over twelve to fifteen cases in nineteen years that required me to analyze whether the claims were repetitive. Certainly, it is much easier when the court of conviction (the Kansas 60-1507 procedure) can maintain "book" on successive filings to determine whether or not the same issues are being realleged. Moreover, the usual advantage of having the same trial court (and perhaps the same prosecutor) address a successive filing would lead to a quick determination of whether that filing is repetitive or frivolous.

In conclusion, if the 60-1507 procedure is unavailable due to a statute of limitations, then I think it is certain that a) you will invite habeas corpus filings in the counties of incarceration (Leavenworth, Reno and Butler); and b) that federal courts will be invited to reexamine and perhaps intervene because of inadequate state remedies.

The Kansas Bar Association Legislative Committee and Board of Governors considered this proposal and unequivocally opposed it. We hope you will do likewise.

Respectfully,

John C. Tillotson
KBA Legislative Committee Chairman

JCT:mkv

Rule 183

PROCEDURE UNDER K.S.A. 60-1507

(a) NATURE OF REMEDY. K.S.A. 60-1507 is intended to provide in a sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in district courts in whose jurisdiction the prisoner was confined. A motion challenging the validity of a sentence is an independent civil action which should be separately docketed, and the procedure before the trial court and on appeal to the Court of Appeals is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required. When the motion is received and filed by the clerk, he shall forthwith deliver a copy thereof to the county attorney and make an entry of such fact in the appearance docket.

(b) EXCLUSIVENESS OF REMEDY. The remedy afforded by K.S.A. 60-1507 dealing with motions to vacate, set aside or correct sentences is exclusive, if adequate and effective, and a prisoner cannot maintain habeas corpus proceedings before or after a motion for relief under the section.

(c) WHEN REMEDY MAY BE INVOKED. (1) The provisions of K.S.A. 60-1507 may be invoked only by one in custody claiming the right to be released, (2) a motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected, (3) a proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal.

(d) SUCCESSIVE MOTIONS. The sentencing court shall not entertain a second or successive motion for relief on behalf of the same prisoner, where (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

(e) SUFFICIENCY OF MOTION. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto which shall be furnished by the court.

(f) HEARING. Unless the motion and the files and records of the case conclusively show that the movant is entitled to no relief, the court shall notify the county attorney and grant a prompt hearing. "Prompt" means as soon as reasonably possible considering other urgent business of the court. All proceedings on the motion shall be recorded by the official court reporter.

(g) BURDEN OF PROOF. The movant has the burden of establishing his grounds for relief by a preponderance of the evidence.

(h) PRESENCE OF PRISONER. The prisoner should be produced at the hearing on a motion attacking a sentence where there are substantial issues of fact as to events in which he participated. The sentencing court has discretion to ascertain

whether the claim is substantial before granting a full evidentiary hearing and requiring the prisoner to be present.
(i) RIGHT TO COUNSEL. If a motion presents substantial questions of law or triable issues of fact the court shall appoint counsel to assist the movant if he is an indigent person.
(j) JUDGMENT. The court shall make findings of fact and conclusions of law on all issues presented.
(k) APPEAL. An appeal may be taken to the Court of Appeals from the order entered on the motion as in a civil case.
(l) COSTS. If the court finds that a movant desiring to appeal is an indigent person it shall authorize an appeal in *forma pauperis* and furnish him without cost such portions of the transcript of such proceeding as are necessary for appellate review.
(m) ATTORNEY. If a movant desires to appeal and contends he is without means to employ counsel to perfect the appeal, the district court shall, if satisfied that the movant is an indigent person, appoint competent counsel to conduct such appeal. If for good cause shown appointed counsel is permitted to withdraw while the case is pending in either the district court or the supreme court, the district court shall appoint new counsel in his stead.

APPENDIX

IN THE DISTRICT COURT OF _____ COUNTY, STATE OF KANSAS

_____

PERSONS IN CUSTODY

_____

Full name of Movant

_____

Prison Number

Case No.:_____

(To be supplied by the Clerk of the District Court)

vs.

STATE OF KANSAS, *Respondent.*

INSTRUCTIONS--READ CAREFULLY

In order for this motion to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular

question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.
Since every motion must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.
If the motion is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay costs of the proceedings. When the motion is completed, *the original and one copy* shall be mailed to the Clerk of the District Court from which he was sentenced.

MOTION

1. Place of detention

_____

2. Name and location of court which imposed sentence

_____

_____

_____

_____

_____

_____

3. The case number and the offense or offenses for which sentence was imposed:

(a)_____

_____

(b)_____

_____

(c)_____

_____

4. The date upon which sentence was imposed and the terms of the sentence:

(a)_____

_____

(b)_____

_____

(c)_____

_____

5. Check whether a finding of guilty was made after a plea:

(a) of guilty

_____;or

(b) of not guilty_____

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury_____; or

(b) a judge without a jury_____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

_____

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

i._____

ii._____

(b) the result in each such court to which you appealed and the date of such result:

i._____

ii._____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)_____

(b)_____

(c)_____

10. State concisely all the grounds on which you base your allegation that you are being held in custody unlawfully:

(a)_____

_____

_____

(b)_____

_____

_____

_____

_____

_____

(c)_____

_____

_____

_____

_____

_____

11. State concisely and in the same order the facts which support each of the grounds set out in (10), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:

(a)_____

_____

_____

_____

_____

_____

(b)_____

_____

_____

_____

_____

_____

(c)_____

_____

_____

_____

_____

_____

12. Prior to this motion have you filed with respect to this conviction:

(a) any petitions in state or federal courts for habeas corpus?_____

(b) any petitions in the United States Supreme Court for certiorari other than petitions, already specified in (8)?_____

(c) any other petitions, motions or applications in this or any other court?

_____

_____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:
i._____
_____
ii._____
_____
iii._____
_____
(b) the name and location of the court in which each was filed:
i._____
_____
ii._____
_____
iii._____
_____
(c) the disposition thereof and the date of such disposition:
i._____
_____
ii._____
_____
iii._____
_____
(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:
i._____
_____
ii._____
_____
iii._____
_____
iv._____
_____
14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed?_____
15. If you answered "yes" to (14), identify
(a) which grounds have been previously presented:
i._____
_____
ii._____
_____
iii._____
_____
(b) the proceedings in which each ground was raised:
i._____
_____

ii._____

_____

iii._____

_____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a)_____

_____

_____

_____

_____

_____

(b)_____

_____

_____

_____

_____

_____

(c)_____

_____

_____

_____

_____

_____

17. Were you represented by an attorney at any time during the course of

(a) your preliminary hearing?_____

(b) your arraignment and plea?_____

(c) your trial, if any?_____

(d) your sentencing?_____

(e) your appeal, if any, from the judgment of conviction or the imposition of sentence?

(f) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?_____

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i._____

_____

ii._____

_____

iii._____

_____

(b) the proceedings at which each such attorney represented you:

i._____

_____

ii._____

_____

iii._____

_____

(c) was said attorney

i. appointed by the

court?_____; or

ii. of your own

choosing?_____

19. If your motion is based upon the trial court's refusing you counsel, attach the transcript of the proceedings which supports your allegation.

20. If your motion is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

(a)_____

_____

(b)_____

_____

21. Are you now serving a sentence from any other court that you have not challenged?

_____

_____

22. If you are seeking leave to proceed in *forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)?____

_____

Signature of Petitioner

STATE OF _____

SS.

COUNTY OF _____

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to
before me this _____
day of _____, 19____.

_____

Notary Public

My commission expires:

_____

(month) . . . . . (day) . . . . . (year)

FORMA PAUPERIS AFFIDAVIT
(See instructions page 1 of this form)

_____

_____

_____

_____

_____

_____

_____

_____

_____
Signature of Petitioner

STATE OF _____

SS.

COUNTY OF _____

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

_____
< of>

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19___.

_____
Notary Public

My commission expires:

_____

(month) . . . . . (day) . . . . . (year)

CONCERNS ABOUT LIMITING K.S.A. 60-1507
By Martha J. Coffman
January 30, 2001

I write to express my concern about the proposal in House Bill No. 2138 to place a limitation on K.S.A. 60-1057. A person convicted of a crime uses this procedure to challenge a conviction after the direct criminal appeal is completed. I oppose placing a time limit on filing of 60-1507 petitions and would be happy to answer questions about this important change. In this memorandum I will briefly summarize my concerns about the continuing effort to limit the availability of this collateral remedy for those convicted of offenses in Kansas.

Let me begin by reviewing my background. Right now I am Advisory Counsel for the Kansas Corporation Commission and work in the area of telecommunications. I am not here today to talk about telephones. Before going to the Commission 18 months ago, I was Director of Central Research for the Kansas Court of Appeals for 10 years. In that position, I supervised 14 attorneys who provided research for the Court of Appeals judges. The caseload of the intermediate appellate court includes all direct criminal appeals, except those involving the death penalty, a life sentence, or off-grid crimes. The Court of Appeals also handles all appeals from K.S.A. 60-1507 proceedings. Before becoming Director, I served as a research attorney for Justice Donald Allegrucci, as an Assistant Appellate Defender, and as a private practitioner in Lawrence, KS.

Twice I have served as President of the Criminal Law Section of the Kansas Bar Association. I have been a member of the KBA since graduating from law school 22 years ago. I have written two articles about habeas corpus in Kansas. The first article dealt with habeas corpus generally. *Habeas Corpus in Kansas: How is the Great Writ Used Today?* 1995 J. Kan. Bar. Assoc. 26. In the second article, I discussed K.S.A. 60-1507 proceedings specifically. *Habeas Corpus in Kansas: The Great Writ Affords Postconviction Relief at K.S.A. 60-1507*, 1998 J. Kan. Bar Assoc. 16. I would be happy to provide you with a copy of either article. I am here today because I am concerned about the proposed changes to 60-1507. The opinions I express are my personal views, not those of the Corporation Commission or the appellate courts.

After the Sentencing Guidelines Act went into effect July 1, 1993, the Kansas appellate courts saw an increase in appeals from 60-1507 petitions. A chart at the end of this statement shows a steady rise in these appeals until 1997; in 1998 and 1999 the number of 60-1507 appeals decreased. The appellate courts do not have this number available for 2000 and 2001. This increase was not from traditional 60-1057 appeals but instead involved challenges to the sentencing guidelines regarding implementing partial conversion and amending the guidelines without indicating whether changes were to be retroactive. To slow the number of 60-1507 appeals, the Legislature should limit changes to sentencing guidelines to corrections of egregious errors.

Understanding the reason K.S.A. 60-1507 was adopted helps explain why the proposed changes should be rejected. Before K.S.A. 60-1507, all habeas petitions were

filed in the jurisdiction where the person was confined. Thus, most habeas cases were filed in Leavenworth and Reno Counties, where the penitentiary and reformatory were located. To decide these cases, judges in those two counties reviewed records of convictions from all over the state. Under K.S.A. 60-1507, inmates file a petition in the county of conviction, where a judge, often the same one who conducted the trial, reviews the claims. This is a more sensible and efficient procedure.

The body of law surrounding K.S.A. 60-1507 is well settled. The vast majority of 60-1507 petitions are decided after a review of the trial record and without an evidentiary hearing. K.S.A. 60-1507 and Supreme Court Rule 183, which outlines procedures to use in these cases, do not allow 60-1507 petitions to raise issues presented in the direct appeal, to raise mere trial errors that should have been raised in the direct appeal, or to use successive 60-1507 petitions. Only rarely do district courts schedule an evidentiary hearing, and then the petitioner, usually a confined inmate, has the burden of proof. Granting a petition is extremely rare.

Several problems arise if a one-year limitation is imposed on K.S.A. 60-1507. One involves newly discovered evidence. A motion for new trial based upon newly discovered evidence must be brought within two years after final judgment. K.S.A. 22-3501. If a claim for new trial based on newly discovered evidence arises after the two-year limitation of K.S.A. 22-3501, a prisoner must use a 60-1507 proceeding to request that the sentence be set aside and a new trial granted. *State v. Bradley*, 245 Kan. 316, 787 P.2d 706 (1990). If a one-year limitation is imposed on K.S.A. 60-1507, this proceeding will no longer be available for these cases. Another procedure will need to be created to replace the well known rules now used in K.S.A. 60-1507 proceedings.

What evidence can be newly discovered some time after trial? The most widely publicized is newly tested DNA evidence, which can establish the wrong person was convicted of a crime. Kansas is not immune. In fact, Kansas had one of the first cases that resulted in release of an inmate, Joe Jones, after serving 7 years for a rape he did not commit. DNA testing established the semen taken from the victim could not have been from Mr. Jones. The availability of such a remedy is particularly critical now that Kansas has inmates on death row.

Ineffective assistance of counsel is one of the most frequent claims brought under K.S.A. 60-1507. The United States Supreme Court and the Kansas Supreme Court have recognized a person charged with a felony offense is entitled to counsel at trial. A perfect trial is not guaranteed. To present a successful claim of ineffective assistance of counsel, a person must show counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense by depriving defendant of a fair trial. The standard used to review this claim is highly deferential in scrutinizing counsel's performance. *State v. Rice*, 261 Kan. 567, 598-602, 982 P.2d 981 (1997). These claims are rarely successful. The attorney is presumed to provide effective assistance; the inmate must prove otherwise. Although prosecuting attorneys criticize the long delays that can occur before a claim of ineffective assistance of counsel is heard, the question that should be asked is why it took

so long for the claim to be heard. An inmate that knows how to use a 60-1507 proceeding will not sit in Lansing for 10 years on a valid ineffective assistance of counsel claim waiting for his attorney to die. After all, the presumption is the attorney provided effective counsel. The inmate must overcome this presumption. Each year of delay, this burden of proof on the inmates becomes more difficult.

