

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on March 13, 2002 in Room 313-S of the Capitol.

All members were present except:

Representative Karen DiVita-Johnson - Excused
Representative Kathe Lloyd - Excused
Representative Rick Rehorn - Excused
Representative Candy Ruff - 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:

Tom Weilert, Sedgwick County District Attorney's Office
Kyle Smith, Kansas Bureau of Investigation
Chris Biggs, Geary County Attorney
Steve Rarrick, Office of Attorney General, Consumer Protection Division
Doug Smith, Direct Marketing Association
Ron Gaches, Experian
LJ Leatherman, Kansas Trial Lawyers Association

Due to no conferees signed up to testify on **SB 491 - Definitions under the Kansas tort claims act**, the hearing was cancelled.

Hearing on **SB 453 - sentencing of offenders who are arrested for violations of conditions of original sentence**, was opened.

Tom Weilert, Sedgwick County District Attorney's Office, explained that the bill would give judges the ability to order a lesser sentence for a defendant who violates a condition of probation. (Attachment 1)

Kyle Smith, Kansas Bureau of Investigation, requested two amendments; the first would clarify existing law that such lab reports can be authenticated pursuant to the provisions of K.S.A. 22-3437; second amendment was to add section 3 of HB 2856 which is clean up language. (Attachment 2)

Hearing on **SB 453** was closed.

Hearing on **SB 487 - presumed imprisonment for certain persons convicted of burglary with three prior burglary convictions**, was opened.

Chris Biggs, Geary County Attorney, explained that the proposed bill would address the problem of repeat burglary offenders who commit burglary of a non dwelling or a vehicle. Presently they would receive presumptive probation. There needs to be a way to remove property offenders from the community. (Attachment 3)

Tom Weilert, Sedgwick County District Attorney's Office, appeared in support of the proposed bill. He proposed language that would clarify legislative intent when dealing with: the inclusion of juvenile adjudications for crimes which trigger the enhancement provisions and inclusion of out of state convictions for crimes which trigger the enhancement provisions (Attachment 4)

Kyle Smith, Kansas Bureau of Investigation, requested two amendments: first would amend in section 1 of HB 2856 regarding expungement of those convicted of sexual battery and aggravated sexual battery not being allowed by statute; the second would clarify that expunged convictions must be divulged and considered in application as a private investigator. (Attachment 5)

CONTINUATION SHEET

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on March 13, 2002 in Room 313-S of the Capitol.

Hearing on **SB 487** was closed.

Hearing on Substitute **SB 467 - commercial electronic mail act; protection from deceptive and unwanted span**, was opened.

Steve Rarrick, Office of Attorney General, Consumer Protection Division, appeared before the committee to explain the bill which was designed to provide protection from unwanted e-mails, also known as "spam". The proposal was modeled after California and Washington, both of which have been upheld at the appellant court level. (Attachment 6)

Doug Smith, Direct Marketing Association, was concerned with the "ADV" provisions that could actually legitimize "spam". (Attachment 7)

Ron Gaches, Experian, supported all language in the proposed bill except that placing "ADV:" at the beginning of the subject line for all commercial email. It was his belief that authorized email should not have this requirement. (Attachment 8)

LJ Leatherman, Kansas Trial Lawyers Association, supported the bill and requested that subsection (k) be deleted because it would allow deceptive and unwanted emails to circumvent the consumer protections created by the bill. (Attachment 9)

Hearing on **SB 467** was closed.

The committee meeting adjourned at 6:30 p.m. The next meeting was scheduled for March 14, 2002.

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TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
REGARDING AMENDMENT OF K.S.A.22-3716(b)

Presented on March 13, 2002

By Thomas J. Weilert

When the Kansas Sentencing Guidelines went into effect in 1993, they were intended to create truth in sentencing in Kansas. No longer would a person be sentenced to a 15 year to life term of imprisonment be released after serving only 8 years.

The Guidelines provided for determinate terms of imprisonment based upon the crime of conviction and the criminal history of the offender. In addition, they provided for a presumption of incarceration for the combinations of criminal history and crime severity that intersected above the dispositional line. Non prison sanctions were presumed for those cases where the criminal history and crime severity intersection was below the dispositional line.

In compliance with Federal guidelines, the maximum reduction of the sentence imposed was set at 15% in 1994.

The adoption of the Guidelines also brought about the end of the 120 day callback which gave individuals a second chance at probation following an evaluation at the reception and diagnostic center. It was thought that the sentencing courts were stripped of the power to modify a sentence once imposed. Such was the belief until the opinion of the Kansas Supreme Court in the case of State v. McGill, 271 Kan. 120, 22 P.3d 597(2001).

In McGill, the defendant was originally charged with indecent liberties with a child, a presumptive prison offense. Pursuant to a plea agreement, he pled guilty to indecent solicitation of a child, a presumptive probation offense, given a sentence of 26 months which was an agreed upon duration al departure and placed on probation for 24 months. Prior to the expiration of the probation period(which had been extended to allow the defendant to finish paying financial obligations) a motion to revoke the probation was filed based upon new criminal activity by the defendant.

At the probation revocation hearing, the court found the defendant to be in violation of his probation, revoked the same and then modified his sentence to 12 months imprisonment and ordered him delivered to the Department of Corrections.

The State appealed the reduction in the sentence, arguing that the power to modify a sentence once imposed was removed by the guidelines. The Supreme Court, citing the often used principle of statutory construction that criminal statutes must be strictly construed in the favor of the accused, found the sentencing court's action to be appropriate.

In reaching its decision, the Supreme Court relied on a on four words from a pre-guideline statute which outlined the sentencing court's options upon revocation of a previously granted probation. K.S.A. 22-3716(b) provides in pertinent part:

“...If the violation is established, the court may continue or revoke the probation, assignment

to a community correctional services program, suspension of sentence or nonprison sanction and may require the defendant to serve the sentence imposed, **or any lesser sentence...**”

While K.S.A.2-3716 was amended in 2000, the portion relied upon by the Court was left unchanged.

Given the overall intent of the guidelines, the lack of attention would appear to be a mere oversight. The allowance of modification of the sentence imposed at the point probation revocation has several consequences that are in contradiction of the overall guideline scheme.

- 1) The ability to modify the sentence violates the spirit of the federal truth in sentencing guidelines. A victim can no longer be assured that a defendant placed on probation will suffer the consequence of serving the entire sentence imposed if he or she does not comply with all of the conditions of probation.
- 2) The Guidelines have removed the sentencing court’s power to modify a sentence once imposed in all other circumstances. It appears a mere oversight has occurred which would allow that power only after a person has been given an opportunity at probation and failed to comply with the terms set forth.
- 3) The allowance of a lesser sentence at the time of a probation revocation serves as a reward to a defendant for violation of the conditions of probation. Instead of being faced with the full consequences of the failure to abide by the court’s directions, the loophole gives a defendant the opportunity to escape the logical results of the decision not to comply.

For all of these reasons, the elimination of the words “or any lesser sentence” from K.S.A. 22-3716(b) is appropriate.



Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

Testimony in Support of SB 453
Before the House Judiciary Committee
Kyle G. Smith
Kansas Bureau of Investigation
March 13, 2002

Chairman O'Neal and members of the Committee,

I am pleased to appear today on behalf of the KBI in support of SB 453. This legislation corrects a bizarre quirk in our current law that allows a criminal to be rewarded for violating probation with a lesser sentence.

I would also request the committee consider two amendments to SB 453 that the KBI proposed in sections 2 and 3 of HB 2856. We realize that there simply is not enough time for judiciary to hear every bill but the changes involved here are basically cleanups in criminal procedure statutes that need to be made and should not be controversial.

The first amendment (what was section 2 of HB 2856) deals with the admission of forensic laboratory reports under K.S.A. 22-3437 and would specifically reference K.S.A. 53-601. This would clarify existing law that such lab reports can be authenticated pursuant to the provisions of that statute (see attached) and save our chemists time that can be better spent on their regular duties. The clarification is necessary as some courts are unaware of 53-601 or are concerned that 22-3437, being more recent legislation, may not be covered. There is one correction from the published version of HB 2856 as the 'strike out' was omitted.

The second amendment would be to add section 3 of HB 2856 which is purely clean-up – correcting grammar and one incorrectly cited paragraph. These changes may seem minor but the courts construe criminal statutes strictly against the state and any mistakes can result in criminal going free on such technicalities.

Thank you for your attention and concern. I would be happy to answer any questions.

