

House Substitute for SENATE BILL No. 55

By Committee on Corrections and Juvenile Justice

3-16

1 AN ACT concerning crimes, criminal procedure and punishment; relating
2 to electronic communications; relating to harassment by
3 telecommunications device; relating to warrants for interception and
4 information; amending K.S.A. 2010 Supp. 22-2502 and 22-2516 and
5 section 184 of chapter 136 of the 2010 Session Laws of Kansas and
6 repealing the existing sections.

7

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

9 Section 1. K.S.A. 2010 Supp. 22-2502 is hereby amended to read as
10 follows: 22-2502. (a) A search warrant shall be issued only upon the oral
11 or written statement, including those conveyed or received by electronic
12 communication, of any person under oath or affirmation which states facts
13 sufficient to show probable cause that a crime has been or is being
14 committed and which particularly describes a person, place or means of
15 conveyance to be searched and things to be seized. Any statement which is
16 made orally shall be either taken down by a certified shorthand reporter,
17 sworn to under oath and made part of the application for a search warrant,
18 or recorded before the magistrate from whom the search warrant is
19 requested and sworn to under oath. Any statement orally made shall be
20 reduced to writing as soon thereafter as possible. If the magistrate is
21 satisfied that grounds for the application exist or that there is probable
22 cause to believe that they exist, the magistrate may issue a search warrant
23 for the seizure of the following:

24 (1) Any things which have been used in the commission of a crime, or
25 any contraband or any property which constitutes or may be considered a
26 part of the evidence, fruits or instrumentalities of a crime under the laws of
27 this state, any other state or of the United States. The term "fruits" as used
28 in this act shall be interpreted to include any property into which the thing
29 or things unlawfully taken or possessed may have been converted.

30 (2) Any person who has been kidnapped in violation of the laws of
31 this state or who has been kidnapped in another jurisdiction and is now
32 concealed within this state.

33 (3) Any human fetus or human corpse.

34 (4) Any person for whom a valid felony arrest warrant has been
35 issued in this state or in another jurisdiction.

1 (5) (A) Any information concerning the user of an electronic
2 communication service; any information concerning the location of
3 electronic communications systems, including, but not limited to, towers
4 transmitting cellular signals involved in any wire communication; and any
5 other information made through an electronic communications system.

6 (B) The jurisdiction granted in this paragraph shall extend to
7 information held by entities registered to do business in the state of
8 Kansas, submitting to the jurisdiction thereof, and entities primarily
9 located outside the state of Kansas if the jurisdiction in which the entity is
10 primarily located recognizes the authority of the magistrate to issue the
11 search warrant.

12 (b) Before ruling on a request for a search warrant, the magistrate
13 may require the affiant to appear personally and may examine under oath
14 the affiant and any witnesses that the affiant may produce. Such
15 proceeding shall be taken down by a certified shorthand reporter or
16 recording equipment and made part of the application for a search warrant.

17 (c) Affidavits or sworn testimony in support of the probable cause
18 requirement of this section shall not be made available for examination
19 without a written order of the court, except that such affidavits or
20 testimony when requested shall be made available to the defendant or the
21 defendant's counsel for such disposition as either may desire.

22 (d) As used in this section: (1) "Electronic communication" means
23 the use of electronic equipment to send or transfer a copy of an original
24 document; and

25 (2) "electronic communication service" and "electronic
26 communication system" have the meaning as defined in K.S.A. 22-2514,
27 and amendments thereto.

28 (e) Nothing in this section shall be construed as requiring a search
29 warrant for cellular location information in an emergency situation
30 pursuant to K.S.A. 22-4615, and amendments thereto.

31 Sec. 2. K.S.A. 2010 Supp. 22-2516 is hereby amended to read as
32 follows: 22-2516. (1) Each application for an order authorizing the
33 interception of a wire, oral or electronic communication shall be made in
34 writing, upon oath or affirmation, to a judge of competent jurisdiction, and
35 shall state the applicant's authority to make such application. Each
36 application shall include the following information:

37 (a) The identity of the prosecuting attorney making the application,
38 and the identity of the investigative or law enforcement officer requesting
39 such application to be made;

40 (b) A full and complete statement of the facts and circumstances
41 relied upon by the applicant to justify such applicant's belief that an order
42 should be issued, including (i) details as to the particular offense that has
43 been, is being or is about to be committed, (ii) except as provided in