The changes will not ease the workload of the appellate defender's office (ADO). ADO attorneys raise all issues possible in a direct appeal. ADO does not see a K.S.A. 60-1507 proceeding until after it has been to the trial court. By the time ADO is assigned, it is limited to raising issues preserved in the district court—if any.

The bill will not reduce the workload of prosecuting attorneys. If an inmate has a legitimate claim that should be investigated and heard, a long delay will complicate the case. The legislature should consider the admonition of Kansas Supreme Court Justice Six when he noted a prosecutor is a servant of the law and a representative of the people of Kansas. A prosecutor represents "'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *State v. Pabst*, 268 Kan. 501, 510, 996 P.2d 321 (2000), *quoting Berger v. United States*, 295 U.S. 78, 88, 79 L.3d 1314, 55 S. Ct. 629 (1935).

Section 8 of the Kansas Bill of Rights states that "the right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion." Why did the founders of Kansas include this statement? Debates at the Wyandotte Convention in 1859 show little discussion about this section. Section 1 of our Bill of Rights assures, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 6 rejects slavery, thus embracing freedom for all. By adopting section 8, the founders guaranteed a way to preserve these rights for all, even those on the bottom rung of society's social ladder. I believe a one-year restriction on the use of habeas corpus violates section 8 of the Kansas Bill of Rights.

I oppose a statute of limitation for 60-1507 proceedings. This is the last protection our system provides to correct unconstitutional proceedings in criminal cases. K.S.A. 60-1507 has rarely been amended since its enactment in 1963. The statute has worked well for almost 40 years. Its procedures are well established. Its increased use to test the dramatic changes brought about by the Sentencing Guidelines Act is a testament to how well it works. Unless the Legislature wants to develop a new statutory proceeding, which assures the constitutional protections now provided by K.S.A. 60-1507, the limitation should be rejected. I urge you to reject House Bill No. 2138.

APPEALS FROM K.S.A. 60-1507 PROCEEDINGS[1]

Year	60-1507 Appeals
1999	117
1998	124
1997	205
1996	180
1995	99
1994	79
1993[2]	57
1992	57

[1] These numbers are based upon calendar year totals of the Kansas Court of Appeals. The Clerk of the Kansas Appellate Courts was unable to provide the number of K.S.A. 60-1507 appeals for 2000 and 2001.
[2] The Kansas Sentencing Guidelines Act became effective on July 1, 1992.

WRITTEN TESTIMONY OF STEVE LEBEN
ON HOUSE BILL 2138

January 30, 2002

I am sorry that I am unable to appear in person today before your committee, but I would like to add my voice to those in opposition to House Bill 2138, which would place a time limit on the filing of habeas corpus petitions in Kansas. I have been a district judge since 1993; the views expressed here are submitted solely on my own behalf.

To me, the issues here really are simple ones: Should there be a time limit on justice when a person is in custody? If the State *has* wrongly imprisoned someone, doesn't the State *always* have an obligation to restore that person's freedom?

All of us must recognize that mistakes *do* happen in our justice system—and that will *always* be the case. The reason for that, too, is a simple one: No human institution can achieve perfection.

Let me take a moment to provide some explanation about why we must always realize that there will be an error rate in our justice system, no matter how well intentioned we may be. To achieve the right result, we must determine who, among conflicting witnesses, is telling the truth. That is a very difficult job. A pretty good study by a group of psychologists a few years ago tested several groups to see whether they were able to do any better than chance in telling which of two witnesses was telling the truth. (In the experiment, one was telling the truth; the other was not.) They conducted the experiment with a group of judges, psychologists, social workers, police officers, and Secret Service agents. Among all of those groups, the *only* ones who did better than chance at spotting the liars were Secret Service agents who were at that time doing anti-counterfeiting work. The researchers theorized that the specific training those agents received, plus the daily work, gave them an advantage in this task. Significantly, after those agents had been off of the anti-counterfeiting detail for six months, even they no longer scored better than chance.

So, it has been proven that judges do no better than chance in telling truth-tellers from liars. We certainly hope that juries of 12 may do better. And they may. But they also may not.

The publication in 2000 of *Actual Innocence*, a book detailing 62 cases in which serious convictions, including ones for murder and rape, were overturned based on DNA evidence certainly stands as compelling evidence for the wisdom of those who founded our country, and of those who wrote the Kansas Constitution, in providing for habeas relief. Virtually all of those 62 innocent, yet imprisoned, men would have been brought their habeas claims more than a year after sentencing. The top three reasons for mistakes in those cases, according to the authors, were mistaken eyewitness testimony, mistaken lab data, and police or prosecutorial misconduct. All of those are problems that can never be eliminated from our very human justice system.

I recognize that HB2138 does have an escape valve of sorts. It would allow an untimely claim to proceed, but "only to prevent a manifest injustice." Obviously, this will result in substantial litigation before any of us knows what that will be held by the Kansas Supreme Court to mean. One could certainly argue that any time an innocent person is imprisoned is a situation of manifest injustice. To have a time limit and an escape valve, however, indicates that some claims are intended to be time-barred. So we should recognize that this "escape valve" still is intended to result in closing the doors to the courthouse in at least some cases, even if the person imprisoned may be innocent.

The primary justification, as I understand it, for this bill is a claim that taxpayers are paying too much for these habeas cases to be resolved, and that they are taking up too much time of the courts. I note that the fiscal note provided by the Governor's office indicates that the Office of Judicial Administration has not documented any expected savings and the Board of Indigents' Defense Services actually has estimated that the bill could cause additional expense. I hope you'll require that the claim of cost savings to be very carefully documented before taking the proposed step of closing the doors of the courthouse to these claims.

I do apologize that I could not come to speak with you today in person. I hope, though, that you'll agree that the writ of habeas corpus, which was so significant both when our nation was founded and when our own state constitution was written, is worth preserving in a strong and vital way.

Actual Innocence:

The Justice System Confronts Wrongful Convictions

Steve Leben

Jim Dwyer, Peter Neufeld & Barry Scheck, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED. Doubleday, 2000. 304 pp. $24.95.

In some abstract, impersonal way, all of us are aware that mistakes are made in our justice system. It is, after all, a human institution, and human beings make mistakes.

Even as we read occasional stories about the release of an innocent person, the issues raised by that apparent mistake may remain abstract, without a sense of urgency attached to them. After all, this may have been an isolated error. Or the person may actually have been guilty, but not provably so.

If you read this book, the mistakes made in our criminal justice system will no longer be abstract ones.

Barry Scheck and Peter Neufeld are lawyers who started their careers in a legal aid office in the Bronx. Although they have long ago left legal aid for other, arguably greater pursuits—Scheck is a law professor and Neufeld is in private practice; they have teamed up to represent big-name clients like O.J. Simpson and to develop national reputations for their understanding of DNA evidence—they retain the zeal of idealistic young lawyers who have just started legal aid work and, as beginners, been given only a single client to represent.

The book tracks the work done by Scheck and Neufeld through the Innocence Project, a clinic they co-founded at the Cardozo Law School that uses volunteer law students and attorneys to review cases in which DNA testing might prove a convicted person's innocence. Their co-author, Jim Dwyer, is a reporter at *Newsday* who championed—prior to their release—the cases of some of those who had been wrongfully convicted.

The majority of the book consists of separate chapters detailing specific cases that illustrate typical ways in which the justice system may go awry and the innocent may be found guilty. The authors present overall data on 62 cases through August 1999 in which convictions were overturned based on DNA evidence. In 52 of 62 cases, there were mistaken eyewitnesses; in one case, there were five eyewitnesses, all of whom were wrong. The authors show how common techniques for police interrogations and lineups can suggestively lead witnesses to identify an innocent person. The also show how other factors—including false confessions, scientific fraud, junk science, poor defense counsel, and unethical prosecutors—have led to conviction of the innocent in specific cases in which DNA evidence has, after-the-fact, conclusively proved the defendant's innocence.

Two aspects of the book give a sense of urgency about reading it. First, it takes you vividly behind the scenes of real-life cases in which innocent men were convicted. We get to share not only the horror of the innocent who is sent to prison; we also get to see, in context, how such a terrible mistake could have occurred. Second, it provides a number of suggestions for improving the system to avoid these results, including a helpful, six-page appendix detailing the authors' suggested reforms.

Perhaps the most intriguing proposal is the establishment of governmental Innocence Commissions at the federal and state levels. The authors appropriately note that government agencies investigate the causes of air crashes for the purpose of figuring out what went wrong so that future accidents can be prevented. Surely the specter of placing innocent people in prison for long terms—or even capital punishment—is worthy of a similar effort.

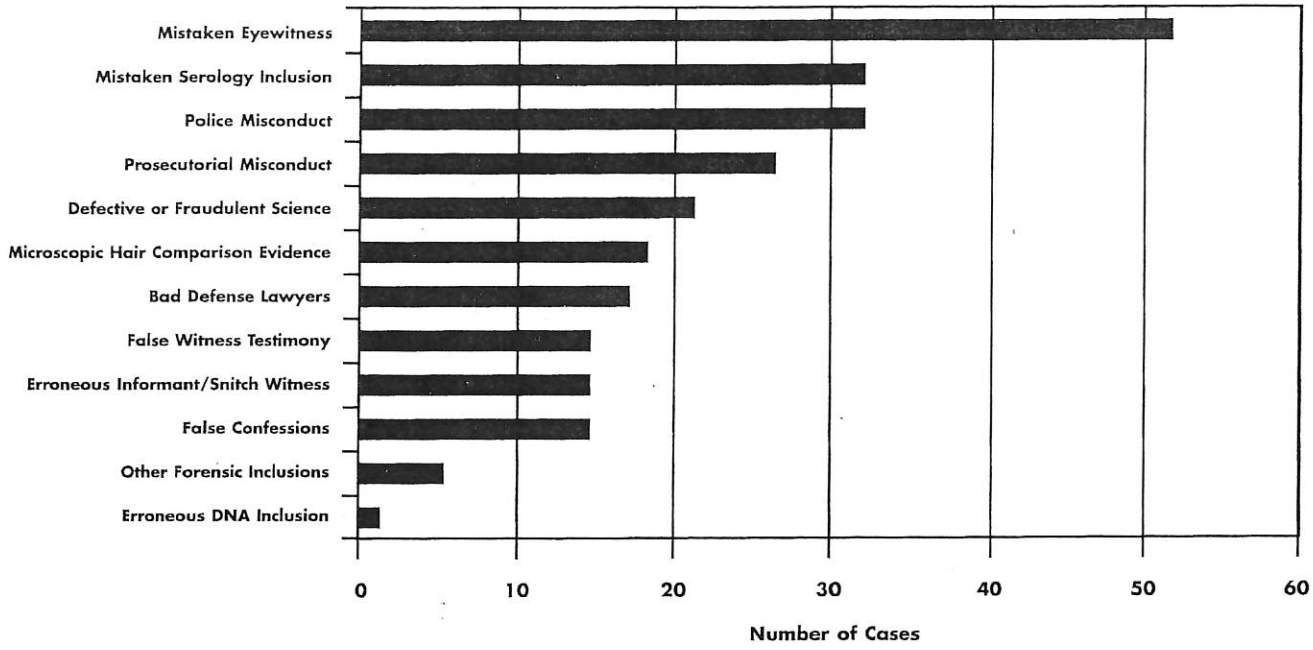
The book is not without flaws. The authors have no doubt good-naturedly poked fun at whichever of them—or the editor—who mistakenly referred to "Brett and Scarlett" as the leading characters from *Gone with the Wind*. More relevant is the sense that the authors have a consistent pro-defense slant and do not always give fair consideration to opposing views. It is interesting that they suggest that the immunity enjoyed by prosecutors should be ended so that they could be sued for intentional misconduct. They do not, however, suggest any civil remedies against incompetent defense counsel, even as they note that 27 percent of the wrongfully convicted in their study had "subpar or outright incompetent legal help." When discussing the case of David Shephard, who had spent more than 11 years in prison for a rape he did not commit, the authors note that Shepard was unable to sue the prosecutor, the state, or the victim who had testified that he was the rapist. They ignore any possible claim against the defense counsel, who they have previously told us got so mad at Shephard when he refused to accept the plea bargain she had obtained (under which he would, no doubt, have served many years in prison) that she refused even to prepare him for his testimony in court.

There is also a sense that the authors generally accept whatever the wrongfully convicted man has to say about his dealings with attorneys, police and prosecutors as being accurate. Though they carefully attribute statements to the defendant, the stories are certainly told with an air of presumed truth to their statements. Yet there is certainly a chance that some of the police or prosecutorial misconduct was not as bad as reported *if* some of these recollections by the now-released defendants are exaggerated or wrong. Given the problems dutifully noted with eyewitness recollections, it would perhaps be appropriate to note more clearly that some of these recollections, potentially enhanced by years of wrongful imprisonment, may themselves lack accuracy as well.