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1 the state board for admission of attorneys or the state board for discipline
2 of attorneys, and the request is accompanied by a statement that the
3 request is being made in conjunction with an application for admission,
4 or for an order of reinstatement, to the practice of law in this state by the
5 person whose record has been expunged;

6 (8) the Kansas lottery and the request is accompanied by a statement
7 that the request is being made to aid in determining qualifications for
8 employment with the Kansas lottery or for work in sensitive areas within
9 the Kansas lottery as deemed appropriate by the executive director of the
10 Kansas lottery;

11 (9) the governor or the Kansas racing commission, or a designee of
12 the commission, and the request is accompanied by a statement that the
13 request is being made to aid in determining qualifications for executive
14 director of the commission, for employment with the commission, for
15 work in sensitive areas in pari-mutuel racing as deemed appropriate by
16 the executive director of the commission or for licensure, renewal of
17 licensure or continued licensure by the commission;

18 (10) the Kansas sentencing commission;

19 (11) the state gaming agency, and the request is accompanied by a
20 statement that the request is being made to aid in determining qualifi-
21 cations: (A) To be an employee of the state gaming agency; or (B) to be
22 an employee of a tribal gaming commission or to hold a license issued
23 pursuant to a tribal-gaming compact;

24 (12) the Kansas securities commissioner or a designee of the com-
25 missioner, and the request is accompanied by a statement that the request
26 is being made in conjunction with an application for registration as a
27 broker-dealer, agent, investment adviser or investment adviser represen-
28 tative by such agency and the application was submitted by the person
29 whose record has been expunged; or

30 (13) the department of wildlife and parks and the request is accom-
31 panied by a statement that the request is being made to aid in determining
32 qualifications for a permit as a commercial guide or associate guide under
33 K.S.A. 32-964, and amendments thereto.

34 Sec. 2. K.S.A. 2001 Supp. 22-3437 is hereby amended to read as
35 follows: 22-3437. (1) In any hearing or trial, a report concerning forensic
36 examinations and certificate of forensic examination executed pursuant
37 to this section shall be admissible in evidence if the report and certificate
38 are prepared and attested by a criminalist or other employee of the Kansas
39 bureau of investigation, Kansas highway patrol or any laboratory of the
40 general bureau of investigation, federal postal inspection service, federal
41 bureau of alcohol, tobacco and firearms or federal drug enforcement ad-
42 ministration. If the examination involves a breath test for alcohol content,
43 the report must also be admissible pursuant to subsection (f)(1) of K.S.A.

1 8-1001, and amendments thereto, and be conducted by a law enforce-
2 ment officer or other person who is certified by the department of health
3 and environment as a breath test operator as provided by K.S.A. 65-1,107
4 et seq. and amendments thereto.

5 (2) Upon the request of any law enforcement agency, such person as
6 provided in subsection (1) performing the analysis shall prepare a certifi-
7 cate. Such person shall sign the certificate under oath and shall include
8 in the certificate an attestation as to the result of the analysis. The pres-
9 entation of this certificate to a court by any party to a proceeding shall
10 be evidence that all of the requirements and provisions of this section
11 have been complied with. This certificate *supported by a written decla-*
12 *ration pursuant to K.S.A. 53-601 and amendments thereto shall be sworn*
13 *to before a notary public or other person empowered by law to take oaths*
14 and shall contain a statement establishing the following: The type of anal-
15 ysis performed; the result achieved; any conclusions reached based upon
16 that result; that the subscriber is the person who performed the analysis
17 and made the conclusions; the subscriber's training or experience to per-
18 form the analysis; the nature and condition of the equipment used; and
19 the certification and foundation requirements for admissibility of breath
20 test results, when appropriate. When properly executed, the certificate
21 shall, subject to the provisions of subsection (3) and notwithstanding any
22 other provision of law, be admissible evidence of the results of the foren-
23 sic examination of the samples or evidence submitted for analysis and the
24 court shall take judicial notice of the signature of the person performing
25 the analysis and of the fact that such person is that person who performed
26 the analysis.

27 (3) Whenever a party intends to proffer in a criminal or civil pro-
28 ceeding, a certificate executed pursuant to this section, notice of an intent
29 to proffer that certificate and the reports relating to the analysis in ques-
30 tion, including a copy of the certificate, shall be conveyed to the opposing
31 party or parties within 20 days after arraignment, if a criminal proceeding
32 or at least 20 days before a civil trial begins. An opposing party who
33 intends to object to the admission into evidence of a certificate shall give
34 notice of objection and the grounds for the objection within 10 days upon
35 receiving the adversary's notice of intent to proffer the certificate. When-
36 ever a notice of objection is filed, admissibility of the certificate shall be
37 determined not later than two days before the beginning of the trial. A
38 proffered certificate shall be admitted in evidence unless it appears from
39 the notice of objection and grounds for that objection that the conclusions
40 of the certificate, including the composition, quality or quantity of the
41 substance submitted to the laboratory for analysis or the alcohol content
42 of a blood or breath sample will be contested at trial. A failure to comply
43 with the time limitations regarding the notice of objection required by

this section shall constitute a waiver of any objections to the admission of the certificate. The time limitations set forth in this section may be extended upon a showing of good cause.

Sec. 3. K.S.A. 2001 Supp. 22-4902 is hereby amended to read as follows: 22-4902. As used in this act, unless the context otherwise requires:

- (a) "Offender" means: (1) A sex offender as defined in subsection (b);
- (2) a violent offender as defined in subsection (d);
- (3) a sexually violent predator as defined in subsection (f);

(4) any person who, on and after the effective date of this act, is convicted of any of the following crimes when the victim is less than 18 years of age:

(A) Kidnapping as defined in K.S.A. 21-3420 and amendments thereto, except by a parent;

(B) aggravated kidnapping as defined in K.S.A. 21-3421 and amendments thereto; or

(C) criminal restraint as defined in K.S.A. 21-3424 and amendments thereto, except by a parent;

(5) any person convicted of any of the following criminal sexual conduct if one of the parties involved is less than 18 years of age:

(A) Adultery as defined by K.S.A. 21-3507, and amendments thereto;

(B) criminal sodomy as defined by subsection (a)(1) of K.S.A. 21-3505, and amendments thereto;

(C) promoting prostitution as defined by K.S.A. 21-3513, and amendments thereto;

(D) patronizing a prostitute as defined by K.S.A. 21-3515, and amendments thereto;

(E) lewd and lascivious behavior as defined by K.S.A. 21-3508, and amendment amendments thereto; or

(F) unlawful sexual relations as defined by K.S.A. 21-3520, and amendments thereto;

(6) any person who is a resident of this state who has been required to register under any federal, military or other state's law;

(7) any person who has been convicted of an offense in effect at any time prior to the effective date of this act, that is comparable to any crime defined in subsection (4) or (5), or any federal, military or other state conviction for an offense that under the laws of this state would be an offense defined in subsection (4) or (5); or

(8) any person who has been convicted of an attempt, conspiracy or solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of an offense defined in subsection (4) or (5).

Convictions which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the

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1 purpose of this section as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this section. A conviction from another state shall constitute a conviction for purposes of this section.

2 (b) "Sex offender" includes any person who, after the effective date of this act, is convicted of any sexually violent crime set forth in subsection (c).

3 (c) "Sexually violent crime" means:

4 (1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

5 (2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

6 (3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;

7 (4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;

8 (5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;

9 (6) indecent solicitation of a child as defined by K.S.A. 21-3510 and amendments thereto;

10 (7) aggravated indecent solicitation of a child as defined by K.S.A. 21-3511 and amendments thereto;

11 (8) sexual exploitation of a child as defined by K.S.A. 21-3516 and amendments thereto;

12 (9) sexual battery as defined by K.S.A. 21-3517 and amendments thereto;

13 (10) aggravated sexual battery as defined by K.S.A. 21-3518 and amendments thereto;

14 (11) aggravated incest as defined by K.S.A. 21-3603 and amendments thereto; or

15 (12) any conviction for an offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent crime as defined in subparagraphs (1) through (11), or any federal, military or other state conviction for an offense that under the laws of this state would be a sexually violent crime as defined in this section;

16 (13) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of a sexually violent crime, as defined in this section; or

17 (14) any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated. As used in this subparagraph, "sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

18 (d) "Violent offender" includes any person who, after the effective

1 this section shall constitute a waiver of any objections to the admission of
 2 the certificate. The time limitations set forth in this section may be ex-
 3 tended upon a showing of good cause.

4 Sec. 3. K.S.A. 2001 Supp. 22-4902 is hereby amended to read as
 5 follows: 22-4902. As used in this act, unless the context otherwise
 6 requires:

7 (a) "Offender" means: (1) A sex offender as defined in subsection (b);

8 (2) a violent offender as defined in subsection (d);

9 (3) a sexually violent predator as defined in subsection (f);

0 (4) any person who, on and after the effective date of this act, is
 1 convicted of any of the following crimes when the victim is less than 18
 2 years of age:

3 (A) Kidnapping as defined in K.S.A. 21-3420 and amendments
 4 thereto, except by a parent;

5 (B) aggravated kidnapping as defined in K.S.A. 21-3421 and amend-
 6 ments thereto; or

7 (C) criminal restraint as defined in K.S.A. 21-3424 and amendments
 8 thereto, except by a parent;

9 (5) any person convicted of any of the following criminal sexual con-
 0 duct if one of the parties involved is less than 18 years of age:

1 (A) Adultery as defined by K.S.A. 21-3507, and amendments thereto;

2 (B) criminal sodomy as defined by subsection (a)(1) of K.S.A. 21-
 3 3505, and amendments thereto;

4 (C) promoting prostitution as defined by K.S.A. 21-3513, and amend-
 5 ments thereto;

6 (D) patronizing a prostitute as defined by K.S.A. 21-3515, and
 7 amendments thereto;

8 (E) lewd and lascivious behavior as defined by K.S.A. 21-3508, and
 9 ~~amendment~~ amendments thereto; or

0 (F) unlawful sexual relations as defined by K.S.A. 21-3520, and
 1 amendments thereto;

2 (6) any person who is a resident of this state who has been required
 3 to register under any federal, military or other state's law;

4 (7) any person who has been convicted of an offense in effect at any
 5 time prior to the effective date of this act, that is comparable to any crime
 6 defined in subsection (4) or (5), or any federal, military or other state
 7 conviction for an offense that under the laws of this state would be an
 8 offense defined in subsection (4) or (5); or

9 (8) any person who has been convicted of an attempt, conspiracy or
 0 rnal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303
 1 and amendments thereto, of an offense defined in subsection (4) or (5).