1 subsection (10), a particular description of the nature and location of the
2 facilities from which or the place where the communication is to be
3 intercepted, (iii) a particular description of the type of communications
4 sought to be intercepted, and (iv) the identity of the person, if known,
5 committing the offense and whose communications are to be intercepted;

6 (c) A full and complete statement as to whether or not other
7 investigative procedures have been tried and failed or why they reasonably
8 appear to be unlikely to succeed if tried or to be too dangerous;

9 (d) A statement of the period of time for which the interception is
10 required to be maintained and, if the nature of the investigation is such that
11 the authorization for interception should not automatically terminate when
12 the described type of communication first has been obtained, a particular
13 description of facts establishing probable cause to believe that additional
14 communications of the same type will occur thereafter;

15 (e) A full and complete statement of the facts known to the applicant
16 concerning all previous applications made to any judge for authorization to
17 intercept wire, oral or electronic communications involving any of the
18 same persons, facilities or places specified in the application, and the
19 action taken by the judge on each such application; and

20 (f) Where the application is for the extension of an order, a statement
21 setting forth the results thus far obtained from the interception, or a
22 reasonable explanation of the failure to obtain such results.

23 (2) The judge may require the applicant to furnish additional
24 testimony or documentary evidence in support of the application. Oral
25 testimony shall be under oath or affirmation, and a record of such
26 testimony shall be made by a certified shorthand reporter and reduced to
27 writing.

28 (3) Upon such application the judge may enter an *ex parte* order, as
29 requested or as modified, authorizing the interception of wire, oral or
30 electronic communications within the territorial jurisdiction of such judge,
31 if the judge determines on the basis of the facts submitted by the applicant
32 that:

33 (a) There is probable cause for belief that a person is committing, has
34 committed or is about to commit a particular offense enumerated in
35 subsection (1) of K.S.A. 22-2515, and amendments thereto;

36 (b) there is probable cause for belief that particular communications
37 concerning the offense will be obtained through such interception;

38 (c) normal investigative procedures have been tried and have failed,
39 or reasonably appear to be unlikely to succeed if tried, or to be too
40 dangerous; and

41 (d) except as provided in subsection (10), there is probable cause for
42 belief that the facilities from which, or the place where, the wire, oral or
43 electronic communications are to be intercepted are being used, or are

1 about to be used, in connection with the commission of such offense, or
2 are leased to, listed in the name of or commonly used by such person.

3 (4) Each order authorizing the interception of any wire, oral or
4 electronic communication shall:

5 (a) Specify the identity of the person, if known, whose
6 communications are to be intercepted;

7 (b) specify the nature and location of the communications facilities as
8 to which, or the place where, authority to intercept is granted;

9 (c) specify with particularity a description of the type of
10 communication sought to be intercepted, and a statement of the particular
11 offense to which it relates;

12 (d) specify the identity of each agency authorized to intercept the
13 communications, and of the person authorizing the application;

14 (e) specify the period of time during which such interception is
15 authorized, including a statement as to whether or not the interception
16 shall automatically terminate when the described communication has been
17 first obtained; and

18 (f) upon request of the applicant, direct that a provider of wire
19 *communication*, ~~or~~ electronic communication service, *regardless of the*
20 *location or principal place of business of such provider of electronic*
21 *communication service*, or public utility, landlord, custodian or other
22 person shall furnish the applicant forthwith all information, facilities and
23 technical assistance necessary to accomplish the interception unobtrusively
24 and with a minimum of interference with the services that such service
25 provider, utility, landlord, custodian or person is according the person
26 whose communications are to be intercepted. Any provider of wire or
27 electronic communication service or public utility, landlord, custodian or
28 other person furnishing such facilities or technical assistance shall be
29 compensated therefor by the applicant for reasonable expenses incurred in
30 providing such facilities or technical assistance.