Despite any limitations the book may have, it powerfully details problems in the system that anyone seriously concerned about justice must, at least, carefully consider. By

6-3

FACTORS LEADING TO WRONGFUL CONVICTIONS IN 62 U.S. CASES AS CATEGORIZED BY DWYER, NEUFELD & SCHECK



"Mistaken serology inclusion" refers to ABO and protein blood typing of semen, saliva, and blood stains. "Other forensic inclusions" refers to comparisons of fingerprints, fibers, and other physical evidence. Source: ACTUAL INNOCENCE, p. 263.

reviewing in detail cases in which it is beyond doubt that the wrong person was convicted, the book itself likely is better than any work product that could ever be produced by one of the authors' suggested Innocence Commissions: the written work of a committee rarely approaches the scope, clarity, or depth of research reflected in this book. The proposal for an Innocence Commission—in each state and at the federal level—is still worth pursuing, however, because it is only through getting all of the relevant players to sit down at the same table and to collaborate about the potential solutions that real change in the system can be achieved.

Judges are among those who must give careful thought to whether the existence of these cases—and the apparent causes of these wrongful convictions—demand change from us. In many, if not most, of the cases examined, the appeals process had included an appellate court's finding that whatever errors had occurred were harmless because the evidence of guilt was overwhelming. In the cases examined in this book, the one thing we know for sure is that the errors in those cases were *not* harmless ones. We can't know how many other cases are out there in which innocent men and women have been convicted—DNA evidence is not available to give definitive findings in most cases. The book makes a strong case, however, for careful thought about how a justice system of humans, with procedures already refined over the centuries, can be further improved.

Steve Leben, a general jurisdiction state trial judge in Kansas, is the editor of Court Review.

6-4

LANA GORDON
REPRESENTATIVE, FIFTY-SECOND DISTRICT
5820 SW 27TH ST.
TOPEKA, KANSAS 66614
(785) 273-1203
STATE CAPITOL—RM. 181-W
TOPEKA, KANSAS 66612-1504
(785) 296-6014
(1-800) 432-3924

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: HEALTH & HUMAN SERVICES
HIGHER EDUCATION
K-12 EDUCATION
NEW ECONOMY
CHAIR: SHAWNEE COUNTY LEGISLATIVE DELEGATION

January 30, 2002

Chairman O'Neal, members of the House Judiciary Committee, I am here today to testify on behalf of HB2606, a bill concerning telecommunication fraud. This bill limits the liability of the consumer/business to $50 per occurrence of fraudulent use of phone lines. Currently, the consumer/business is liable for such use.

This issue was brought to my attention by Mike Conlin the owner of Jayhawk Pharmacy, a small locally owned business. It is my understanding that events such as the one that we will relate to you can occur with many different scenarios.

Last summer Mike contacted me in frustration because he had been trying for over seven months to resolve a matter of long-distance overseas phone calls, which he had not made, but had been billed. By the time he called me, he had exhausted his resources. Contact had been made to Sprint, the KCC, the Attorney General's Consumer Protection Division, Sen. Brownback's office, and the FCC. None had helped him to be able to resolve an over $3,000 (tax included) bill for fraudulent use of his business phone line.

The original crime occurred in Oct. of 2000. He did not even subscribe to Sprint long-distance service. I was puzzled by the whole thing and started my own investigation by retracing through the same steps that Mike had. I found that the Attorney General's office is not able to fully investigate matters such as this for a business, only for individuals.

My foremost concern was to try to help Mike get the charges removed from the Sprint bill. I then contacted Mike Murray, lobbyist for Sprint and asked for his assistance. He tried to convince Sprint to remove the charges. After a conference call was held between myself, Mike Murray and three or four other people from different divisions of Sprint, the best offer was to remove one half of the $3,000 from the account. I felt that I could not speak for Jayhawk Pharmacy myself, so they were then included in the conference call. Reducing the bill by one half was not agreeable to them, and I certainly understand their situation, especially being a small business owner myself. Three thousand or even fifteen hundred dollars is a huge bite for any business, and particularly a small one. Therefore, I felt the need for legislative assistance to consumers to protect businesses and individuals from having to be responsible for criminal use of the phone lines.

After newspaper coverage of this incident, Bill Hiskey, President of Super Chief Credit Union, informed me that a similar instance had happened at his office.

House Judiciary
Attachment 7
2-4-02

There are other ways for people to gain access to the lines besides those experienced at Jayhawk Pharmacy and Super Chief Credit Union. Someone called posing as a Sprint person and said they needed to check their lines. The employee on duty was then instructed to push some buttons. He could not have realized that the line was accessed to make nine calls within a half hour's time amounting to over $3,000 including tax.

I realize that Sprint is not the only company, which has its lines used for illegal purposes; all the telecom companies do. I also understand that telecom companies incur some costs from these scams. Still, there must be a way for the telecommunications companies to prevent this from happening to unsuspecting people. I have concern for elderly persons at home that may fall prey to this kind of situation as well as anyone else who might be a victim. I am including with my testimony, copies of some of the social engineering methods given to me by Sprint as well as copies of Jayhawk Pharmacy's phone bill and copies of a newspaper article that summarizes this issue.

I urge you to support this legislation in order to protect our consumers in Kansas.

Thank you,

Lana Gordon

Lana Gordon, State Representative

Phone bill to take on consumer fraud

By Jim McLean
The Capital-Journal

A Topeka lawmaker is sponsoring legislation to protect telephone consumers from long-distance fraud.

Rep. Lana Gordon

Rep. Lana Gordon, R-Topeka, said Tuesday that she has prefiled a bill limiting the amount consumers have to pay when unauthorized charges show up on their telephone bills.

Gordon's bill, which will be considered when lawmakers return in January for their 2002 session, limits consumers' liability to $50, provided they report instances of fraud to their long-distance carrier within 90 days.

"Consumers are being taken advantage of through their long-distance bills, and the state needs to provide protection for them," said Gordon, a first-term House member who represents the 52nd District, which covers portions of southwest Topeka.

Gordon was alerted to the problem of long-distance fraud by constituents at Jayhawk Pharmacy Custom Prescription Center, 6730 S.W. 29th. A year ago, someone posing as an employee of Sprint Corp. gained access to one of the pharmacy's phone lines and made several lengthy phone calls to Jordan, Senegal and France.

Because the pharmacy wasn't a Sprint customer, security officials at the long-distance company called to alert the owners about the unusual activity on their lines. During a follow-up phone call, a Sprint executive said the charges would be waived once they showed up on the pharmacy's local phone bill, according to a letter sent to the Federal Communications Commission by Michael Conlin, president of the pharmacy corporation.

In January, the pharmacy's Southwestern Bell Co. bill included $2,768 in long-distance charges from Sprint. But when Michele Smith, the pharmacy's business manager, called to have the charges removed, a Sprint customer services representative told her that wasn't possible.

See **FRAUD,** *page 10A*

Fraud: Legislator aims to limit phone fraud

Continued from page 1A

Smith protested and repeatedly tried to reach someone in a position of authority who could explain why the pharmacy was being required to pay charges that Sprint officials earlier had promised to waive.

"I probably spent the entire months of February and March trying to get somebody there to give me an answer," Smith said. "I kept getting passed back to this customer service representative who obviously had a script in front of her."

Monica Evans-Trout, a spokeswoman for Sprint, said the company has offered to cut the charges in half, but that is the best it can do.

"While we are sympathetic to the pharmacy being victimized, Sprint can't absorb the cost of those calls," Evans-Trout said, explaining that the long-distance company had to pay access charges to complete the unauthorized calls.

"We, too, are the victims of such scams," Evans-Trout said. "We lose millions of dollars a year to telephone scams."

Smith said Sprint didn't offer to reduce the charges until Gordon got involved in the case and called the company's legislative lobbyist, Mike Murray.

"They're willing to write off 50 percent, but they say the rest is our responsibility," Smith said.

Gordon said the protection she is attempting to extend to telephone consumers is similar to that already in place for people victimized by credit card fraud.

Sprint's Evans-Trout declined to comment on Gordon's legislation. But she said the company is working to reduce fraud by providing business customers with detailed information about how the scam artists work.

She said in the pharmacy's case, the person posing as a Sprint employee was able to gain access to the business' telephone line nine times by calling repeatedly and asking whomever answered the phone to help check the line by dialing a sequence of numbers, which allowed the caller to place international calls over the pharmacy's line.

Sprint

CORPORATE SECURITY

SOCIAL ENGINEERING

It's not high-tech, but it's high dollar loss!

Social Engineering, as it is known within the Telecommunications Industry, is the art of utilizing interpersonal conversational skills to convince unsuspecting victims into forwarding fraudulent telephone calls through corporate America's telephone systems. The fraudulent schemes which have been in use by telephone service thieves for years, have in recent months shown a drastic increase among corporate customers.

These " social engineers" can be hackers, prison inmates or call/sell operators and the terminating locations can be domestic or international telephone numbers. The following are four of the more popular schemes currently utilized by these social engineers: (*keep in mind—there are an infinite number of ways that these thieves can talk a victim out of a dialtone)

SCHEME ONE

A caller will place a call into a company receptionist, generally via the company's 800 number, requesting to be connected to the customer service department. When the customer service representative answers, the callers gets the representative's name and then indicates that the receptionist has put his call to the wrong department. The caller then asks to be returned to the receptionist and when connected, assumes the identity of the employee previously called. The caller requests the receptionist's assistance in getting an outside line. Upon connection to an outside line, the caller places a fraudulent long distance call.

SCHEME TWO ***MOST COMMON***

A caller contacts a company receptionist posing as a telephone technician and requests assistance in checking for problems with the company's telephone lines. The caller requests that the receptionist dial 910333 (or 910XXX—depending on the carrier). This is the casual calling feature that allows the call to go out over a chosen carrier. If forwarded, the " 9" provides the caller with an outside line and the 10333 allows the caller to either charge the call directly to the company through Sprint, or allows him to use a stolen telephone credit card. The caller can also utilize this scenario and ask to be transferred to extension 90xx which connects him to a long distance operator who then facilitates a long distance call. Another variation of this scheme is to ask to be connected to extension 9011. This allows the caller to get an outside line (" 9"), then " 011" allows the caller to direct dial to international locations.

It is not uncommon for telephone thieves to pose as executives of their respective companies and attempt to dupe unsuspecting employees, or a receptionist, into placing calls for them through the company's PBX.

SCHEME THREE

In this scheme, a caller from a foreign country calls a company which provides FAXBACK services for its customers. The caller then requests that a fax be forwarded to a foreign location. When the fax is sent, the call is manipulated so that it does not disconnect, resulting in a long duration international call. The caller perpetrating this fraud is paid a percentage payment in advance by the foreign carrier, based on calling volume generated by the scheme. The payment made to the caller is made prior to the foreign carrier receiving complaints about the illegal activity.

SCHEME FOUR

This scheme involves fraudulent companies and persons in foreign countries that page employees of companies in the United States, who in turn, call the international number on their pager. When the call is answered, the person in the foreign country acts as though he is very busy accepting calls, and asks the caller to hold. The scheme is designed to keep the caller on hold for as long as possible to raise the calling volume again. The company or individual in the foreign country again receives a percentage payment for the increased call volume from the foreign carrier.

The above four schemes are very basic and can be used in multiple variations, depending on what the thief is attempting to accomplish. **The one common characteristic in each of these schemes is that they are very effective!**

Unlike other forms of customer premise equipment fraud, the answer to prevention is not more hardware or software. The only way to stop this fraud is having well-educated employees who are familiar with these types of fraud schemes and refuse to be manipulated by these social engineers!
Discuss this with all employees who answer incoming calls. Have a plan of action in place if one of these thieves does call.
EMPLOYEE EDUCATION IS THE ONLY PREVENTION!

Billing For:
Sprint

Sprint
Billing Questions
1-800-559-7928

► **Current Charges**		
Monthly Service (See Detail)		
Itemized Calls (See Items 1 thru 9)		2768 00
► **Sprint Current Charges (before taxes)**		**2768.00**
Federal Tax	93 04	
State and Local Taxes	188 22	

Itemized Calls

Item	Date	Time	Place Called		Area	Number	Rate*	Min	Amount	
Calls from 785-228-9740										
1	10/17	04 56PM	SENEGAL	SG	221	821-1004	ES	130 0	465 08	#
2	10/17	05 00PM	SENEGAL	SG	221	641-5908	NS	1 1	14 17	#
3	10/17	05 01PM	SENEGAL	SG	221	827-9230	NS	28 5	108 47	#
4	10/17	05 04PM	SENEGAL	SG	221	646-2017	NS	106 3	380 87	#
5	10/17	05 08PM	JORDAN	JN	196227254362		NS	169 8	465 52	#
6	10/17	05 13PM	SENEGAL	SG	221	827-0352	NS	127 2	454 21	#
7	10/17	05 15PM	FRANCE	FR	33320253387		ES	47 8	124 93	#
8	10/17	05 17PM	SENEGAL	SG	221	824-3537	NS	103 7	370 39	#
9	10/17	05 24PM	SENEGAL	SG	221	824-1107	NS	107 7	384 36	#
► **Total Itemized Calls for Sprint (before taxes)**								822.1	**2768.00**	

2768.00
page 5 only
3039.66
X 90 days

January 30, 2002

Chairman O'Neal and members of the Judiciary Committee:

My name is Michele Smith, I am a pharmacy technician at Jayhawk Pharmacy here in Topeka. On October 17, 2000, Jayhawk Pharmacy was the victim of a telephone scam that has proven to be very costly on many fronts.