2 Convictions which result from or are connected with the same act, or
 3 result from crimes committed at the same time, shall be counted for the

1 purpose of this section as one conviction. Any conviction set aside pur-
 2 suant to law is not a conviction for purposes of this section. A conviction
 3 from another state shall constitute a conviction for purposes of this
 4 section.

5 (b) "Sex offender" includes any person who, after the effective date
 6 of this act, is convicted of any sexually violent crime set forth in subsection
 7 (c).

8 (c) "Sexually violent crime" means:

9 (1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

10 (2) indecent liberties with a child as defined in K.S.A. 21-3503 and
 11 amendments thereto;

12 (3) aggravated indecent liberties with a child as defined in K.S.A. 21-
 13 3504 and amendments thereto;

14 (4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of
 15 K.S.A. 21-3505 and amendments thereto;

16 (5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and
 17 amendments thereto;

18 (6) indecent solicitation of a child as defined by K.S.A. 21-3510 and
 19 amendments thereto;

20 (7) aggravated indecent solicitation of a child as defined by K.S.A.
 21 21-3511 and amendments thereto;

22 (8) sexual exploitation of a child as defined by K.S.A. 21-3516 and
 23 amendments thereto;

24 (9) sexual battery as defined by K.S.A. 21-3517 and amendments
 25 thereto;

26 (10) aggravated sexual battery as defined by K.S.A. 21-3518 and
 27 amendments thereto;

28 (11) aggravated incest as defined by K.S.A. 21-3603 and amendments
 29 thereto; or

30 (12) any conviction for an offense in effect at any time prior to the
 31 effective date of this act, that is comparable to a sexually violent crime as
 32 defined in subparagraphs (1) through (11), or any federal, military or
 33 other state conviction for an offense that under the laws of this state would
 34 be a sexually violent crime as defined in this section;

35 (13) an attempt, conspiracy or criminal solicitation, as defined in
 36 K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of a sex-
 37 ually violent crime, as defined in this section; or

38 (14) any act which at the time of sentencing for the offense has been
 39 determined beyond a reasonable doubt to have been sexually motivated.
 40 As used in this subparagraph, "sexually motivated" means that one of the
 41 purposes for which the defendant committed the crime was for the pur-
 42 pose of the defendant's sexual gratification.

43 (d) "Violent offender" includes any person who, after the effective

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- 1 date of this act, is convicted of any of the following crimes:
- 2 (1) Capital murder as defined by K.S.A. 21-3439 and amendments
- 3 thereto;
- 4 (2) murder in the first degree as defined by K.S.A. 21-3401 and
- 5 amendments thereto;
- 6 (3) murder in the second degree as defined by K.S.A. 21-3402 and
- 7 amendments thereto;
- 8 (4) voluntary manslaughter as defined by K.S.A. 21-3403 and amend-
- 9 ments thereto;
- 10 (5) involuntary manslaughter as defined by K.S.A. 21-3404 and
- 11 amendments thereto; or
- 12 (6) any conviction for an offense in effect at any time prior to the
- 13 effective date of this act, that is comparable to any crime defined in this
- 14 subsection, or any federal, military or other state conviction for an offense
- 15 that under the laws of this state would be an offense defined in this
- 16 subsection; or
- 17 (7) an attempt, conspiracy or criminal solicitation, as defined in
- 18 K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of an of-
- 19 fense defined in this subsection.
- 20 (e) "Law enforcement agency having jurisdiction" means the sheriff
- 21 of the county in which the offender expects to reside upon the offender's
- 22 discharge, parole or release.
- 23 (f) "Sexually violent predator" means any person who, on or after July
- 24 1, 2001, is found to be a sexually violent predator pursuant to K.S.A. 59-
- 25 29a01 *et seq.* and amendments thereto.
- 26 (g) "Nonresident student or worker" includes any offender who
- 27 crosses into the state or county for more than 14 days, or for an aggregate
- 28 period exceeding 30 days in a calender year, for the purposes of employ-
- 29 ment, with or without compensation, or to attend school as a student.
- 30 (h) "Aggravated offenses" means engaging in sexual acts involving
- 31 penetration with victims of any age through the use of force or the threat
- 32 of serious violence, or engaging in sexual acts involving penetration with
- 33 victims less than 14 years of age, and includes the following offenses:
- 34 (1) Rape as defined in subsection (a)(1)(A) and subsection (a)(2) of
- 35 K.S.A. 2001 Supp. 21-3502, and amendments thereto;
- 36 (2) aggravated criminal sodomy as defined in subsection (a)(1) and
- 37 subsection (a)(3)(A) of K.S.A. 21-3506, and amendments thereto; and
- 38 (3) any attempt, conspiracy or criminal solicitation, as defined in
- 39 " S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto, of an of-
- 40 se defined in subsection ~~(f)~~ (h).

41 Sec. 4. K.S.A. 2001 Supp. 21-4619, 22-3437 and 22-4902 are hereby
 42 repealed.
 43

1 Sec. 5. This act shall take effect and be in force from and after its
 2 publication in the statute book.

53-601. Unsworn declarations; written declaration sufficient, form; exceptions; relationship to notarial acts.

(a) Except as provided by subsection (b), whenever a law of this state or any rules and regulations, order or requirement adopted or issued thereunder requires or permits a matter to be supported, evidenced, established or proved by the sworn written declaration, verification, certificate, statement, oath or affidavit of a person, such matter may be supported, evidenced, established or proved with the same force and effect by the unsworn written declaration, verification, certificate or statement dated and subscribed by the person as true, under penalty of perjury, in substantially the following form:

- (1) If executed outside this state: "I declare (or verify, certify or state) under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct. Executed on (date). _____ (Signature)"
- (2) If executed in this state: "I declare (or verify, certify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). _____ (Signature)"

(b) The provisions of subsection (a) do not apply to the following oaths:

- (1) An oath of office.
- (2) An oath required to be taken before a specified official other than a notary public.
- (3) An oath of a testator or witnesses as required for wills, codicils, revocations of wills and codicils and republications of wills and codicils.

(c) A notarial act performed prior to the effective date of this act is not affected by this act. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state or rules and regulations adopted thereunder.

(d) On or after July 1, 1989, whenever an officer or partner listed in subsection (b) of K.S.A. 17-2718, subsection (c) of K.S.A. 17-7503, subsection (c) of K.S.A. 17-7504, subsection (c) of K.S.A. 17-7505, subsection (d) of K.S.A. 56-1a606 or subsection (d) of K.S.A. 56-1a607 and amendments thereto is required to execute a report before a notary or swear an oath before an officer authorized to administer oaths, in lieu thereof, such person may execute an unsworn declaration if such declaration is in substantial conformity with subsections (a), (b) and (c) of this section.

(e) On or after July 1, 1990, subsections (a), (b) and (c) of this section shall have general application.

History: L. 1989, ch. 93, § 1; July 1.

Testimony
Chris Biggs/ KCDAAs Legislative Chair
House Judiciary
3/13/2002

I would like to thank the Committee for the Opportunity to testify as a proponent concerning SB 487 which proposes an amendment to 21-4704. I am presently the Legislative Chair of the Kansas County and District Attorneys Association and have served as the Geary County Attorney for the last 13 years, supervising an office which files close to 2,000 criminal cases a year. This bill was selected as an agenda item for our Association through our process of solicitation of suggestions from members and the results from our survey of support.

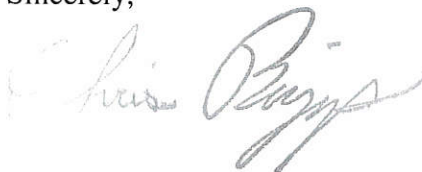
Succinctly, property crime pays in Kansas and defendants know it. This bill addresses the problem of the repeat burglar (of a non-dwelling or vehicle) who would presently be presumptive probation. Because non-person felonies do not aggregate to person crimes, such burglar who has unlimited prior burglaries would still be presumptive probation, as long as he does not have in addition two or more person felonies. (See attached Guidelines Grid, level VII business burglary/ level 9 vehicle burglary) I have had experience in our office with a business burglary defendant who had in excess of 15 prior property felonies, to include numerous burglaries, who was still presumptive probation and did receive probation. Such horror stories are repeated topics of conversation and consternation at our prosecutor meetings. I have even overheard defendants discussing among themselves on the courthouse steps the grid and its ludicrous application as applied to them. Even they see it as a joke. Once a defendant is off of probation, burglary becomes essentially a no-risk occupation. Victims and the community are justifiably outraged.

K.S.A. 21-4704 (1), as it now reads, provides that a **residential burglar** who has a prior burglary of a residence or business or aggravated burglary is presumed to be sentenced to prison. This addresses part of the problem. This bill provides that a **burglar of a business or vehicle** who has three prior burglary convictions (of any kind) is presumed imprisonment.