31 (5) No order entered under this section may authorize the interception
32 of any wire, oral or electronic communication for any period longer than is
33 necessary to achieve the objective of the authorization, nor in any event
34 longer than 30 days. Such thirty-day period begins on the earlier of the day
35 on which the investigative or law enforcement officer first begins to
36 conduct an interception under the order or 10 days after the order is
37 entered. Extensions of an order may be granted, but only upon application
38 for an extension made in accordance with subsection (1) of this section
39 and the court making the findings required by subsection (3) of this
40 section. The period of any such extension shall be no longer than the
41 authorizing judge deems necessary to achieve the purposes for which it
42 was granted and in no event for longer than 30 days. Every order and
43 extension thereof shall contain a provision that the authorization to

1 intercept shall be executed as soon as practicable, shall be conducted in
2 such a way as to minimize the interception of communications not
3 otherwise subject to interception under this act, and must terminate upon
4 attainment of the authorized objective, or in any event in 30 days. In the
5 event the intercepted communication is in a code or foreign language, and
6 an expert in that foreign language or code is not reasonably available
7 during the interception period, minimization may be accomplished as soon
8 as practicable after such interception. An interception under this chapter
9 may be conducted in whole or in part by government personnel, or by an
10 individual operating under a contract with the government, acting under
11 the supervision of an investigative or law enforcement officer authorized
12 to conduct the interception.

13 (6) Whenever an order authorizing the interception of wire or oral
14 communications is entered pursuant to this act, the order may require
15 reports to be made to the judge who issued the order showing what
16 progress has been made toward achievement of the authorized objective
17 and the need for continued interception. Such reports shall be made at
18 such intervals as the judge may require.

19 (7) (a) The contents of any wire, oral or electronic communication
20 intercepted by any means authorized by this act shall be recorded, if
21 possible, on tape or wire or other comparable device. The recording of the
22 contents of any wire, oral or electronic communication under this
23 subsection shall be done in a manner which will protect the recording from
24 editing or other alterations. Immediately upon the expiration of the period
25 of the order, or extensions thereof, such recordings shall be made available
26 to the judge issuing such order and sealed under such judge's directions.
27 Custody of the recordings shall be wherever the judge orders, and the
28 recordings shall not be destroyed except upon order of the issuing or
29 denying judge and, in any event, shall be kept for not less than 10 years.
30 Duplicate recordings may be made for use or disclosure pursuant to the
31 provisions of subsections (b) and (c) of K.S.A. 22-2515, and amendments
32 thereto, for investigations. The presence of the seal provided for by this
33 subsection, or a satisfactory explanation for the absence thereof, shall be a
34 prerequisite for the use or disclosure of the contents of any wire, oral or
35 electronic communication or evidence derived therefrom under subsection
36 (d) of K.S.A. 22-2515, and amendments thereto.

37 (b) Applications made and orders granted under this act shall be
38 sealed by the judge. Custody of the applications and orders shall be
39 wherever the judge directs. Such applications and orders shall be
40 disclosed only upon a showing of good cause before a judge of competent
41 jurisdiction and shall not be destroyed except on order of the issuing or
42 denying judge, and in any event shall be kept for not less than 10 years.

43 (c) Any violation of the provisions of paragraph (a) or (b) of this

1 subsection may be punished as contempt of the issuing or denying judge.

2 (d) Within a reasonable time but not later than 90 days after the
3 termination of the period of an order or extensions thereof the issuing or
4 denying judge shall cause to be served on the persons named in the order
5 or the application and, in the interest of justice, such other parties to
6 intercepted communications as the judge may determine, an inventory
7 which shall include notice of:

8 (i) the fact of the entry of the order or the application;

9 (ii) the date of the entry and the period of authorized, approved or
10 disapproved interception, or the denial of the application; and

11 (iii) the fact that during the period wire, oral or electronic
12 communications were or were not intercepted.

13 The judge, upon the filing of a motion in such judge's discretion, may
14 make available to such person or such person's counsel for inspection,
15 such portions of the intercepted communications, applications and orders
16 as the judge determines to be in the interest of justice. On an *ex parte*
17 showing of good cause to a judge of competent jurisdiction the serving of
18 the inventory required by this subsection may be postponed.

19 (8) The contents of any intercepted wire, oral or electronic
20 communication or evidence derived therefrom shall not be received in
21 evidence or otherwise disclosed in any trial, hearing or other proceeding in
22 any federal court or court of this state, unless each party, not less than 10
23 days before the trial, hearing or proceeding, has been furnished with a
24 copy of the court order, and accompanying application, under which the
25 interception was authorized. Such ten-day period may be waived by the
26 judge, if the judge finds that it was not possible to furnish the party with
27 the above information 10 days before the trial, hearing or proceeding, and
28 that the party will not be prejudiced by the delay in receiving such
29 information.