A gentleman posing as a Sprint employee called the Custom Pharmacy and explained that Sprint was having trouble with their line and could we please help them. We are a customer service orientated business, so we do our best to help anyone who calls. We obliged the gentleman and dialed a test number and hit the "flash" key on the phone several times. This scam was truly thought out and had been perfected. The employee involved asked to speak to a supervisor and was "transferred" several times and got to speak to another individual. Our phone line was accessed nine times and a total of $2768.00 in international calls was charged to the pharmacy. The calls were made to Senegal, France and Jordan. There were nine calls made in a 28-minute time frame. The majority of the calls were for over 1 hour and therefore could not have been made by anyone at the pharmacy.

Martha Bellamy from Sprint corporate security contacted the pharmacy's owner, Mike Conlin, on October 18, 2000. Since we were not Sprint long-distance customers, she was calling to report unusual activity on our line. She faxed a copy of the incident report along with information on how the scams usually work. After this initial phone call, Kirk Starr called the Sprint executive offices to report the fraud. He talked to Patricia who told him once the charges appeared on a bill, they would be taken off with no problems or hassles. I then contacted the Kansas State Attorney General's office and spoke with Shelly Welch. She advised me to report the incident to the Kansas Corporation Commission (KCC) since it was out of her jurisdiction. Richard Persky at the KCC was notified at this time.

The charges appeared on a Southwester Bell Telephone (SWBT) bill in November. Cathy Conlin called Sprint in January to ask that the charges be removed as we were told they would be. She was put in contact with Marilyn Smith in customer service. Ms. Smith asked that Cathy fax her a copy of the bill and incident report. Cathy complied and later had a message on an answering machine that Marilyn Smith was checking on things and would get back to her. Cathy did not hear from her again. The charges were put on hold by SWBT and we were not charged interest on the amount due.

On February 28, 2001, I contacted Sprint again since we had not heard anything from them. I called the executive offices and asked to speak to Patricia. They had no Patricia in their employment. I explained the situation and was transferred to customer service. I was transferred throughout Sprint customer service no fewer than four times and spent over thirty minutes on the phone. Finally, a supervisor in the business accounts department of Sprint Kansas told me that Sprint had no responsibility for the incident and we were responsible for the entire amount.

I once again contacted Shelly Welch at the Attorney General's office asking for any type of assistance. She gave me Peggy Watkins name at Sprint and explained that she had been quite helpful in the past. I attempted to contact Ms. Watkins and was told by the telephone operator that I did not need to talk to Ms. Watkins and that she would transfer me the appropriate person. I explained that I did in fact wish to talk to Ms. Watkins and to please leave her a message.

House Judiciary
Attachment 8
2-4-02

Althea Bush returned my call the same day on behalf of Peggy Watkins and after explaining the situation again, she assured me that she would take care of it and get back to me after she checked into the situation. I faxed her a copy of the incident report, the SWBT bill, and Cathy's cover sheet from January. Ms. Bush stated that she saw no note of receiving the fax in January.

On March 1, Marilyn Smith called and left a message on the store's voice mail. For a customer service representative, the message she left was what co-workers and I would consider un-professional. The reason for her message was to tell me that she had never received the fax from Cathy, had left numerous messages for Cathy that went un-answered and was investigating the matter and would be in touch. A follow-up conversation with Cathy indicated that Cathy had never received these messages. I placed a phone call to Ms. Bush and left a voice mail for her to tell her that I had received the message from Marilyn Smith, we were not going to play a 'she said-she said' game, the situation needed to be resolved now and I thought she was going to help me.

I never received another phone call from Ms. Bush even after I left other messages for her. Ms. Smith called me back on March 2 to tell me that Ms. Bellamy from security would be calling.

Again, after hearing nothing from Sprint, I called Ms. Bellamy on March 6, 2001. She had no idea why I was calling or why she needed to talk to me. She had a note that she needed to call me, but did not know why. Later in the day, Ms. Bellamy called me back wanting to know what exactly had happened. Told her of the situation again!

A phone call to a friend at Sprint enabled me to get the name and direct phone line of Sandra McNabb, Ms. Bush's supervisor. I made this phone call and left a message as to my frustration and asked that she call me back. She returned my call and after explaining the situation and how tired I was of getting the run around, she told me she would check into things and get back to me the same day. She did return a phone call after I had left for the day and called back the next day to tell me she was still checking into things. I did not talk to Ms. McNabb ever again.

On the 9th of March, Ms. Smith called me on behalf of Ms. McNabb. She was letting me know that the legal investigation was completed and found that we were the victims of social engineering fraud and we were responsible for any and all charges up to $15,000. She would be sending me a copy of the report and also a copy of the Federal Corporation Commission (FCC) tariff that protects Sprint. I asked Ms. Smith if this was not like having a credit card stolen and having the thief run up charges. I was not responsible for the entire amount. Ms. Smith said it was not the same; this was social engineering fraud. I then asked her if Sprint was not endorsing the scam by making the consumer responsible for the charges. Her response was that Sprint had notified us of the fraud and she was not getting into this with me. My impression was that these questions were not on her customer service "script", and therefore could not answer my questions. I then called Peggy Watkins' direct line and left a message asking her to return my call, I was terribly frustrated with her customer service staff and would appreciate some answers.

Ms. Watkins returned my call on March 12th, re-iterating that Sprint was not responsible for the charges; Sprint is protected under a tariff by the FCC and state corporation commissions releasing them of any responsibility. She told me this was a criminal

matter and the police should be involved, I told her this was the first I had heard of this. After this phone call a report was filed with the Topeka Police Department. I asked for a definition of social engineering fraud and was told, "Someone gains access to your private equipment and makes phone calls and commits fraud against you." I gave her my credit card analogy and was told that is entirely different. One of Ms. Watkins comments was that this kind of fraud happens every day and Sprint cannot be held responsible for all the cases. I told her we would be appealing these charges and they would not be paid. Ms. Watkins told me that I could appeal to the FCC and the KCC, but it would not do any good because they had their tariff agreement. I thanked her for her time and the phone call ended.

I had not received a copy of the incident report and tariff by March 13th, so a follow-up phone call was made to Ms. Smith. She returned my call and said that it had been faxed to the Colin's residence. I gave her the fax number at the store and asked her to please send it again. After one more phone call to Ms. Smith, I finally received a fax on March 19th. I never did receive a copy in the mail as promised.

On March 19th, I sent a letter to the FCC explaining what had happened and we hoped that they could help us. On the 20th I received a call from Andrea McDaniel with Sprint investigating our complaint to the FCC. She asked for and I obliged her by sending another copy of the phone bill in question along with a copy of the incident report. Ms. McDaniel called back on the 26th, stating that she was not aware that we had already spoken to her supervisor. I asked who that was and she replied that it was Ms. Watkins. Ms. McDaniel told me that Ms. Watkins had already told me that the charges would not be removed so there was nothing else she could do for us.

From March 26 until July 25, 2001, I heard nothing from Sprint and to my best knowledge the pharmacy has not received a bill for these charges. On June 8th, I copied all the information I had concerning this issue and sent it to Representative Lana Gordon at her request. She had spoken with Mike and wanted to see if she could help us with this problem.

I visited with Rep. Gordon several times throughout the next month as she struggled to understand what had happened. Rep. Gordon contacted the KCC and the Sprint lobbyist here in town asking for any assistance they could give her. She also suggested that I contact Senator Sam Brownback's office to see if they could assist us in any way.

All of the information I had was copied and sent to Senator Brownback's office. His office contacted the FCC and the KCC to determine the extent of our liability. I have received the FCC's response to Senator Brownback.

Southwestern Bell Telephone contacted me in June to tell me that SWBT had removed the charges from the pharmacy's account and was returning them to Sprint, "the recourse is back to Sprint".

On July 25th, Rep. Gordon, Ms. Watkins, Mike Murray and I had a conference call. Ms. Watkins indicated that Sprint was willing to write-off 50% of the charges. I told her this was unacceptable—we had been told in October that all charges would be removed. She again explained social engineering fraud; Sprint's protection by the FCC tariff, and that no one in her office would have told us that the charges would be removed. At this point, I asked Ms. Watkins how Sprint morally and ethically could charge someone for charges incurred through fraud, did they feel right about taking money from people especially the elderly who are the most frequent fraud victims? She had no response

except to again quote her tariff. I also told her that the word was out about her company, no one here at the store would ever use Sprint, and we had even dropped Earthlink because of its affiliation with Sprint. Perhaps I needed to contact our representatives and senators in Washington about repealing this tariff because I do not think it is right that a carrier has no liability. Ms. Watkins interjected that Sprint was willing to accept 50% of the liability. I replied that the amount was not acceptable and we would wait to see what our next step would be. Ms. Watkins did not know what more Sprint could do. I left the conference call.

We have received written responses from Sprint concerning our letter to the FCC. The letters state what has been told to me in the past. The FCC tariff seems to be the company's answer for any question or concern. The letters are enclosed as part of this testimony.

This situation has taken far longer than it ever should have to be resolved. And it has not been resolved in my mind. My personal frustration with Sprint and the whole matter is that no one could answer questions, return phone calls and I could never speak to a person in charge more than once. I found Marilyn Smith to be unprofessional and incapable of providing the information necessary to answer my questions and she seemed to be the one in charge of this matter. I think the fact that it took her a week to get a fax to me speaks volumes. The whole matter has taken more of my time, both at the pharmacy and at home, than you can even imagine.

We at the pharmacy are all professionals, there are 4 registered pharmacists, a nurse, a certified pharmacy technician and I am a radiologic technologist and an educator. We all have been in the health care profession long enough to know that if something is told to you, you document it in writing at the time. My point is that if we were told to report this incident to the police in October of 2000, we would have written it down and it would have been done, and if someone named Patricia at Sprint said the charges would be taken care of, then we did in fact talk to Patricia.

Representative Gordon contacted me late in the summer to tell me she was drafting a bill to protect other consumers from this type of fraud. I applaud her effort. Long distance carriers should not be free of liability. I continue to see no difference in social engineering fraud and the stealing of a credit card. The consumer must be protected from this type of fraud. It is not the consumers' fault that the long distance carriers have easily memorized and recognizable access numbers. If a consumer reports the fraud and notifies the carrier, it is not their responsibility to prove that the fraud occurred—the carrier must accept its responsibility.

While it may be to late for the pharmacy, I can only hope that this bill makes it out of committee and is passed. No one in the state of Kansas or for that matter in the United States should have to go through what we as business owners, employees and citizens did. Most people would have given up and paid the charges and, unfortunately, Sprint would have accepted them with no qualms. I ask that you give careful consideration to Representative Gordon's bill. Let Kansas be on the forefront of protecting its consumers from the long distance carriers and FCC tariff NO1, Section 3.4.

Thank you for your time and consideration.

Sprint

401 9th Street, Northwest, Suite 400
Washington, DC 20004

August 3, 2001

Federal Communications Commission
Consumer Information Bureau
Consumer Information Network Division
Gettysburg Consumer Center
1270 Fairfield Road
Gettysburg, PA 17325-7245

Attn: Sharon C. Bowers, Deputy Division Chief

Re: 63203 IC # 01-G21810 (Billing)
Congressional Complaint of Michael Conlin
Notice of Informal Complaint dated July 11, 2001

Dear Ms. Bowers:

Sprint Communications Company (Sprint) is in receipt of the above-referenced complaint of Senator Sam Brownback on behalf of Michael Conlin. This complaint was served on Sprint on July 11, 2001.

According to the information received, Mr. Conlin disputes Sprint charges totaling $2,700.00 for calls placed as the result of social engineering fraud.

Sprint's records show that we have previously addressed this complaint under FCC IC # 01-N50031 and Kansas Corporation Commission file number 47937. I have attached a copy of those two responses for your convenience.

The $15,000 liability cap on fraudulent toll charges to which Mr. Conlin refers pertains to Sprint customers who utilize SprintGuard, a liability sharing program. Because Mr. Conlin is not a Sprint customer, it does not apply to his situation.

Our records further show that several members of Sprint management conducted a conference call on July 25, 2001 with Ms. Michelle Smith of Jayhawk Pharmacy and Rep. Lana Gordon. During the call, Sprint offered to reduce the disputed charges by 50%; however, Ms. Smith declined this offer. Therefore, the charges were not credited and Sprint continues to sustain them as of this date. If Mr. Conlin would care to reconsider our offer, we ask that he contact our Executive Office at (800) 347-8988.

Sprint sincerely regrets the inconvenience this matter has caused Mr. Conlin. If you have any further questions, please do not hesitate to contact me.

Yours very truly,

Norina T. Moy

Norina T. Moy
Director, Federal Regulatory
Policy and Coordination

NTM/jdc:1135402

Enclosures

c: Michael Conlin
Jayhawk Pharmacy
6730 S.W. 29th Street
Topeka, KS 66614

Sprint

PO Box 569290
Dallas, TX 75356-9290

March 26, 2001

Ms. Michelle Smith
Jayhawk Custom Prescription Center
6730 SW 29th Street
Topeka, KS 66614

Re.: 47937

Dear Ms. Smith:

Sprint is in receipt of your complaint to the Kansas Corporation Commission. According to the information that I was provided, you were a victim of Customer Premise Equipment (CPE)/ Social Engineering Fraud.