Stolen items, particularly auto electronic items, become like currency on the street, particularly in the drug trade. Most agents involved in search warrants at drug houses find stacks of car stereos and electronics that have been exchanged for drugs. This is common knowledge. Most burglars are active until caught and many burglaries, particularly vehicle burglaries, go unsolved.

The KCDAAs supports this bill and would suggest that consideration be given to looking at the language to be sure that convictions from other states would also be counted in its application. A transient burglar should not receive special treatment.

Sincerely,



SENTENCING RANGE - NONDRUG OFFENSES

Category⇒	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

Probation Terms are:

- 36 months recommended for felonies classified in Severity Levels 1 – 5
- 24 months recommended for felonies classified in Severity Levels 6 – 7
- 18 months (up to) for felonies classified in Severity Level 8
- 12 months (up to) for felonies classified in Severity Levels 9 - 10

Postrelease terms are:

- 36 months for felonies classified in Severity Levels 1 – 4
- 24 months for felonies classified in Severity Level 5 – 6
- 12 months for felonies classified in Severity Levels 7 - 10

Postrelease for felonies committed before 4/20/95

- 24 months for felonies classified in Severity Levels 1 - 6
- 12 months for felonies classified in Severity Level 7 - 10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
REGARDING AMENDMENT OF K.S.A. 21-4704(l)

Presented on March 13, 2002

By Thomas J. Weilert

In 1999, the legislature amended K.S.A. 21-4704 by adding subsection (l) which provides:

“The sentence for a violation of subsection (a) of K.S.A. 21-3715 and amendments thereto when such person being sentenced has a prior conviction for a violation of subsection (a) or (b) of K.S.A. 21-3715 or 21-3716 and amendments thereto shall be presumed imprisonment.”

The obvious intent of the amendment was to recognize the seriousness of the invasion of a person's home by increasing the penalty for said act in the event that the perpetrator had already been previously convicted or adjudicated of the burglary of a structure.

The Kansas Supreme Court and the Court of Appeals have often relied upon the rule of statutory interpretation which provides that criminal statutes are to be strictly construed in favor of the accused. Given the wording of the statute above cited, a result contrary to the legislative intent is clearly conceivable and likely.

The statute as written does not allow for two fairly common contingencies that need to be addressed to fulfil the legislative intent. They are:

- 1) The inclusion of juvenile adjudications for the crimes which trigger the enhancement provisions.
- 2) The inclusion of out of state convictions for the crimes which trigger the enhancement provisions.

Suggested language to cure the problem presented is as follows:

“The sentence for a violation of subsection (a) or (b) of K.S.A. 21-3715 and amendments thereto when such person being sentenced has a prior conviction or juvenile court adjudication for a violation of subsection (a) or (b) of K.S.A. 21-3715 or 21-3716 and amendments thereto, or any comparable out of state convictions or juvenile adjudications, shall be presumed imprisonment. The facts required to establish the out of state convictions or juvenile adjudications as comparable must be established by the state by a preponderance of the evidence.”



Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

Testimony in Support of SB 487
Before the House Judiciary Committee
Kyle G. Smith
Kansas Bureau of Investigation
March 13, 2002

Chairman O'Neal and members of the Committee,

I am pleased to appear today on behalf of the KBI in support of SB 487. This legislation addresses the problem of burglars continuing to re-offend as the sentencing guidelines currently make incarceration a unlikely deterrent. Burglars are some of the worst recidivists according to criminal justice studies. The substantive changes in SB 487 would at incapacitate, and hopefully deter, career burglars.

I would also request the committee consider one amendment to SB 487 that the KBI originally proposed as section 1 of HB 2856 (see attached). In recognition that there simply is not enough time for judiciary to hear every bill we would request the committee resurrect this provision. The amendments are to K.S.A. 21-4619 dealing with expungements. The first change deals with a conflict in our current law. Persons convicted of sexual battery and aggravated sexual battery are required to register as convicted offenders for a minimum of 10 years. All other crimes covered by the offender registration act are not subject to expungement under 21-4619(c) but these two were left out. Expungement relieves the person from the obligation to register. As a result, 2 years after conviction, records of these crimes are being expunged and the defendants are arguing the provisions of the offender registration act no longer apply.

The other change to K.S.A. 21-4619 clarifies that expunged convictions must be divulged, and therefore can be considered, in application for licensure as a private investigator. In section (f) (2) (A) the statute already seems to say that but as it requires divulgence for "employment" there is an argument that only the employer, not the state of Kansas issuing the license, gets the expunged record. The proposed change would make it clear that expunged records are also available in the licensing process.

Thank you for your attention. I would be happy to answer any questions.

HOUSE BILL No. 2856

By Committee on Judiciary

2-13

9 AN ACT regarding crimes, criminal procedures and punishment;
10 amending K.S.A. 2001 Supp. 21-4619, 22-3437 and 22-4902 and re-
11 pealing the existing sections.
12

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

14 Section 1. K.S.A. 2001 Supp. 21-4619 is hereby amended to read as
15 follows: 21-4619. (a) (1) Except as provided in subsections (b) and (c),
16 any person convicted in this state of a traffic infraction, cigarette or to-
17 bacco infraction, misdemeanor or a class D or E felony, or for crimes
18 committed on or after July 1, 1993, nondrug crimes ranked in severity
19 levels 6 through 10 or any felony ranked in severity level 4 of the drug
20 grid, may petition the convicting court for the expungement of such con-
21 viction or related arrest records if three or more years have elapsed since
22 the person: (A) Satisfied the sentence imposed; or (B) was discharged
23 from probation, a community correctional services program, parole, post-
24 release supervision, conditional release or a suspended sentence.

25 (2) Except as provided in subsections (b) and (c), any person who has
26 fulfilled the terms of a diversion agreement may petition the district court
27 for the expungement of such diversion agreement and related arrest re-
28 cords if three or more years have elapsed since the terms of the diversion
29 agreement were fulfilled.

30 (b) Except as provided in subsection (c), no person may petition for
31 expungement until five or more years have elapsed since the person sat-
32 isfied the sentence imposed, the terms of a diversion agreement or was
33 discharged from probation, a community correctional services program,
34 parole, postrelease supervision, conditional release or a suspended sen-
35 tence, if such person was convicted of a class A, B or C felony, or for
36 crimes committed on or after July 1, 1993, if convicted of an off-grid
37 felony or any nondrug crime ranked in severity levels 1 through 5 or any
38 felony ranked in severity levels 1 through 3 of the drug grid, or:

39 (1) Vehicular homicide, as defined by K.S.A. 21-3405 and amend-
40 ments thereto or as prohibited by any law of another state which is in
41 substantial conformity with that statute;

42 (2) a violation of K.S.A. 8-1567 and amendments thereto, or a viola-
43 tion of any law of another state, which declares to be unlawful the acts

1 prohibited by that statute;

2 (3) driving while the privilege to operate a motor vehicle on the public
3 highways of this state has been canceled, suspended or revoked, as pro-
4 hibited by K.S.A. 8-262 and amendments thereto or as prohibited by any
5 law of another state which is in substantial conformity with that statute;

6 (4) perjury resulting from a violation of K.S.A. 8-261a and amend-
7 ments thereto or resulting from the violation of a law of another state
8 which is in substantial conformity with that statute;

9 (5) violating the provisions of the fifth clause of K.S.A. 8-142 and
10 amendments thereto, relating to fraudulent applications or violating the
11 provisions of a law of another state which is in substantial conformity with
12 that statute;

13 (6) any crime punishable as a felony wherein a motor vehicle was
14 used in the perpetration of such crime;

15 (7) failing to stop at the scene of an accident and perform the duties
16 required by K.S.A. 8-1602, 8-1603 or 8-1604, and amendments thereto,
17 or required by a law of another state which is in substantial conformity
18 with those statutes;

19 (8) violating the provisions of K.S.A. 40-3104 and amendments
20 thereto, relating to motor vehicle liability insurance coverage; or

21 (9) a violation of K.S.A. 21-3405b, prior to its repeal.

22 (c) There shall be no expungement of convictions for the following
23 offenses or of convictions for an attempt to commit any of the following
24 offenses: (1) Rape as defined in subsection (a)(2) of K.S.A. 21-3502 and
25 amendments thereto; (2) indecent liberties with a child as defined in
26 K.S.A. 21-3503 and amendments thereto; (3) aggravated indecent liber-
27 ties with a child as defined in K.S.A. 21-3504 and amendments thereto;
28 (4) criminal sodomy as defined in subsection (a)(2) or (a)(3) of K.S.A. 21-
29 3505 and amendments thereto; (5) aggravated criminal sodomy as defined
30 in K.S.A. 21-3506 and amendments thereto; (6) indecent solicitation of a
31 child as defined in K.S.A. 21-3510 and amendments thereto; (7) aggra-
32 vated indecent solicitation of a child as defined in K.S.A. 21-3511 and
33 amendments thereto; (8) sexual exploitation of a child as defined in K.S.A.
34 21-3516 and amendments thereto; (9) aggravated incest as defined in
35 K.S.A. 21-3603 and amendments thereto; (10) endangering a child as
36 defined in K.S.A. 21-3608 and amendments thereto; (11) abuse of a child
37 as defined in K.S.A. 21-3609 and amendments thereto; (12) capital mur-
38 der as defined in K.S.A. 21-3439 and amendments thereto; (13) murder

39 the first degree as defined in K.S.A. 21-3401 and amendments thereto;

40 (14) murder in the second degree as defined in K.S.A. 21-3402 and
41 amendments thereto; (15) voluntary manslaughter as defined in K.S.A.
42 21-3403 and amendments thereto; (16) involuntary manslaughter as def-
43 ined in K.S.A. 21-3404 and amendments thereto; (17) involuntary man-

1 slaughter while driving under the influence of alcohol or drugs as defined
2 in K.S.A. 2001 Supp. 21-3442 and amendments thereto; ~~or~~ (18) sexual
3 battery as defined in K.S.A. 21-3517 and amendments thereto; (19) ag-
4 gravated sexual battery as defined in K.S.A. 21-3518 and amendments
5 thereto; or (20) any conviction for any offense in effect at any time prior
6 to the effective date of this act, that is comparable to any offense as
7 provided in this subsection.