You have previously dealt with Marilyn Smith in our office regarding this same issue. Ms. Smith states that she has sent you the tariff information regarding of Customer Premise Equipment (CPE)/ Social Engineering Fraud, as well as information stating Sprint's position on this issue.

Sprint is not liable for the charges that you incurred, as the abuse occurred at your premise equipment and not in the Sprint switches or network. We regret that we respectfully sustain the charges.

If you have additional questions or concerns regarding this issue, please contact at (800) 347-8988.

Sincerely,

Andrea McDaniel

Andrea McDaniel
Regulatory Analyst

AM:1125858

c: Mr. Steve Boyd
Kansas Corporation Commission
Via Fax

Sprint

401 9th Street, NW, Suite 400
Washington, DC 20004

June 15, 2001

Ms. Cynthia D. Brown, Acting Chief
Federal Communications Commission
Consumer Information Bureau
Consumer Information Network Division
Informal Complaints Team
Room TW-385
445 12th Street, Southwest
Washington, DC 20554

RE: IC # 01-N50031 (Billing)
Complaint of Michael Conlin on behalf of Jayhawk Pharmacy Services
Notice of Informal Complaint dated May 16, 2001

Dear Ms. Brown:

Sprint Communications Company (Sprint) is in receipt of the above-referenced complaint of Michael Conlin. The Commission served Sprint with this complaint on May 16, 2001.

According to the information provided, Mr. Conlin is disputing $2768.00 in Sprint charges for calls that were billed to him as a result of a scam in which someone posed as a Sprint employee to get access to his telephone lines.

Our customer records do not include an account for telephone number (785) 228-9740 or under the name of Michael Conlin or Jayhawk Pharmacy Services. Our records indicate Sprint discussed this issue with Mr. Conlin on March 10, 2001. At that time we informed Mr. Conlin that in accordance with Sprint's Tariff F.C.C. No. 1, Section 3.4, he is responsible for these calls because they were made directly from his telephone lines.

Sprint regrets any inconvenience that Mr. Conlin may have experienced as a result of this matter. However, since the charges represent valid use of the Sprint network, they must respectfully be sustained. If you require any additional information, please do not hesitate to contact me.

Yours very truly,

Norina T. Moy

Norina T. Moy
Director, Federal Regulatory
Policy and Coordination.

NTM/jr: 1130409

cc: Michael Conlin
6730 SW 29th Street
Topeka, KS 66614

Citizens' Utility Ratepayer Board

State of Kansas
Bill Graves: Governor

1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027
Phone: (785) 271-3200
Fax: (785) 271-3116

January 30, 2002

H.B. 2606

Testimony by Walker Hendrix
Consumer Counsel
Citizens' Utility Ratepayer Board

Representative Lana Gordon has sponsored an excellent bill to place limitations on the charges that can be assessed for "telecommunications service abuse." As new technology provides businesses and residential customers with more flexibility in how they use their telecommunications services, new schemes have been devised by perpetrators to remotely access phone systems for the purpose of making unauthorized or fraudulently induced toll calls. These calls will be billed to an innocent victim and the charges may run into the thousands of dollars. Not unlike credit card fraud, H.B. 2606 places a limitation on the charges that can be assessed to an innocent victim. These charges will be restricted to no more than $50.00. Telecommunications companies will have the burden to show the calls were authorized.

There is no question that new forms of telephone fraud are on the rise. A person masquerading as a telephone repairman may be able to remotely contact you and convince you there is trouble on your line. If you assume this is correct and you comply with a request to dial a number to confirm trouble on the line, you may allow the perpetrator the ability to make toll calls using your phone line. If the calls are to Kabul or Singapore, the charges will be staggering and the phone company will insist that you pay for the full amount of the calls

Businesses with PBX equipment are particularly vulnerable. PBX systems have remote access features which allow employees away from the office to obtain an outside line. Unauthorized users can breach the security within the phone system and are able to make long distance phone calls.

Unauthorized users can use computers to test authorization codes on your phone system. Once the authorization code is broken, the person can make unauthorized calls through the PBX equipment. If an incoming 800 or 888 line has been used, your business will be held responsible for the incoming and outgoing call.

Some voice mail systems have features that provide a link to the PBX remote access feature and will give a caller a dial tone after the voice male message has been finished. Unauthorized users may be able to arrange third number billing to the telephone number served off the voice mail system.

The incidents of fraud occur more often during the holidays and vacation seasons when many businesses have temporary personnel filling in. A small business may be economically hampered if it is the victim of unauthorized calls.

It seem that if the credit card industry can protect a consumer against similar types of fraudulent activities, the phone companies could be required to institute similar protections. Accordingly, the Citizens' Utility Ratepayer Board supports passage of H.B. 2606.

Thank you for your consideration.

AARP Kansas

555 S. Kansas Avenue
Suite 201
Topeka, KS 66603
(785) 232-4070
(785) 232-8259 Fax

February 4, 2002

Good afternoon, Chairman O'Neal, members of the House Judiciary Committee. My name is John Reinhart and I am the Associate State Director of Communications for AARP Kansas. AARP Kansas represents the views of our more than 350,000 members in the state of Kansas. Thank you for this opportunity to express our views in ***support*** of House Bill 2606.

The emerging global economy presents many challenges for consumers. Telemarketing fraud and identity theft victimizes people of all ages, ethnic groups, educational backgrounds and income levels. Computers, toll-free communications, etc. have enabled white-collar criminals and con artists to reach vast audiences. Access to personal information allows an imposter to obtain credit, open accounts and make unauthorized purchases including long distance telephone calls. It is estimated by the Privacy Rights Clearinghouse that some 500,000 individuals a year are the victims of some form of identify theft. The US Secret Service estimates that monetary losses (individual and institutional) associated with identify theft rose from $442 million in 1995 to $745 million in 1997.

Safeguarding consumers against fraud, deception and unfair practices is the responsibility of federal, state and local consumer protection regulatory agencies. On many consumer protection issues, there has been a move on the federal level to preempt state laws. However, states have long been recognized for their policy innovations and currently play an invaluable role in developing important innovations in health, safety and consumer protection regulations. In many cases, state initiatives ultimately act as the impetus for needed improvements in federal regulations.

AARP encourages state legislation that provides individuals with effective protections against the unauthorized use of communications services. We believe that legislation should be enacted to insure that consumer privacy is consistently protected. Therefore, AARP Kansas *supports* House Bill 2606.We would recommend that the following two amendments be considered:

- Limits on liability are reduced from $50 dollars to no cost to the consumer. The consumer is a victim in this theft and AARP proposes that no entity should charge for a service that the customer has not ordered or used.
- Removal of the 90-day reporting period. Customers may not immediately notice the fraudulent charges during that period of time.

Thank you again for this opportunity. I will now stand for questions.

House Judiciary
Attachment 10
2-4-02

SUPER CHIEF Credit Union

Main Office ★ 501 N. Lake ★ Topeka, KS 66616 ★ 235-5311
Branch Office ★ 2120 S.W. Belle Avenue ★ Topeka, KS 66614

January 24, 2002

My name is Bill Hiskey, and I'm here to speak in favor of House Bill No. 2606 introduced by Representative Gordon. I am the current President of the Super Chief Credit Union here in Topeka.

I'm here to share with you what happened to our business several years ago. In the way of background, we have a Merlin Legend AT&T phone system in our credit union.

I came to work on a Monday morning and received a call from the "security department" of Sprint Communications informing me that over $1,600 in long distance calls had been made from our phone number over the weekend. The caller further stated that they suspected our system had been "hacked". The calls were all the way from Hong Kong to Malaysia and all were overseas calls.

The hackers called our business number, received the "auto attendant" and with internal knowledge of the system, were able to get an outside line and make as many long distance calls as they wanted.

I immediately asked if there wasn't something that could be done to reduce the phone bill, knowing that no one from our credit union had made the calls. I was informed that nothing could be done.

My last hope was that our bonding company might provide some coverage. The answer was "no coverage". The end result was that the members of our credit union suffered a loss of over $1,600.

I'm asking your support for House Bill No. 2606.

Respectfully,

Bill Hiskey, President
Super Chief Credit Union

House Judiciary
Attachment 11
2-4-02

January 30, 2002

Chairman O'Neal and members of the Judiciary Committee:

My name is Mike Conlin and I am the owner of Jayhawk Pharmacy Services of Topeka. I am also a consumer, both as a business owner and a private resident. The fraud that was committed against the pharmacy could have just as easily been perpetrated at a private residence.

Michele Smith has testified as to the facts of our case and the time and effort spent in attempting to resolve this issue with the Sprint Corporation. I would like to address another aspect of the issue.

As a small business owner there are expenses every month, every year that I must incur that I have no control over. One thing I do have some control over is my telephone and the bill that goes along with it. These charges from Sprint were beyond my control. The nature of my business is customer service. I stress to my employees that our customers and how they are treated are the most important thing we do. This includes how we conduct ourselves on the telephone. If Mrs. Jones calls and would like to talk to a pharmacist about a medication she picked up yesterday, she is put through to one of our pharmacists without question. Anyone with a question or concern is put through to the appropriate person or is helped by the person answering the phone. This would include someone with a telephone company that said there was a problem on the line. We now know better, we have learned the hard way. At the time though, there would have been no question but to help.

I do appreciate Sprint calling about the charges—I can only imagine the reaction I would have had opening the November telephone bill and seeing almost $3000 worth of long distance calls to Senegal and Jordan. I was told by Martha Bellamy at the time not to worry about the charges so I didn't as Martha said the calls were not going to be our responsibility. In hindsight, I should have proceeded differently.

Michele contacted both the Attorney General's office and the Kansas Corporation Commission (KCC) about this issue. The Attorney General's office had no jurisdiction over this issue because I own a small business and am not a sole proprietorship. The KCC had no jurisdiction because the calls went across the state's borders. While I understand these issues, it is a shame that another small business owner, a private citizen or I have no recourse against this type of fraud. I think Representative Gordon's bill would offer that recourse.

The persons committing this fraud had Sprint's access codes that granted them use of my long distance line, these codes have to be easily attainable. As a business owner, I would make sure that anything that put me in danger of being a party to a criminal act was not available, for example fraudulent prescriptions. Certainly, if somehow that information was accessed, I would change the information. Sprint states that this type of fraud happens every day; should Sprint then not take some type of action to ensure that it does not happen every day? Or is this a Sprint scheme to increase revenues because consumers presently do not have any recourse? Could these access codes not be changed from time to time? I do not know the feasibility of doing something like this, but from a business standpoint it would seem that something needs to be done. Long distance carriers should not be allowed to perpetuate this type of fraud and collect the

money. Again, I think this bill would jump-start this type of process if the carriers have some liability when theft by deception takes place.

The actual charges involved in our situation are enough of a hardship for a business, they would be worse if they happened on a residential line. A lot of people would go the first round with a long-distance carrier, but would probably give up and pay the bill. If this happened to the elderly or someone on a fixed income, are they going to go without food, medicine, or heat in order to pay the charges? Sprint is willing to accept the money and go on with their daily business.

The charges that were incurred on our line, are but one of other financial issues that have resulted as a consequence of this scam. We have lost manpower hours, several members of my staff took time to help report the scam when it first occurred and Michele has spent a countless amount of time trying to get the issue resolved. There have been phone calls, letters and faxes to Sprint, the KCC, the Attorney General's office, the FCC and Senator Brownback's office. All take time and money on my part.

We are all health care professionals at the pharmacy. Our business depends on accuracy and precision. Taking accurate notes and documentation are a routine part of our day, the customer's well-being are dependent on us getting the prescription right. Things that were told to us by Sprint would have been documented—Kirk was told that the charges would be removed, and Michele was told that she would receive documentation and could expect phone calls to be returned. We as pharmacists are held to certain standards to ensure the consumer is taken care of correctly, should long distance carriers not be held to their own standards?

In conclusion, I fully support Rep. Gordon's bill. I see it as necessary to protect the rights of <u>all</u> consumers in the state. The consumer needs to have some recourse when they are the victims of social engineering fraud. I, like Michele, see no difference between this type of fraud and credit card theft. The credit card carriers accept responsibility and aid the consumer, the long distance carriers should accept their responsibility. This bill will see to that. I urge you to carefully consider this bill and pass it on to the full legislature.

Sprint

Before the House Judiciary Committee
Monday, February 4, 2002
Michael R. Murray, Director of Governmental Affairs
HB 2606

Thank you Mr. Chairman and the Members of the Committee for the opportunity to comment on the issue of telecommunications fraud and HB 2606.

First, let me say that we sympathize with the folks from Jayhawk Pharmacy who were victimized by the perpetrator of this crime. We understand and appreciate their point of view.

At the same time, Sprint is also the victim, and has suffered financial harm since we have already paid very exorbitant access charges to the foreign telephone carriers involved, in addition to incurring our internal network costs.

This phone scam is known in the telecommunications industry as "social engineering." It means that a person uses their "social" skills, their verbal skills, their interpersonal skills, to "engineer" access to a businesses' long distance lines for the purposes of making fraudulent domestic or international telephone calls.

Generally it occurs when a person telephones a business with multiple lines, and tells the operator he or she is a telephone company technician working on the businesses' phones and says to the operator "just dial a 9 0 1 1 and that will be all I need", or "All I need is a dial tone and the trouble will be fixed." 9 gets you to an outside line, and 011 are the first three digits of an international phone call, or by just getting an outside line or dial tone the perpetrator can use the long distance "dial around" number for any long distance carrier, in this case Sprint, which is 1010333. This bypasses the long distance carrier of the customer and puts the fraudulent call directly on the Sprint network.

The perpetrator is probably not in the city of the business being victimized. He or she is probably in Grand Central Station in New York, or LAX in Los Angeles, or O'Hare in Chicago. He or she probably has some "clients" lined up at a bank of pay phones each one willing to pay him or her $50 to talk to their family in a foreign country for as long as they want.

These businesses are hit at random. The crook just keeps dialing business numbers until they get someone to cooperate on the other end.

This type of telecommunications fraud represents a multi-million dollar annual loss to Sprint. From October 2000 to October 2001, Sprint investigated 1964 cases of social engineering involving international phone calls. These calls cost Sprint over $2.3 million, or about $1,171 per instance. This amounts to 37 cases per week. In addition, there are an estimated 150 to 160 cases of domestic social engineering which occur per week. We know this because of customer complaints about domestic calls made from their lines which were not authorized. It is impossible for Sprint to monitor those calls.

Sprint Corporate Security monitors our international fiber optic network for anomalies in international phone calling. It is not in real time. In this particular case it took about 8 hours for the excessive usage to show up on the system which triggered phone calls to Jayhawk Pharmacy from Sprint to see if they were aware of the calls. After the pharmacy indicated no on there was making the calls, Sprint blocked further international calling. Unfortunately, by that time it had resulted in a substantial number of minutes of calls to Jordan, Senegal and France, with a total bill of $2,768. As in most cases, the perpetrator had called the pharmacy several times and access was granted several times.

Sprint made the same offer to Jayhawk Pharmacy that it would make to a Sprint long distance or local telephone customer. That is to rerate the charges, reducing them by 50%, if the Pharmacy would file a police report. The Pharmacy refused the 50% offer and refused to file the police report. The offer is still open, however. Jayhawk Pharmacy is a Southwestern Bell local customer, and I don't know who is the long distance provider.

Sprint offers materials and provides seminars to Sprint business long distance customers at their request or through the sales process to alert employees to this type of fraud. An example of such information is included. Also, the FCC recognizes this is a significant problem and has posted the enclosed consumer alert on its website. Besides that, as you can see from the 1998 letter to Ann Landers and a Wellsville Globe newspaper editorial also from 1998 this issue has been in the public domain for some time.

So, that brings us to this point and the legislation before us.

Section 151 and Section 152 of the Federal Telecommunications Act of 1996 grant to the Federal Communications Commission exclusive jurisdiction in regulation of interstate and foreign telephone calls. I've included copies of relevant portions of the Act with my testimony. It is our view that the State of Kansas has no jurisdiction in this matter, and therefore passage of such a bill is inappropriate.

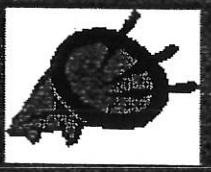
Indeed, the FCC has acted in this area. It has consistently ruled that liability for such fraud will rest with the party in the best position to prevent it. In this case it would be the customer. I've included a copy of one of such rulings with my testimony. (Gerry Murphy Realty vs AT&T.)

Notwithstanding the fact that we believe the Legislature has no jurisdiction in this matter, HB 2606 goes way beyond the situation with Jayhawk Pharmacy. By limiting a consumer's liability to $50 for telecommunications service abuse as defined in (p) of Section 1, beginning on line 33, an unscrupulous person or relative could make unauthorized long distance calls and then deny doing so, and pay only $50.

Secondly, in New Section 2 beginning on line 18, the burden of proof is unattainable. The provider cannot prove that the telecommunications service abuse charges were authorized or unauthorized.

We respectfully ask that this bill not be passed. I'd be happy to respond to questions.

FCC Consumer Alert



Consumer Information Bureau
445 12th Street, S.W., Washington, DC 20554
1-888-CALL-FCC (1-888-225-5322) *voice*
1-888-TELL-FCC (1-888-825-5322) *TTY*

Don't Fall for the 90# Telephone Scam

The old phone scam involving the 90# buttons on your business telephone is still around.

How This Kind of Scam Occurs

You receive a call at your office from someone claiming to be a telephone company employee investigating technical problems with your line, or checking up on calls supposedly placed to other states or countries from your line. The caller asks you to aid the investigation by either dialing 90# or transferring him/her caller to an outside line before hanging up the telephone receiver. By doing this, you unknowingly enable the caller to place calls that are billed to your office telephone number.

What You Should Know

- Telephone company employees checking for technical and other types of telephone service or billing problems would not call and ask a subscriber to dial a specific series of numbers before hanging up the telephone receiver.
- Telephone company employees would not request subscribers to connect the caller to an outside line before hanging up the receiver.
- These types of calls are made to trick subscribers into taking actions that will enable the caller to place fraudulent calls.
- This scam only works if your telephone is served by a private branch exchange (PBX) or private automatic branch exchange (PABX).

What to Do

13-4

If you are a business subscriber of telephone service and your place of business utilizes either a PBX or a PABX, you or your company telecommunications manager should contact the manufacturer of the PBX or PABX and the telephone companies that provide you with local and long distance service, to obtain information about the type of security systems they have available to protect your telephone system from toll fraud. You may also ask about any monitoring services that they might have to help detect unusual telephone system usage.

Avoid Becoming a Target

To avoid becoming a target of this scam, educate yourself and your employees about the 90# toll fraud scam. Encourage them to take the following steps if they think that a telephone call is fraudulent or is part of this scam:

- Ask the caller for his/her name and telephone number;
- Tell the caller you are going to call the telephone company immediately to determine whether or not there is a problem with the line;
- Immediately hang up the receiver; do not dial any numbers or transfer the caller to an outside line before hanging up;
- Find the telephone number for your telephone service provider and/or its security office and report the suspicious phone call. Be prepared to provide details of the call to the telephone company representative; and
- Contact your local law enforcement officials.

To receive regular FCC consumer information *via* e-mail, send an e-mail to: subscribe@info.fcc.gov. Type the following in the subject line: subscribe fcc-consumer-info Your first name Your last name

011105

last reviewed/updated on 11/07/01

Federal Communications Commission
445 12th Street SW
Washington, DC 20554
More FCC Contact Information...

Phone: 888-CALL-FCC (225-5322)
TTY: 888-TELL-FCC (835-5322)
Fax: 202-418-0232
E-mail: fccinfo@fcc.gov

13-5

Sprint

CORPORATE SECURITY

SOCIAL ENGINEERING

It's not high-tech, but it's high dollar loss!

Social Engineering, as it is known within the Telecommunications Industry, is the art of utilizing interpersonal conversational skills to convince unsuspecting victims into forwarding fraudulent telephone calls through corporate America's telephone systems. The fraudulent schemes which have been in use by telephone service thieves for years, have in recent months shown a drastic increase among corporate customers.

These " social engineers" can be hackers, prison inmates or call/sell operators and the terminating locations can be domestic or international telephone numbers. The following are four of the more popular schemes currently utilized by these social engineers: (*keep in mind—there are an infinite number of ways that these thieves can talk a victim out of a dialtone)

SCHEME ONE

A caller will place a call into a company receptionist, generally via the company's 800 number, requesting to be connected to the customer service department. When the customer service representative answers, the callers gets the representative's name and then indicates that the receptionist has put his call to the wrong department. The caller then asks to be returned to the receptionist and when connected, assumes the identity of the employee previously called. The caller requests the receptionist's assistance in getting an outside line. Upon connection to an outside line, the caller places a fraudulent long distance call.

SCHEME TWO ***MOST COMMON***

A caller contacts a company receptionist posing as a telephone technician and requests assistance in checking for problems with the company's telephone lines. The caller requests that the receptionist dial 910333 (or 910XXX—depending on the carrier). This is the casual calling feature that allows the call to go out over a chosen carrier. If forwarded, the " 9" provides the caller with an outside line and the 10333 allows the caller to either charge the call directly to the company through Sprint, or allows him to use a stolen telephone credit card. The caller can also utilize this scenario and ask to be transferred to extension 90xx which connects him to a long distance operator who then facilitates a long distance call. Another variation of this scheme is to ask to be connected to extension 9011. This allows the caller to get an outside line (" 9"), then " 011" allows the caller to direct dial to international locations.

It is not uncommon for telephone thieves to pose as executives of their respective companies and attempt to dupe unsuspecting employees, or a receptionist, into placing calls for them through the company's PBX.

SCHEME THREE

In this scheme, a caller from a foreign country calls a company which provides FAXBACK services for its customers. The caller then requests that a fax be forwarded to a foreign location. When the fax is sent, the call is manipulated so that it does not disconnect, resulting in a long duration international call. The caller perpetrating this fraud is paid a percentage payment in advance by the foreign carrier, based on calling volume generated by the scheme. The payment made to the caller is made prior to the foreign carrier receiving complaints about the illegal activity.

SCHEME FOUR

This scheme involves fraudulent companies and persons in foreign countries that page employees of companies in the United States, who in turn, call the international number on their pager. When the call is answered, the person in the foreign country acts as though he is very busy accepting calls, and asks the caller to hold. The scheme is designed to keep the caller on hold for as long as possible to raise the calling volume again. The company or individual in the foreign country again receives a percentage payment for the increased call volume from the foreign carrier.

The above four schemes are very basic and can be used in multiple variations, depending on what the thief is attempting to accomplish. **The one common characteristic in each of these schemes is that they are very effective!**

Unlike other forms of customer premise equipment fraud, the answer to prevention is not more hardware or software. The only way to stop this fraud is having well-educated employees who are familiar with these types of fraud schemes and refuse to be manipulated by these social engineers!
Discuss this with all employees who answer incoming calls. Have a plan of action in place if one of these thieves does call.

EMPLOYEE EDUCATION IS THE ONLY PREVENTION!

Phone scam can be stopped

Kansas City Star - June 23, 1998

DEAR ANN LANDERS: I just found out about a telephone scam, and I hope you will warn your readers about it.

I received a phone call from someone who identified himself as an AT&T service technician. This so-called technician claimed to be running a test on the phone lines and asked me to help him by touching the number 9, then 0, then the pound sign ( ). I was then supposed to hang up. I became suspicious, said I was in a big hurry and hung up.

I called the phone company and was informed that by pushing 90 , I would be giving that "technician" access to my phone line, allowing him to place long-distance calls while the charge appeared on my bill. Please alert your readers to this scam. — Dayton, Ohio

Dear Dayton: I appreciate your letter. You have helped me alert millions of people to a racket that could be very costly.

We contacted Oriano Pagnucci, the director of public relations at AT&T. He said that real AT&T technicians do *not* call and ask customers to help check the phone lines or run tests. If anyone should call you and say he (or she) is an AT&T service person, ask for his or her name, phone number and the name of a supervisor. Then hang up. The caller's identity can then be verified through AT&T.

These crooks should not be permitted to get away with such shenanigans. Victims who do nothing are aiding and abetting them in their dirty work.

WELLSVILLE
GLOBE
6-11-98

Beware of Phone Scam

By Clyde Adams

There is a new phone scam that allows the perpetrator to place long distance calls billed to your phone number.

The scam basically works as follows: The caller identifies himself as a phone company technician. He/She states they are conducting a test on your phone line. The caller then requests you touch 9, 0, the # sign and then hang up to complete the test.

When you push 90#, you give the requesting individual full access to your telephone line. This allows them to place long distance calls billed to your number.

DO NOT PRESS 90# FOR ANYONE.

Source: All Sources > / . . . / > **USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws**
TOC: United States Code Service; Code, Const, Rules, Conventions & Public Laws > / . . . / > GENERAL PROVISIONS > **§ 151. Purposes of chapter; Federal Communications Commission created**

47 USCS § 151

*** CURRENT THROUGH P.L. 107-89, APPROVED 12/18/01 ***

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

47 USCS § 151 (2001)

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act [47 USCS §§ 151 et seq.].

HISTORY:
(June 19, 1934, ch 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, ch 229, § 1, 50 Stat. 189.)
(As amended Feb. 8, 1996, P.L. 104-104, Title I, Subtitle A, § 104, 110 Stat. 86.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:
Act June 19, 1934, ch 652, Title VII [Title VI], § 707 [607], 48 Stat. 1105, which appears as 47 USCS § 607, provided that this section is effective July 1, 1934.

Amendments:
1937. Act May 20, 1937, inserted "for the purpose of promoting safety of life and property through the use of wire and radio communication".
1996. Act Feb. 8, 1996, inserted ", without discrimination on the basis of race, color, religion, national origin, or sex,".