8 (d) When a petition for expungement is filed, the court shall set a
9 date for a hearing of such petition and shall cause notice of such hearing
10 to be given to the prosecuting attorney and the arresting law enforcement
11 agency. The petition shall state: (1) The defendant's full name;

12 (2) the full name of the defendant at the time of arrest, conviction or
13 diversion, if different than the defendant's current name;

14 (3) the defendant's sex, race and date of birth;

15 (4) the crime for which the defendant was arrested, convicted or
16 diverted;

17 (5) the date of the defendant's arrest, conviction or diversion; and

18 (6) the identity of the convicting court, arresting law enforcement
19 authority or diverting authority. There shall be no docket fee for filing a
20 petition pursuant to this section. All petitions for expungement shall be
21 docketed in the original criminal action. Any person who may have rel-
22 evant information about the petitioner may testify at the hearing. The
23 court may inquire into the background of the petitioner and shall have
24 access to any reports or records relating to the petitioner that are on file
25 with the secretary of corrections or the Kansas parole board.

26 (e) At the hearing on the petition, the court shall order the peti-
27 tioner's arrest record, conviction or diversion expunged if the court finds
28 that:

29 (1) The petitioner has not been convicted of a felony in the past two
30 years and no proceeding involving any such crime is presently pending
31 or being instituted against the petitioner;

32 (2) the circumstances and behavior of the petitioner warrant the
33 expungement; and

34 (3) the expungement is consistent with the public welfare.

35 (f) When the court has ordered an arrest record, conviction or diver-
36 sion expunged, the order of expungement shall state the information re-
37 quired to be contained in the petition. The clerk of the court shall send
38 a certified copy of the order of expungement to the Kansas bureau of
39 investigation which shall notify the federal bureau of investigation, the
40 secretary of corrections and any other criminal justice agency which may
41 have a record of the arrest, conviction or diversion. After the order of
42 expungement is entered, the petitioner shall be treated as not having been
43 arrested, convicted or diverted of the crime, except that:

1 (1) Upon conviction for any subsequent crime, the conviction that
2 was expunged may be considered as a prior conviction in determining the
3 sentence to be imposed;

4 (2) the petitioner shall disclose that the arrest, conviction or diversion
5 occurred if asked about previous arrests, convictions or diversions:

6 (A) In any application for *licensure as a private detective, private*
7 *detective agency, certification as a firearms trainer pursuant to K.S.A.*
8 *2001 Supp. 75-7b21, and amendments thereto, or employment as a de-*
9 *tective with a private detective agency, as defined by K.S.A. 75-7b01 and*
10 *amendments thereto; as security personnel with a private patrol operator,*
11 *as defined by K.S.A. 75-7b01 and amendments thereto; or with an insti-*
12 *tution, as defined in K.S.A. 76-12a01 and amendments thereto, of the*
13 *department of social and rehabilitation services;*

14 (B) in any application for admission, or for an order of reinstatement,
15 to the practice of law in this state;

16 (C) to aid in determining the petitioner's qualifications for employ-
17 ment with the Kansas lottery or for work in sensitive areas within the
18 Kansas lottery as deemed appropriate by the executive director of the
19 Kansas lottery;

20 (D) to aid in determining the petitioner's qualifications for executive
21 director of the Kansas racing commission, for employment with the com-
22 mission or for work in sensitive areas in parimutuel racing as deemed
23 appropriate by the executive director of the commission, or to aid in
24 determining qualifications for licensure or renewal of licensure by the
25 commission;

26 (E) upon application for a commercial driver's license under K.S.A.
27 8-2,125 through 8-2,142, and amendments thereto;

28 (F) to aid in determining the petitioner's qualifications to be an em-
29 ployee of the state gaming agency;

30 (G) to aid in determining the petitioner's qualifications to be an em-
31 ployee of a tribal gaming commission or to hold a license issued pursuant
32 to a tribal-state gaming compact;

33 (H) in any application for registration as a broker-dealer, agent, in-
34 vestment adviser or investment adviser representative all as defined in
35 K.S.A. 17-1252 and amendments thereto; or

36 (I) in any application for a commercial guide permit or associate
37 guide permit under K.S.A. 32-964, and amendments thereto;

38 (3) the court, in the order of expungement, may specify other cir-
39 cumstances under which the conviction is to be disclosed;

40 (4) the conviction may be disclosed in a subsequent prosecution for
41 an offense which requires as an element of such offense a prior conviction
42 of the type expunged; and

43 (5) upon commitment to the custody of the secretary of corrections,

1 any previously expunged record in the possession of the secretary of cor-
2 rections may be reinstated and the expungement disregarded, and the
3 record continued for the purpose of the new commitment.

4 (g) Whenever a person is convicted of a crime, pleads guilty and pays
5 a fine for a crime, is placed on parole, postrelease supervision or proba-
6 tion, is assigned to a community correctional services program, is granted
7 a suspended sentence or is released on conditional release, the person
8 shall be informed of the ability to expunge the arrest records or convic-
9 tion. Whenever a person enters into a diversion agreement, the person
10 shall be informed of the ability to expunge the diversion.

11 (h) Subject to the disclosures required pursuant to subsection (f), in
12 any application for employment, license or other civil right or privilege,
13 or any appearance as a witness, a person whose arrest records, conviction
14 or diversion of a crime has been expunged under this statute may state
15 that such person has never been arrested, convicted or diverted of such
16 crime, but the expungement of a felony conviction does not relieve an
17 individual of complying with any state or federal law relating to the use
18 or possession of firearms by persons convicted of a felony.

19 (i) Whenever the record of any arrest, conviction or diversion has
20 been expunged under the provisions of this section or under the provi-
21 sions of any other existing or former statute, the custodian of the records
22 of arrest, conviction, diversion and incarceration relating to that crime
23 shall not disclose the existence of such records, except when requested
24 by:

25 (1) The person whose record was expunged;

26 (2) a private detective agency or a private patrol operator, and the
27 request is accompanied by a statement that the request is being made in
28 conjunction with an application for employment with such agency or op-
29 erator by the person whose record has been expunged;

30 (3) a court, upon a showing of a subsequent conviction of the person
31 whose record has been expunged;

32 (4) the secretary of social and rehabilitation services, or a designee of
33 the secretary, for the purpose of obtaining information relating to em-
34 ployment in an institution, as defined in K.S.A. 76-12a01 and amend-
35 ments thereto, of the department of social and rehabilitation services of
36 any person whose record has been expunged;

37 (5) a person entitled to such information pursuant to the terms of the
38 expungement order;

39 (6) a prosecuting attorney, and such request is accompanied by a
40 statement that the request is being made in conjunction with a prosecu-
41 tion of an offense that requires a prior conviction as one of the elements
42 of such offense;

43 (7) the supreme court, the clerk or disciplinary administrator thereof,



CARLA J. STOVALL
ATTORNEY GENERAL

State of Kansas

Office of the Attorney General

CONSUMER PROTECTION / ANTITRUST DIVISION

120 S.W. 10TH AVENUE, 2ND FLOOR, TOPEKA, KANSAS 66612-1597

PHONE: (785) 296-3751 FAX: (785) 291-3699

CONSUMER HOTLINE
1-800-432-2310

Testimony of
Steve Rarrick, Deputy Attorney General
Consumer Protection Division
Office of Attorney General Carla J. Stovall
Before the House Judiciary Committee
Re: Substitute for Senate Bill 467
March 13, 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 testify in support of Substitute for Senate Bill 467. My name is Steve Rarrick and I am the Deputy Attorney General for Consumer Protection.

As originally drafted, Senate Bill 467 would provide protections to Kansans from deceptive and unwanted commercial e-mail, or "spam." The term "spam" refers to unsolicited bulk e-mail, or "junk" e-mail, and the origin of the term arose out of a skit by the British comedy troupe Monty Python. The FTC reported on February 12, 2002, that consumers complaining about spam currently forward spam to the agency at a rate of approximately 15,000 each day. Our office regularly hears from consumers upset about receiving unwanted spam.

Senate Bill 467 was modeled primarily after statutes in Washington and California. Both laws have been challenged on Commerce Clause grounds, and both have been upheld at the appellate court level. (See, *State v. Heckel*, 143 Wash.2d 824, 24 P.3d 404 (2001), and *Ferguson v. Friendfinders, Inc., et al.*, 94 Cal.App.4th 1255, 115 Cal.Rptr.2d 258 (2002).