Other provisions:
World telecommunications conferences. Act May 13, 1947, ch 51, 61 Stat. 83, provided:

13-9

Source: All Sources > / . . . / > USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws
TOC: United States Code Service; Code, Const, Rules, Conventions & Public Laws > / . . . / > GENERAL PROVISIONS > § 152. Application of chapter

47 USCS § 152

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

• GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

47 USCS § 152 (2001)

§ 152. Application of chapter

(a) The provisions of this Act [47 USCS §§ 151 et seq.] shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to wire or radio communication or transmission wholly within [the Philippine Islands or] the Canal Zone. The provisions of this Act [47 USCS §§ 151 et seq.] shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI [47 USCS §§ 521 et seq.].

(b) Except as provided in sections 223 through 227 [47 USCS §§ 223-227], inclusive, and section 332 [47 USCS § 332], and subject to the provisions of section 301 [47 USCS § 301] and Title VI [47 USCS §§ 521 et seq.], nothing in this Act [47 USCS §§ 151 et seq.] shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive [47 USCS §§ 201-205], shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

HISTORY:

(June 19, 1934, ch 652, Title I, § 2, 48 Stat. 1064; April 27, 1954, ch 175, § 1, 68 Stat. 63; Feb. 21, 1978, P.L. 95-234, § 5, 92 Stat. 35; Oct. 30, 1984, P.L. 98-549, § 3(a)(1), (2), 98 Stat. 2801; Nov. 21, 1989, P.L. 101-166, Title V, § 521(2), 103 Stat. 1193; July 26, 1990, P.L. 101-336, Title IV, § 401(b)(1), 104 Stat. 369; Dec. 20, 1991, P.L. 102-243, § 3 (b), 105 Stat. 2401; Aug. 10, 1993, P.L. 103-66, Title VI, § 6002(b)(2)(B)(i), 107 Stat. 396.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "Canal Zone", referred to in subsec. (a), is defined in 22 USCS § 3602(b).

Explanatory notes:

The words "the Philippine Islands" were enclosed in brackets in subsec. (a) as obsolete in view of the recognition of Philippine independence by Proc. No. 2695 of July 4, 1946, 11 Fed. Reg. 7517, 60 Stat. 1352, which appears as 22 USCS § 1394 note.

Effective date of section:

For effective date of section, see Act June 19, 1934, ch 652, Title VII [Title VI], § 707 [607], 48 Stat. 1105, which appears as 47 USCS § 607.

Amendments:

1954. Act April 27, 1954, in subsec. (b), in cl. (1), inserted "by wire or radio", added cls. (3) and (4), and inserted "(3), and (4)".

1978. Act Feb. 21, 1978, in subsec. (b), substituted "Except as provided for in section 224 and subject" for "Subject".

1984. Act Oct. 30, 1984 (effective 60 days after enactment on 10/30/84 as provided by § 9(a) of such Act which appears as 47 USCS § 521 note), in subsec. (a), added the sentence beginning "The provisions of this Act shall apply with respect . . ."; and, in subsec. (b) added "and title VI".

1989. Act Nov. 21, 1989 (effective 120 days after enactment as provided by § 521(3) of such Act, which appears as a note to this section), in subsec. (b), substituted "section 223 or 224" for "section 224".

1990. Act July 26, 1990, in subsec. (b), purported to substitute "sections 224 and 225" for "section 224"; however, "sections 224 and 225" were substituted for "224" as the probable intention of Congress.

1991. Act Dec. 20, 1991, in subsec. (b), substituted "Except as provided in sections 223 through 227, inclusive, and subject to the provisions" for "Except as provided in section 223 or sections 224 and 225 and subject to the provisions".

1993. Act Aug. 10, 1993 (effective on the date of enactment, as provided by § 6002(c) of such Act, which appears as 47 USCS § 332 note), in subsec. (b), inserted "and section 332,".

Other provisions:

Effective date of Feb. 21, 1978 amendments. Act Feb. 21, 1978, P.L. 95-234, § 7, 92 Stat. 36, provided: "The amendments made by this Act [amending this section, among other things; for full classification, consult USCS Tables volumes] shall take effect on the thirtieth day after the date of enactment of this Act; except that the provisions of sections 503(b) and 510 of the Communications Act of 1934 [47 USCS §§ 503(b), 510], as in effect on such date of enactment, shall continue to constitute the applicable law with the respect to any act or omission which occurs prior to such thirtieth day.".

Application of Oct. 30, 1984 amendments. For provisions as to the application of the Oct. 30, 1984 amendments to this section, see Act Oct. 30, 1984, P.L. 98-549, § 3(b), 98 Stat. 2801, which appears as 47 USCS § 521 note.

Effective date of Nov. 21, 1989 amendments. Act Nov. 21, 1989, P.L. 101-166, Title V, §

*2001 FCC LEXIS 5540, *; 24 Comm. Reg. (P & F) 1191*

In the Matter of GERRI MURPHY REALTY, INC., Complainant, v. AT&T CORPORATION Defendant

File No. EB-01-TC-F008

FEDERAL COMMUNICATIONS COMMISSION

2001 FCC LEXIS 5540; 24 Comm. Reg. (P & F) 1191

RELEASE-NUMBER: FCC 01-310

October 15, 2001 Released; Adopted October 12, 2001

ACTION: [*1] MEMORANDUM OPINION AND ORDER

JUDGES:
By the Commission

OPINION:
I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the above-captioned formal complaint filed by complainant Gerri Murphy Realty, Inc. (GMRI). The Complaint raises three issues for the Commission's consideration: (1) whether AT&T's Tariff F.C.C. No. 1, Section 2.4.1.A on file with the Commission at the time of the events giving rise to this proceeding is lawful; n1 (2) whether GMRI is liable pursuant to AT&T's tariff for charges associated with long distance telephone calls made in September 1999 by third parties who obtained unauthorized access to GMRI's communications system; n2 and (3) whether AT&T's conduct with regard to the unauthorized calls was unreasonable in violation of Sections 201(b), 203, and 206 of the Communications Act of 1934, as amended. n3 For the reasons discussed below, we conclude that: (1) AT&T's tariff is lawful; (2) GMRI is liable under AT&T's tariff for the unauthorized charges; and (3) AT&T's conduct with regard to the unauthorized calls was not unreasonable or otherwise in violation of the Communications Act.

n1 Complaint at 12.

n2 *Id; see Brief of GMRI in Support of Formal Complaint*, Summary (filed July 27, 2001) (GMRI Brief). **[*2]**

n3 Complaint at 11; 47 U.S.C. §§ 201, 203, 206.

II. BACKGROUND

A. Parties To the Proceeding

2. GMRI is a real estate agency incorporated in Georgia. n4 In 1996, GMRI acquired the assets of Head Realty, Co. (Head Realty) and pursuant to that transaction, became a subscriber to AT&T's 800 Service under AT&T Tariff F.C.C. No. 2 and AT&T's Long Distance

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Message **Telecommunications** Service (LDMTS) under AT&T Tariff F.C.C. No. 1. Pursuant to the Head Realty transaction, GMRI also acquired a contract with Southern Bell for ESSX-1 service, which it renewed in 1997. n5 The ESSX system controlled GMRI's telephone service and also controlled the physical phone lines connecting the central office switch with GMRI. n6 In addition, the ESSX-1 service included a Direct Inward Dialing feature that allowed "incoming calls from the exchange or toll network" to "be dialed directly to completion to" any outbound number. n7 During the relevant time frame, GMRI was also using an on site Panasonic telephone/voice mail system that was password protected. n8 Whether that system permitted external or remote access is a matter of dispute. n9

n4 Complaint at 3. **[*3]**

n5 *Id.* at 5-6; *see also* AT&T's Brief at 1-2.

n6 Complaint at 6.

n7 *See* Georgia state tariffs of Southern Bell Telephone and Telegraph Company, appended to GMRI's Complaint, Exhibit J, Sections A112.8.1A and O.1.a.(2).

n8 Complaint at 6; AT&T Brief at 2-3.

n9 *See* Reply Brief of GMRI at 2 (Reply Brief).

3. AT&T is an interexchange carrier (IXC) and, for purposes of this proceeding, was engaged in the provision of interLATA **telecommunications** services. Under the regulatory framework in place at the time of the events giving rise to this proceeding, AT&T was classified as a "nondominant" interexchange carrier. As a result, AT&T was required to file and maintain tariffs with the Commission that contained charges, terms, and conditions of its common carrier offerings.

B. Underlying Facts

4. On or about September 7, 1999, AT&T noticed that GMRI's 800 number was receiving a high number of inbound calls from the New York area and that there was a high number of international calls to locations where suspected **fraud** has occurred in the past. n10 AT&T's security division then contacted GMRI to inform it of the unusual calling patterns detected. n11 Subsequent **[*4]** conversations ensued between the parties, the contents of which are in dispute. GMRI alleges that despite complying with all of AT&T's recommendations, the fraudulent toll calls continued. n12 AT&T contends that GMRI decided to contact GMRI's voice mail technician to resolve the problem and, when advised to authorize a block of the area codes at issue, initially declined. n13 According to AT&T, after several days of continued unauthorized calling, AT&T placed a block on the area codes without prior authorization and the toll **fraud** ceased. n14 GMRI contends that the toll **fraud** ceased only after AT&T advised it to discontinue its 800 number except for calls from Alaska and Guam. n15

n10 AT&T Brief at 6; GMRI Brief at 2-3

n11 AT&T Brief at 6; GMRI Brief at 3.

n12 GMRI Brief at 4.

n13 AT&T Brief at 7.

n14 *Id.*

n15 GMRI Brief at 4.

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5. AT&T subsequently billed GMRI for all of the telephone calls, both authorized and unauthorized, pursuant to AT&T's Tariff F.C.C. No. 1, Section 2.4.1.A and F.C.C. No. 2, Section 2.4.1.A. n16

n16 AT&T Brief at 7; GMRI Complaint at 1.

C. Procedural History

6. On March 8, 2000, GMRI filed an informal complaint with the Commission **[*5]** alleging that AT&T's effort to collect charges for unauthorized telephone calls originating from GMRI's telephone number were illegal and unjust. n17 On November 16, 2000, AT&T filed its response, stating that it could not offer any resolution to the complainant because the account was in pre-litigation. n18 On December 20, 2000, the Commission's Consumer Information Bureau closed the complaint. n19

n17 Joint Statement of the Parties (filed June 20, 2001) at 9 (Joint Statement).

n18 *Id; see* AT&T Response, (filed November 16, 2000).

n19 Joint Statement at 9.

7. On February 5, 2001, AT&T filed a lawsuit against GMRI in the United States District Court, Northern District of Georgia, Atlanta Division n20 seeking $ 90,270.89 in charges for the provision of long distance **telecommunications** services relating to the calls at issue. n21 The District Court stayed the proceeding pending the filing of a formal complaint with the Commission, retained jurisdiction over AT&T's claims, and dismissed GMRI's counterclaims. n22 On May 15, 2001, GMRI filed the above-captioned Complaint alleging that AT&T's tariff is unlawful, that GMRI is not liable for the unauthorized calls and that **[*6]** AT&T's effort to collect the unauthorized charges violates Sections 201, 203, and 206 of the Communications Act. n23

n20 *AT&T Corp. v. GMRI, a/k/a Coldwell Banker GMRI, et al.*, Civil Action No. 1:01-CV-0337 (District Court Action).

n21 Joint Statement at 9.

n22 *Id.*

n23 Complaint at 11; 47 U.S.C. §§ 201, 203, 206.

III. DISCUSSION

A. Lawfulness of AT&T's Tariff

8. GMRI challenges the lawfulness of AT&T's Tariff F.C.C. No. 1, Section 2.4.1.A on grounds that the allocation of risk associated with toll **fraud** is improperly placed on individual customers. n24 The relevant tariff provision provides that "the Customer is responsible for the payment...for LDMTS calls or services:--Originated at the Customer's number(s)." GMRI suggests that "a more reasonable means for recovering the loss of the risk of toll **fraud** is through spreading it and sharing it" among AT&T's entire customer base. n25 We disagree that AT&T's tariff is unlawful.

n24 Complaint at 15.

n25 *Id.*

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9. As AT&T notes in its Brief, it offers a variety of enhanced NetProtect options to limit customer **liability** for toll **fraud.** n26 Furthermore, customers **[*7]** who do not choose one of the enhanced NetProtect options are automatically enrolled in AT&T's Basic service which caps **liability** at $ 25,000 prior to AT&T's notification, and offers a 50 percent reduction in charges if the customer detects the **fraud** first and notifies AT&T. n27 We find that such provisions both provide customers with reasonable security options and create appropriate incentives for customers to secure and monitor their telephone systems. Particularly in view of the security options available to its customers, we find no merit in GMRI's argument that AT&T should be required to spread the risk of **fraud** over its entire customer base. We therefore reject GMRI's allegation that AT&T's tariff unlawfully allocates the risk of toll **fraud** to individual customers.

n26 AT&T Brief at 19. AT&T's NetProtect Plus Service offers a $ 2,000 **liability** cap prior to notification of the **fraud,** with a 50 percent reduction if the customer detects the **fraud** first and notifies AT&T. AT&T's NetProtect Premium has a $ 0 **liability** cap up to two hours after notification of the **fraud.** *See* AT&T Tariff F.C.C. No. 1, §§ 5.9, 5.8.

n27 *Id.*

B. Liability for Unauthorized Calls

10. **[*8]** GMRI contends that it is not liable for the unauthorized calls placed over its telephone lines because the calls were "not specifically requested by GMRI, were not made at GMRI's locations, were not originated at GMRI's phones and were the result of telephone toll **fraud.**" n28 While GMRI attempts to distinguish the facts in this case from prior Commission precedent, our holding in *Chartways Technologies, Inc. v. AT&T* n29 is dispositive.

n28 Complaint at 1.

n29 8 FCC Rcd 5601 (1993).

11. In *Chartways*, the Commission affirmed the Common Carrier Bureau's determination that a customer who had subscribed to AT&T's LDMTS and 800 services was liable for unauthorized calls made from remote locations through the customer's PBX system. Construing the very same tariff provisions that are before the Commission in this proceeding, the Commission held that "the clear meaning of the relevant tariff provisions is that the customer's obligation includes **liability** for unauthorized usage involving incoming 800 Service calls or LDMTS calls that originate at the customer's numbers." n30 Moreover, the Commission found that the unauthorized calls did, in fact, originate **[*9]** at the customer's number even though the unauthorized calls involved inbound 800 calls. n31 The Commission noted that each incoming unauthorized call using the 800 service is "separate and distinguishable" from the outgoing unauthorized calls using LDMTS." n32 As a result, the Commission concluded that with regard to 800 Service, there is no requirement under the tariff that a call originate at the customer's number because all 800 calls terminate there and because the service is specifically designed to allow unknown callers access to the service. n33 Hence, the complainant in *Chartways* was liable under the tariff for charges associated with the incoming 800 calls. With regard to the disputed outgoing LDMTS calls, the Commission held in *Chartways* that because the unauthorized callers were able to obtain a local dial tone from the premises, the unauthorized calls did originate from Chartways' numbers. n34 The Commission therefore found that Chartways was liable for these calls as well under AT&T's tariff. n35

n30 8 FCC Rcd at 5603, P11.

n31 *Id.* at 5603, P13.

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n32 *Id.*

n33 *Id.* The Commission adds that "the customer has, by subscribing to the service, implicitly authorized any call utilizing the service." *Id.* **[*10]**

n34 *Id.*

n35 *Id.*

12. While there is some dispute in the record as to the particular facility misused by the callers, both parties agree that the inbound callers used GMRI's ESSX system in order to obtain a local dial tone. n36 GMRI argues that because the ESSX system was not within its immediate control, the unauthorized calls did not "originate at the customer's number" within the meaning of the relevant tariff provision. n37 We disagree. Consistent with our decision in *Chartways*, we find that regardless of whether GMRI had physical control over the ESSX system, that system was exploited by the unauthorized callers who then made use of GMRI's number to make fraudulent toll calls. Although there are no stipulated facts in this proceeding to suggest that GMRI had physical control over the ESSX system, we find it significant that GMRI, with the assistance of BellSouth, installed the ESSX system without consulting AT&T in any way, and that it was this equipment that provided the point of vulnerability for the unauthorized callers. n38 Furthermore, there is no indication in the record that AT&T had the ability to determine whether particular 800 or LDMTS calls were **[*11]** authorized or that AT&T represented to GMRI that it had such capabilities. n39 In order to determine that the high number of international calls placed over GMRI's lines were fraudulent, AT&T first had to verify with GMRI that those calls were not authorized. Moreover, there is evidence in the record to suggest that GMRI could have made use of several BellSouth service options to restrict its ESSX service from making outbound calls. n40 In addition, AT&T offered several enhanced NetProtect options that, had GMRI elected to subscribe to them, would have reduced its **liability** associated with the unauthorized calls. n41 We therefore find that absent any evidence that AT&T was in a position to restrict access to and egress from GMRI's ESSX system, and because there is undisputed evidence in the record suggesting that GMRI had control over the system, GMRI is liable under AT&T's tariff for the charges associated with the fraudulent calls.

n36 AT&T Brief at 10; GMRI Brief at 9. AT&T contends that the **fraud** was most likely facilitated by GMRI's on-site voice mail system. *See* AT&T's Brief at 11.

n37 GMRI's Reply Brief at 7.

n38 *See* *Chartways*, 8 FCC Rcd at 5604, P16. Federal courts have also recognized that in instances where the complainant creates the vehicle and mechanism through which the fraudulent calls are made, regardless of whether that mechanism is in the immediate control of complainant, the unauthorized toll calls "originated" at customer's number within the meaning of the relevant tariff provision. *See* *AT&T v. Intrend Ropes and Twines, Inc.*, 944 F.Supp. 701, 710 (C.D. Ill. 1996). **[*12]**

n39 We reject GMRI's unsupported allegations that AT&T maintained control over the ESSX system merely by virtue of its past affiliation with BellSouth or Lucent Technologies Inc., the claimed manufacturer of the equipment used by BellSouth to provide the ESSX service. *See* Complaint at 16.

n40 *See* the "Secondary Optional Features" set forth in Georgia state tariffs of Southern Bell Telephone and Telegraph Company, appended to GMRI's Complaint, Exhibit J, Sections A112.8.10.5. (w), (x), and (y); Code Restriction Arrangements, Section A112.8.10.5. (m).

n41 AT&T Brief at 1; Complaint at 11.

C. Alleged Violations of the Communications Act

13. GMRI contends that AT&T's effort to collect the unauthorized charges violates Sections 201, 203, and 206 of the Communications Act. n42 Specifically, GMRI argues that: (1) AT&T breached its alleged duty to warn GMRI of the potential for telephone **fraud,** and its alleged duty to inform GMRI of the existence of four NetProtect programs offered by AT&T to limit customer **liability;** and (2) AT&T was negligent either in failing to block the fraudulent calls immediately, or alternatively, in failing to promptly disconnect or recommend **[*13]** the disconnection of GMRI's 800 number. n43 We address these arguments below, rejecting GMRI's contention that AT&T violated the Communications Act.

n42 Complaint at 11; 47 U.S.C. §§ 201, 203, 206. GMRI briefly alleges that AT&T's practices are unreasonable, in violation of sections 201 and 203 of the Act, and that it is entitled to recover damages under section 206.

n43 GMRI Brief at 6-12.

1. Alleged Duty to Warn or Inform

14. We find that GMRI's allegation that AT&T had a duty to warn its customers of the risk of toll **fraud,** or to inform its customers of other services it provides to reduce **liability** in such circumstances, is not supported by Commission precedent. In *Chartways*, and again in *Directel, Inc. v. AT&T*, n44 the Commission held that AT&T has no duty to warn its customers of the risk associated with fraudulent telephone activity. n45 In *Chartways*, the Commission concluded that the record did not demonstrate "a failure by AT&T to comply with any existing disclosure obligation imposed by the Commission or required by Section 201(b) of the Act." n46 The Commission further held that the record in *Chartways* did **[*14]** not indicate that AT&T "had any basis for questioning [complainant's] choices about which security measures to implement in connection with [it's] own **telecommunications** equipment." n47 Similarly, in *Directel*, complainants alleged that AT&T had an affirmative duty to warn it of the risks associated with toll **fraud.** n48 Referencing its decision in *Chartways*, the Commission reiterated its position AT&T had no affirmative duty to warn complainant about toll **fraud** risks. n49 We find the same to be true in this proceeding.

n44 11 FCC Rcd 7554 (1996).

n45 *Chartways*, 8 FCC Rcd at 5604, P16; *Directel*, 11 FCC Rcd at 7562-63, P19.

n46 *Chartways*, 8 FCC Rcd at 5604, P16.

n47 *Id.*

n48 *Directel*, 11 FCC Rcd at 7558, P8.

n49 *Id.* at 7562-63, P19.

15. In support of its allegation that AT&T had an affirmative duty to warn its customers of potential toll **fraud,** GMRI cites language in a notice of proposed rulemaking in which the Commission requested comment on whether tariff provisions that **[*15]** fail to recognize an obligation by the carrier to warn customers of risks are unreasonable. n50 Because the Commission never subsequently issued an order or adopted a rule on the issue, the language cited by GMRI cannot be used to support any allegations regarding a carrier's duty to warn its customers about toll **fraud.** As AT&T correctly notes, three years after the Commission issued the NPRM on toll **fraud,** it decided *Directel*, in which it held that AT&T had no

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affirmative duty to warn the complainant about the risks associated with toll **fraud.** n51 We therefore find unpersuasive GMRI's argument regarding AT&T's duty to warn customers about the risks of toll **fraud.** n52

n50 *Policies and Rules Concerning Toll* ***Fraud***, Notice of Proposed Rulemaking, 8 FCC Rcd 8618, 8630, P24 (1993).

n51 *See* AT&T Brief at 14, 15; *Directel*, 11 FCC Rcd 7554 at P19.

n52 Because we find that AT&T did not have a duty to warn GMRI of the risks associated with toll **fraud,** we do not address whether AT&T breached that duty.

16. GMRI further contends that AT&T had a duty to inform its customers of other services it provides to reduce **[*16]** any **liability** that may result from toll **fraud.** n53 While we agree that such information would be useful to consumers, long-standing case law contradicts GMRI's claim that AT&T had such a duty. n54 GMRI's reliance on language the Commission used in a proceeding implementing Section 254(g) of the Communications Act is inapposite. n55 We therefore find that AT&T did not have a duty to inform GMRI of the other services it provides that may have reduced GMRI's **liability** under these circumstances.

n53 Complaint at 12.

n54 *See AT&T v. Intrend Ropes and Twines, Inc.*, 944 F.Supp. at 708; *see also Marco Supply Co. v. AT&T*, 875 F.2d 434, 436 (4th Cir. 1989).

n55 *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act as Amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Second Report and Order. In Re: Western Union Tel. Co.* 27 F.C.C. 2d 515 (1971) is not on point. The issue in that proceeding was "discrimination" and the Commission's holding was based on an extra charge imposed on customers for physical delivery. GMRI makes no allegation of discrimination in this proceeding. In addition, no extra charge was directly imposed on GMRI for its lack of knowledge. To the contrary, GMRI's failure to select one of AT&T's enhanced NetProtect options automatically placed GMRI into the default NetProtect option offered by AT&T. **[*17]**

2. Alleged Negligence

17. GMRI also contends that AT&T's conduct after the toll **fraud** was discovered was unreasonable, in violation of the Communications Act. n56 Specifically, GMRI alleges that AT&T was negligent either in failing to block the fraudulent calls immediately, or alternatively, in failing to promptly disconnect or recommend the disconnection of GMRI's 800 number. n57 We reject GMRI's claims in this regard.

n56 Complaint at 2; GMRI's Brief at 10.

n57 GMRI's Brief at 10.

18. AT&T's tariff limits AT&T's **liability** to its customers except in instances of willful misconduct. n58 When GMRI took service under this tariff, it implicitly agreed to this standard of **liability.** Therefore, we limit our discussion to whether AT&T's conduct, with regard to the unauthorized calls, rose to the level of willful misconduct.

n58 *See* AT&T Tariff No. 1, Section 2.3.1. GMRI does not argue that the willful misconduct provision of the tariff is itself unlawful.

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19. Willful misconduct has been defined as "the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or...the intentional omission of some act, **[*18]** with knowledge that such omission will probably result in damage or injury...." n59 We conclude that AT&T did not engage in any activity that supports a finding of willful misconduct. To the contrary, the evidence in the record indicates that immediately after AT&T discovered the high volume of calls originating from GMRI's telephone lines, it contacted GMRI to warn it of the potential of **fraud.** n60 GMRI admits that AT&T made several calls to GMRI, recommending preventative action. n61 GMRI contends that notwithstanding its compliance with all of AT&T's recommendations, the fraudulent toll calls continued until AT&T advised GMRI to discontinue its 800 number. n62 While AT&T's factual account differs significantly from GMRI's, even under the factual scenario provided by GMRI, we find no evidence that AT&T took any actions with the knowledge that its conduct would likely injure GMRI. To the contrary, AT&T's actions were intended to reduce the incidence of **fraud.** There is also no evidence to suggest that AT&T made any affirmative representations to GMRI that it would correct the problem and then failed to follow up on those representations. n63 In light of the record before us, we find **[*19]** that any acts or omissions by AT&T here do not constitute willful misconduct. n64

n59 *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 536-37 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

n60 Complaint at 7.

n61 *Id.* at 8.

n62 *Id.*

n63 *See MCI v. Management Solutions, Inc.*, 798 F.Supp. 50, 52 (D.Me. 1992)(holding that affirmative representation to correct a problem and subsequent failure to follow up on those representations may constitute willful misconduct).

n64 We reject GMRI's unsupported allegation that the actual charges sought under AT&T's tariff for unauthorized telephone **fraud** are unreasonable. *See* Complaint at 16.

IV. CONCLUSION

20. For the reasons discussed above, we find AT&T's tariff lawful and find that GMRI is liable under AT&T's tariff for the disputed charges associated with long distance telephone calls made in September 1999 by third parties who obtained unauthorized access to GMRI's communications system. In addition, we conclude that AT&T's effort to collect such charges pursuant to its tariff does not violate **[*20]** Sections 201, 203, or 206 of the Communications Act.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, the above-captioned complaint filed by GMRI on May 15, 2001 is DENIED.

22. IT IS FURTHER ORDERED that the Chief of the **Telecommunications** Consumers Division of the Enforcement Bureau shall forward a copy of this Memorandum Opinion and Order to the Clerk, United States District Court for the Northern District of Georgia.

Magalie Roman Salas

Secretary

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