Beyond being annoying and a waste of time, the harm caused by unsolicited commercial e-mail to ISPs (internet service providers), actual owners of domain names which have been forged, and e-mail users has been well documented by courts and commentators. These problems have developed because unsolicited commercial e-mail is easy and inexpensive to create, but extremely difficult and expensive to eliminate.

ISPs incur significant business-related costs accommodating bulk e-mail advertising and addressing the problems it creates. The costs of these efforts, like most business costs, are typically passed on to consumers. The use of deceptive tactics by spammers, including disguising the nature and origin of their messages to evade ISP attempts to filter out their messages, has caused even more expense to ISPs who must attempt to return messages to non-existent addresses or otherwise dispose of undeliverable messages. The use of fraudulent domain names and return e-mail addresses by spammers cause misdirected responses to innocent third parties who can suffer serious economic consequences. The *Heckel* court noted that the

House Judiciary
Attachment 6
3-13-02

“cost-shifting – from deceptive spammers to businesses and e-mail users – has been likened to sending junk mail with postage due or making telemarketing calls to someone’s pay-per-minute cellular phone.” (*Heckel*, 24 P.3d at p. 410). As a result, the *Heckel* court concluded that the Washington Act served the “legitimate local purpose” of banning the cost-shifting inherent in the sending of deceptive spam. Letters supporting SB 467 as originally drafted from representatives of two Kansas-based ISPs, Carol’s Web of Junction City and Pixius Communications of Wichita, are attached to my testimony.

We have concerns about some of the amendments made to SB 467 in the Substitute to SB 467 which we believe weaken the effectiveness of the proposed law. Our most serious concern is the affirmative defense added in paragraph (k) at page 4, lines 8-10 of Substitute for SB 467. We would strongly urge this Committee to remove this defense, which we believe will cause substantial added costs to each investigation and prosecution, because companies committing violations will point to a written policy manual and claim the violations were merely the result of an error or mistake. To prove otherwise, we will be required to take statements and depositions of current and former employees to prove the company instructed employees to act contrary to the written policy manual. As you can imagine, this will be an expensive undertaking, and will make the law difficult to enforce.

Another amendment which causes us concern is the exemption for spam sent to less than 500 recipients contained in the “commercial electronic mail message” definition in paragraph (b)(2) at page 1, line 31. While we understand the intent of this exemption, we believe placing it in the definition of commercial electronic mail message effectively allows anyone sending less than 500 spam messages to send deceptive spam and ignore requests by consumers who have notified the sender to stop sending spam with complete impunity. While we are concerned that the exemption for “less than 500” spam messages may be too high, we believe this exemption should be applied only to the “ADV” disclosure requirement in paragraph (c)(1)(C), not in the definition of spam, which effectively gives a sender of less than 500 spam messages a license to commit deceptive practices. We have provided a balloon amendment deleting this exemption from page 1, lines 29-31, and providing slightly different but similar language at paragraph (c)(1)(C) at page 2, line 32.

I have attached to my testimony proposed balloon amendments reflecting our suggested changes.

The principle prohibitions and requirements of Substitute for Senate Bill 467 are as follows:

- Paragraph (c)(1)(A) at page 2 prohibits using third party domain names without the permission of the third party (deceptive spammers will give a third party domain name to make it look like it came from that source) or otherwise misrepresenting or obscuring any information identifying the point of origin or the transmission path of a commercial electronic mail message (this is to keep the recipient from replying and directing the sender to cease sending spam).
- Paragraph (c)(1)(B) at page 2 prohibits false or misleading information in the subject line (senders often use deceptive subject line statements to falsely suggest that an acquaintance of the recipient was trying to make contact or that the message contains some special or classified information for the recipient’s eyes only).
- Paragraph (c)(1)(C) at page 2 requires the subject line contain “ADV:” as the first four characters to advise the recipient that it is advertising material. This requirement is currently present in spam

laws in California, Colorado, and Tennessee, and is being proposed in other states at this time. This is where we suggest inserting the "less than 500" exemption discussed above and reflected in our proposed balloon amendments.

- Paragraph (c)(1)(D) at page 2 requires instructions on how to notify the sender not to send any subsequent spam via either (1) an electronic mail address or (2) the legal name and address for notice by mail and a toll-free number for notice by telephone.
- Paragraph (c)(1)(E) at page 3 requires the subject line contain "ADV:ADLT" as the first eight characters when the message contains advertising for adult material to advise the recipient of this material fact. California requires this, and Pennsylvania requires the e-mail to include "ADV-ADULT" to designate "explicit sexual materials." Other states are proposing this requirement as well.
- Paragraph (c)(2) at page 3 prohibits sending spam to the recipient after the recipient has notified the sender not to send any further spam.
- Paragraph (c)(3) at page 3 prohibits giving, transferring, selling, or sharing e-mail addresses of any recipient who has notified the seller not to send further spam.
- Paragraph (c)(4) at page 3 prohibits a person from assisting the transmission (defined in section (b)(1)) of spam when the person providing the assistance knows that the initiator of the spam is engaged in, or intends to engage, in acts or practices that violate the Kansas Consumer Protection Act (KCPA).
- Paragraph (e) at page 3 authorizes an interactive computer service to block spam when it reasonably believes the spam is in violation of this law.
- Paragraph (f) at page 3 provides immunity to an interactive computer service for actions taken in good faith to block spam it reasonably believes is in violation of this law.
- Paragraph (g) at page 3 makes violations an unconscionable act and practice under the KCPA.
- Paragraph (h) at page 3 is intended to ensure a penalty is available to persons alleging violations and who bring a private cause of action even though they may not be able to prove actual monetary loss. This is in response to a decision by the Kansas Supreme Court holding consumers may not recover a civil penalty if they are not able to prove actual monetary loss. This decision has also been applied in a slamming case, precluding a consumer from prevailing because the consumer could show no actual damages.
- Paragraph (i) at pages 3-4 provides a private cause of action to non-consumer entities, such as corporations, partnerships, associations, churches, etc. A similar private cause of action was provided in our slamming law last session.
- Paragraph (j) at page 4 of the bill provides for a minimum \$500 and a maximum \$10,000 penalty for each violation.
- Paragraph (k) at page 4 of the bill is the provision we believe will make the law virtually unenforceable and will substantially increase the cost of our investigations and prosecutions. We would strongly urge the Committee to delete this affirmative defense.

On behalf of Attorney General Stovall, I urge you to pass this bill out favorably with the balloon amendments we have proposed. I would be happy to answer questions of the Chair or any member of the Committee.

Substitute for SENATE BILL No. 467

By Committee on Commerce

2-26

AN ACT concerning information technology; providing protection from deceptive and unwanted electronic mail messages; establishing certain acts a violation of the Kansas consumer protection act; allowing for either a cause of action or civil penalty for a violation.

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

Section 1. (a) This act shall be known as the commercial electronic mail act.

(b) As used in this act:

(1) "Assist the transmission" means actions taken by a person to provide substantial assistance or support which enables any person to formulate, compose, send, originate, initiate or transmit a commercial electronic mail message when the person providing the assistance knows that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates the Kansas consumer protection act.

(2) "Commercial electronic mail message" means an electronic mail message sent for the purpose of promoting property or services for sale or lease, but shall not include electronic mail messages sent by a natural person volunteering to send such messages on behalf of a charitable organization as defined by K.S.A. 17-1760, and amendments thereto, ~~or to electronic mail messages, other than messages of a sexually explicit or otherwise adult oriented nature, sent to less than 500 recipients.~~

[delete]

(3) "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.

(4) "Established business relationship" means a prior and existing relationship formed by a voluntary two-way communication between a sender and a recipient with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the recipient regarding products or services offered by such sender, which relationship has not been previously terminated by either party.

(5) "Initiate the transmission" refers to the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message,

1 unless such intervening interactive computer service assists in the trans-
2 mission of an electronic mail message when it knows, that the person
3 initiating the transmission is engaged, or intends to engage, in any act or
4 practice that violates the Kansas consumer protection act.

5 (6) "Interactive computer service" means any information service,
6 system or access software provider that provides or enables computer
7 access by multiple users to a computer server, including specifically a
8 service or system that provides access to the internet and such systems
9 operated or services offered by libraries or educational institutions.

10 (7) "Internet domain name" refers to a globally unique, hierarchical
11 reference to an internet host or service, assigned through centralized
12 internet naming authorities, comprising a series of character strings sep-
13 arated by periods, with the right-most string specifying the top of the
14 hierarchy.

15 (8) "Express authorization" means an express affirmative act by a re-
16 cipient clearly agreeing receive commercial electronic messages from a
17 specified and identifiable sender, or from multiple persons.

18 (c) No person shall:

19 (1) Initiate the transmission, conspire with another to initiate the
20 transmission, or assist the transmission, of a commercial electronic mail
21 message from a computer located in Kansas or to an electronic mail ad-
22 dress that the sender knows, is held by a Kansas resident that:

23 (A) Uses a third party's internet domain name without permission of
24 the third party, or otherwise misrepresents or obscures any information
25 in identifying the point of origin or the transmission path of a commercial
26 electronic mail message;

27 (B) contains false or misleading information in the subject line;

28 (C) does not contain as the first four characters of the subject line
29 "ADV:"; Provided, however, the characters "ADV" shall not be required
30 in the subject line if the recipient has an established business relationship
31 or has given express authorization to receive commercial electronic mail
32 messages. The sender claiming exemption under this subsection shall
33 have the burden of proving the express authorization by a preponderance
34 of the evidence.

35 (D) does not contain instructions, in text at least as large as the ma-
36 jority of the text in the transmission, for the recipient to follow to notify
37 the sender not to send any subsequent communications, with either:

38 (i) An electronic mail address to which the recipient may reply to
39 notify the sender not to send any subsequent communications; or

40 (ii) the legal name of the person or entity initiating the transmission,
41 including such person or entity's physical address for the receipt of the
42 United States mail and a toll-free telephone number that the recipient
43 may call to notify the sender not to send any subsequent communications;

or to the same or similar electronic mail
message, other than messages of a
sexually explicit or otherwise adult
nature, sent to less than 500 recipients.

1 and

2 (E) contains advertising material for viewing, use, consumption, sale,
3 lease or rental only by persons over 18 years of age, including but not
4 limited to content of sexual, sexually explicit or otherwise adult-oriented
5 nature, unless the first eight characters of the subject line are
6 "ADV:ADLT."

7 (2) Initiate the transmission, conspire with another to initiate the
8 transmission, or assist the transmission, of a commercial electronic mail
9 message from a computer located in Kansas or to an electronic mail ad-
10 dress that the sender knows, is held by a Kansas resident that is made
11 after the recipient thereof has notified the sender not to send any sub-
12 sequent communications.

13 (3) Give, transfer, sell or otherwise share with another the electronic
14 mail address of any recipient who has notified the sender not to send any
15 subsequent communications for any use other than for the third party to
16 place the address on a do not contact list.

17 (4) Assist in the transmission of a commercial electronic mail mes-
18 sage, when the person providing the assistance knows, that the initiator
19 of the commercial electronic mail message is engaged, or intends to en-
20 gage, in any act or practice that violates the Kansas consumer protection
21 act.

22 (d) For purposes of this section, a person knows or has reason to know
23 that the intended recipient of a commercial electronic mail message is a
24 Kansas resident if that information is available, upon request, from the
25 registrant of the internet domain name contained in the recipient's elec-
26 tronic mail address.

27 (e) An interactive computer service may, upon its own initiative, block
28 the receipt or transmission through its service of any commercial elec-
29 tronic mail that it reasonably believes is, or will be, sent in violation of
30 this chapter.

31 (f) No interactive computer service may be held liable for any action
32 voluntarily taken in good faith to block the receipt or transmission through
33 its service of any commercial electronic mail which it reasonably believes
34 is, or will be, sent in violation of this act.

35 (g) Any violation of this section is an unconscionable act and practice
36 under the Kansas consumer protection act.

37 (h) Any person alleging a violation of this section including an inter-
38 active computer service damaged by a violation, shall be deemed a con-
39 sumer who has been aggrieved by a violation of the Consumer protection
40 act and to have suffered actual loss as referred to in K.S.A. 50-634 and
41 50-636 and amendments thereto.

42 (i) Any person alleging a violation of this section may bring a private
43 action to seek relief pursuant to K.S.A. 50-634, 50-636 and this section,

1 and amendments thereto, and such person shall be considered a con-
2 sumer pursuant to K.S.A. 50-624, and amendments thereto, for the pur-
3 poses of such private action.

4 (j) Any person that violates this section shall be subject to a civil
5 penalty of not less than \$500 nor more than \$10,000 for each such violation
6 instead of the penalty provided for in subsection (a) of K.S.A. 50-636, and
7 amendments thereto.

8 ~~(k) No person shall be liable for violation of this act if the person has~~
9 ~~established and implemented procedures to comply with the act and any~~ — [delete]
10 ~~subsequent commercial electronic mail message is the result of error.~~


11 ~~(l)~~ The legislature finds that the practices covered by this section are (k)
12 matters vitally affecting the public interest for the purpose of applying
13 the Kansas consumer protection act. A violation of this section is not
14 reasonable or necessary for the development and preservation of com-
15 merce and is an unconscionable act in violation of the Kansas consumer
16 protection act.

17 ~~(m)~~ This section shall be a part of and supplemental to the Kansas (l)
18 consumer protection act.

19 Sec. 2. This act shall take effect and be in force from and after its
20 publication in the statute book.

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Putting Data to Flight 

February 20, 2002

Mr. Steve Rarrick
State Of Kansas
Office of the Attorney General
Deputy Agitant General for Consumer Protection

Dear Mr. Rarrick,

I am writing in regard to Senate Bill No.467 providing "protection from deceptive and unwanted electronic mail messages".

Pixius Communications, LLC is a Kansas based company in Wichita, KS. Pixius provides Internet services and private line services via dial-up and wireless facilities to business and residential consumers in Kansas. Pixius Communications, LLC agrees with Senate Bill No. 467. Our position is not against advertising via email "per se" but is against deceptive or misleading email advertising. Senate Bill No. 467 provides consumers the choice to accept all email advertising or stop unwanted email advertising by: 1) filtering all email with "ADV:" in the header 2) filtering all email with "ADV:ADLT" in the header 3) unsubscribing from future emails from specific advertisers. The most important part of Senate Bill No. 467 is the word "choice". Our clients should be afforded the opportunity to choose what their employees or their family members should or should not receive via email advertising.

Additionally, bandwidth is one of Pixius' largest expenses. Millions of emails are handled by Pixius of which a large number are not requested or wanted by our consumers. Our firm must have adequate equipment and bandwidth to deliver all of these emails. If consumers were able to deny or unsubscribe from certain advertising, our bandwidth costs would be reduced.

Please feel free to contact Jacques L. Fluker with any questions at (316) 269-1437 or email me at jfluker@pixius.com.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jay S. Maxwell", is written over a light-colored background.

Jay S. Maxwell
Managing Member

.....

204 S. Santa Fe
Salina, Ks 67401
785-823-9577



February 21, 2002

Senator Karin Brownlee
Capitol Office Bldg., Room 136-
Topeka, Kansas 66612

Dear Senator:

I am writing on behalf of Carroll's Web. We are a full service Internet provider in the state of Kansas and are locally owned and operated. We provide service to over 85% of the state and are the largest regional provider in Kansas. My correspondence is in support of SENATE BILL No. 467. Email spamming is an issue that we, as an ISP, deal with on a daily basis. Spam costs Carroll's Web money. This expense includes labor, equipment and network facilities. Unsolicited emails require us to expend valuable labor dollars to deal with this issue. It also requires us to acquire larger mail servers than are necessary to handle the volume of email. It requires us to over build our network. Spam email requires Carroll's Web to provide bandwidth, and transport facilities in order for these emails to reach our customers. I would estimate that we spend in excess of \$150,000.00 per year due to unsolicited email.

In April of 2001 Carroll's Web began providing a spam protection service to our customers...free of charge. This service costs Carroll's Web a full 6% of our monthly revenue. During development of this service we discovered through an internal survey that over 60% of the email we received was unsolicited and marketing in nature. When the service rolled out our customer base had the opportunity to opt out of using it...less than 2% decided to do so. This service was very successful in the beginning as it blocked much of the spam. It looked at subject lines and email domains. The marketers, however, changed their tactics and began sending email with misleading subject lines and from very recognizable domains. I am very heartened by the provision in 467 that specifies "ADV:" and "ADV:ADLT" in the message field for emails that are unsolicited. This will make it much easier for our software to function properly. I am also impressed with the provision that will allow my company, without liability, to block email that is or we may

.....

February 21, 2002

Page 2

reasonably feel is, or will be, in violation of this act. This gives us the opportunity to protect our most valuable asset...our customer.

There is certainly a place for marketing via email. We want our customers to have access to everything on the Internet that they wish to view. We do not however wish to encumber our customers or our company with material that the consumer has not requested and does not wish to view. As an ISP we are fairly large but we absolutely refuse to sell our customer's email addresses for any reason. There are other organizations that do sell this information. I am asking you to protect my customers as well as those people that may have chosen another provider. Many of these providers may have been forced into this practice by being forced to bare the cost of spam.

In closing I would ask that you support SENATE BILL No. 467. I believe it has the consumer's interest at heart and it will only help the ISP industry.

Warmest Regards,



Monty Gilliam
Director of Operations
Carroll's Web

Direct Marketing Association

**TESTIMONY
HOUSE JUDICIARY COMMITTEE
SUBSTITUTE FOR SENATE BILL NO. 467**

MARCH 13, 2002

Chairman O'Neal and Members of the House Judiciary Committee:

Thank you for the opportunity to present the remarks of the Direct Marketing Association (DMA) on Substitute for Senate Bill No. 467. The Direct Marketing Association serves as a professional trade association for direct marketers. The DMA is the oldest and largest national trade association, serving the direct marketing industry since 1917.

The Direct Marketing Association believes that unsolicited email (or "spam") has become an increasing problem for both consumers and the industry alike. These unwanted messages have created brownouts, server and router failures and added additional costs to infrastructure development. In regulating "spam" you must counterbalance the issues of free speech and the technical aspects regulation without being burdensome on businesses using legitimate commercial e-mail and providing only band-aid fixes for consumers.

Our Association recently adopted new guidelines for online marketing as a step to promote higher ethical standards among marketers. These guidelines require a commercial sender to have an ongoing relationship with the recipient, permission from the recipient, or have provided the recipient notice and choice about receiving commercial electronic messages.

The DMA supports Substitute for Senate Bill No. 467.

We do have a concern that the provisions of the bill that require unsolicited commercial e-mail messages contain in the subject line of the message the four characters "ADV:" and believe that this language may in some ways legitimize "spam" by requiring such a label. In addition, labeling commercial e-mail messages with "ADV:" may give consumers less choice and control when handling e-mail because it forces a consumer to treat all "ADV:" messages the same.

I have briefly visited with Steve Rarrick, Deputy Attorney General for the Consumer Protection Division about removing this provision, but he indicated that removing this provision might take a more extensive rewrite of the language than a simple deletion. This concern may be an issue for future consideration, as we believe this legislation is important and don't want to impede its process.

We encourage your support of Substitute for Senate Bill No. 467, as drafted, and urge you to recommend this legislation favorable for passage.

Testimony presented by Douglas E. Smith

Commercial Solicitations Online Guidelines

Marketers may send commercial solicitations online under the following circumstances:

1. The solicitations are sent to the marketers' own customers, or
2. Individuals have given their affirmative consent to the marketer to receive solicitations online, or
3. Individuals did not opt out after the marketer has given notice of the opportunity to opt out from solicitations online, or
4. The marketer has received assurance from the third party list provider that the individuals whose e-mail addresses appear on that list
 - a. have already provided affirmative consent to receive solicitations online, or
 - b. have already received notice of the opportunity to have their e-mail addresses removed and have not opted out.

In each solicitation sent online, marketers should furnish individuals with a link or notice they can use to:

- request that the marketer not send them future solicitations online, and
- request that the marketer not rent, sell, or exchange their e-mail addresses for online solicitation purposes.

The above requests should be honored in a timely manner.

Only those marketers that rent, sell, or exchange information need to provide notice of a mechanism to opt out of information transfer to third-party marketers.

Marketers should process commercial e-mail lists obtained from third parties using The DMA's e-Mail Preference Service (E-MPS) suppression file. E-MPS need not be used on one's own *customer* lists, or when individuals have given affirmative consent to the marketer directly.

Solicitations sent online should disclose the marketer's identity, and the subject line should be clear, honest, and not misleading. A marketer should also provide specific contact information at which the individual can obtain service or information. The marketer's street address should be made available in the e-mail solicitation or by a link to the marketer's Web site.



Gaches, Braden, Barbee & Associates

Governmental Affairs & Association Management

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House Judiciary Committee

Hearing on Substitute for Senate Bill 467:

The Commercial Electronic Mail Act

Testimony of Experian

Submitted by Ron Gaches

Wednesday, March 13, 2002

Thank you Chairman O'Neal for the opportunity to appear before your committee on behalf of Experian and share our comments regarding Senate Bill 467.

Experian is a global leader in the information services industry, steward of some of the world's largest repositories of consumer information. You may know us as one of the three national consumer-reporting agencies. However, we also provide direct marketing services to a "Who's Who" of America's premier corporations and growing small business.

One service we provide, from our Internet facility in Denver, is email marketing services. In fact, Experian sends approximately 500 million "permission-based" e-mails out each month on behalf of companies such as the LA Times, the Chicago Tribune, MSNBC, American Express and others.

Experian operates with two e-mail business models. First, we provide email transmission services used by a growing number of commercial enterprises to service their clients and subscribers. These services are provided for organizations that have received authorization from their consumers or subscribers to send them email updates, confirmations, reports, newsletters, special offers and other information. Experian relies on the assurances of these companies that they have received appropriate permission.

Second, Experian collects and aggregates e-mail addresses from consumers who have provided affirmative consent to have their e-mail addresses shared with reputable companies who want to offer good services to willing prospects. For example, when an individual purchases a new consumer electronic device, like a digital camera or printer, he or she might complete an online registration or hardcopy product registration card. At that time, he or she might indicate a desire to receive updates about product upgrades or associated products and services from that company and from other reputable companies.

Experian understands and supports the primary purpose of SB 467, which is to protect Internet users from the ever-growing onslaught of unsolicited email. Like most of you, we regard fraudulent and misleading email spam as a nuisance. I delete this spam without looking at it or giving it a second thought.

That's why Experian supports the prohibitions and restrictions on commercial email found in Section 1 (c) (1), (2), (3) and (4). These paragraphs effectively prohibit:

- • Use of an internet domain name without permission
- • Falsely identifying the point of origin or transmission path of a commercial email message, and
- • Providing false or misleading information in the subject line

The bill also requires unauthorized commercial email to be identified with the characters "ADV:" in the subject line, and requires that any sender claiming exemption from this requirement shall "have the burden of proving the express authorization by a preponderance of the evidence."

And the bill requires the sender of commercial email to provide the recipient with easy access for removal of authorization.

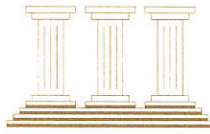
A more stringent requirement is imposed on adult content email; all adult content emails must be identified with ADV:ADLT in the subject line. This requirement is imposed whether the email is authorized or not.

Experian supported almost all of the provisions of the original version of SB 467. The language we did not support would have required placing "ADV:" at the beginning of the subject line for ALL commercial email, whether it had been authorized or not. We believe it is appropriate to place the "ADV:" requirement on unauthorized commercial email, but believe authorized email should not be subject to this requirement. Our concern here is that local ISP will filter out ALL email marked "ADV:" in an effort to eliminate unwanted spam sent to the subscribers.

The other concern we had with the original version of the bill concerned the enforcement standards. As originally introduced, the bill would have made a single email sent in violation of the act an unconscionable act under the Consumer Protection Act. Experian works with tremendous volumes of authorized email, 500 million messages a month. Utilizing the latest technology, email is sent in huge batches, up to 50,000 at a time. While these electronic processes are being continuously improved, human error is still possible. For that reason we supported the safe harbor provision found in (k) at line 8, page 4 of the bill.

The language declaring a violation to be an unconscionable act and the \$10,000 fines still remain in the bill. We believe this strikes a balance between the state's desire to pursue and punish intentional violators of the act while providing the complying firms with protection for unintentional human error. Of course, a pattern of violation, no matter the cause, would remain actionable.

In conclusion, we respectfully request the Committee retain the language in SB 467 that clearly distinguishes between unauthorized email and those messages that have been explicitly authorized. Drawing that distinction will encourage firms to participate in proper opt-in methodologies for authorizing email. Further, the Committee should not hold companies who merely transmit e-mail messages on behalf of marketers liable for message content.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Senate Judiciary Committee
FROM: Kansas Trial Lawyer's Association
RE: SB 467
DATE: March 13, 2002

Members of the House Senate Judiciary Committee, thank you for the opportunity to offer comments on Substitution SB 467. My name is LJ Leatherman and I am a Topeka attorney and a member of the Board of Governors of the Kansas Trial Lawyers Association.

KTLA supports legislation to create a protection from unwanted electronic mail messages protect the privacy of Kansas consumers and to provide an effective means to prevent unwanted telemarketing calls. KTLA agrees with the proponents of this bill that this legislation is needed and will only be effective if the list is managed by the Attorney General's office.

Substitute SB 467, however, provides a simple but powerful mechanism that will allow these producers of deceptive and unwanted electronic mail messages to circumvent the consumer protections created by this bill. Specifically, Sec. 1(k) provides:

(k) No person shall be liable for violation of this act if the person has established and implemented procedures to comply with the act and any subsequent commercial electronic mail message in is the result of error.

Under this section, producers of deceptive unwanted electronic mail messages could establish written policies that would serve as a defense for the producers to a consumer complaint regardless of whether the written policies were followed.

For example, a producer of these unwanted and deceptive electronic messages could have a written policy regarding compliance with this act, which it either does not enforce the policy, or orally instructs persons sending the messages, to ignore the policy and not follow the mandates of the law. Under either situation, the producer company would have a defense to the consumer's complaint despite their willful failure to follow the law concerning unsolicited, unwanted and deceptive electronic messages and solicitations.

Terry Humphrey, Executive Director

Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 785.232.7756 • Fax 785

E-Mail: triallaw@ink.org

House Judiciary
Attachment 9
3-13-02

The reality is that this defense will often create an insurmountable burden on consumers to pursue a company for unsolicited unwanted and deceptive electronic messages. The reason for this burden is that the only way to overcome the defense is to depose the employees or former employees of the company to determine what the persons making the calls were instructed or how the company enforced its policy. This substantially increases the cost of the litigation and thereby the risk undertaken by the consumer.

The reason that it will be necessary to depose current and former employees is that the rules of professional conduct for attorneys make it improper for attorneys to contact current employees and many former employees of the telemarketing company. For this reason, the only way the information can be obtained is to depose current employees and subpoena former employees to testify if they can be located. Again, this defense substantially increases litigation costs and creates a serious burden on Kansas consumers who are the victims of unsolicited unwanted and deceptive electronic messages.

For these reasons, KTLA supports legislation but request the language in Substitution SB 467 Section 1(k) be deleted.

Thank you again for the opportunity to express our support and concerns with Substitution SB 467.