30 (9) (a) Any aggrieved person in any trial, hearing or proceeding in or
31 before any court, department, officer, agency, regulatory body or other
32 authority of the United States, this state, or a political subdivision thereof,
33 may move to suppress the contents of any intercepted wire or oral
34 communication, or evidence derived therefrom, on the grounds that:

35 (i) The communication was unlawfully intercepted;

36 (ii) The order of authorization under which it was intercepted is
37 insufficient on its face; or

38 (iii) The interception was not made in conformity with the order of
39 authorization.

40 Such motion shall be made before the trial, hearing or proceeding,
41 unless there was no opportunity to make such motion or the person was
42 not aware of the grounds of the motion. If the motion is granted, the
43 contents of the intercepted wire or oral communication, or evidence

1 derived therefrom, shall be treated as having been obtained in violation of
2 this act. Upon the filing of such motion by the aggrieved person, the judge
3 in such judge's discretion may make available to the aggrieved person or
4 such person's counsel for inspection such portions of the intercepted
5 communication or evidence derived therefrom as the judge determines to
6 be in the interest of justice.

7 (b) In addition to any other right to appeal, the state shall have the
8 right to appeal:

9 (i) From an order granting a motion to suppress made under
10 paragraph (a) of this subsection. Such appeal shall be taken within 14
11 days after the order of suppression was entered and shall be diligently
12 prosecuted as in the case of other interlocutory appeals or under such rules
13 as the supreme court may adopt;

14 (ii) From an order denying an application for an order authorizing the
15 interception of wire or oral communications, and any such appeal shall be
16 *ex parte* and shall be in camera in preference to all other pending appeals
17 in accordance with rules promulgated by the supreme court.

18 (10) The requirements of subsections (1)(b)(ii) and (3)(d) of this
19 section relating to the specification of the facilities from which, or the
20 place where, the communication is to be intercepted do not apply if:

21 (a) In the case of an application with respect to the interception of an
22 oral communication:

23 (i) The application is by a law enforcement officer and is approved by
24 the attorney general and the county or district attorney where the
25 application is sought;

26 (ii) the application contains a full and complete statement as to why
27 such specification is not practical and identifies the person committing the
28 offense and whose communications are to be intercepted; and

29 (iii) the judge finds that such specification is not practical; and

30 (b) in the case of an application with respect to a wire or electronic
31 communication:

32 (i) the application is by a law enforcement officer and is approved by
33 the attorney general and the county or district attorney where the
34 application is sought;

35 (ii) the application identifies the person believed to be committing the
36 offense and whose communications are to be intercepted and the applicant
37 makes a showing of a purpose, on the part of that person, to thwart
38 interception by changing facilities; and

39 (iii) the judge finds that such purpose has been adequately shown.

40 (11) An interception of a communication under an order with
41 respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of
42 this section do not apply by reason of subsection (10) shall not begin until
43 the facilities from which, or the place where, the communication is to be

1 intercepted is ascertained by the person implementing the interception
 2 order. A provider of wire or electronic communications service that has
 3 received an order as provided for in subsection (10)(b) may move the court
 4 to modify or quash the order on the ground that its assistance with respect
 5 to the interception cannot be performed in a timely or reasonable fashion.
 6 The court, upon notice to the government, shall decide such a motion
 7 expeditiously.

8 ~~(e)~~ (12) The remedies and sanctions described in this chapter with
 9 respect to the interception of electronic communications are the only
 10 judicial remedies and sanctions for nonconstitutional violations of this act
 11 involving such communications.

12 (13) *Nothing in this section shall be construed as requiring a search*
 13 *warrant for cellular location information in an emergency situation*
 14 *pursuant to K.S.A. 22-4615, and amendments thereto.*

15 Sec. 3. Section 184 of chapter 136 of the 2010 Session Laws of
 16 Kansas is hereby amended to read as follows: Sec. 184. (a)
 17 Harassment by telecommunication device is the use of:

18 (1) ~~Telephone communication~~ *A telecommunications device to:*

19 (A) Knowingly make or transmit any comment, request, suggestion
 20 or, proposal, *image or text* which is obscene, lewd, lascivious, ~~filthy~~ or
 21 indecent;

22 ~~(B) make a telephone call, whether or not conversation ensues, or~~
 23 ~~transmit a telefacsimile communication with intent to abuse, threaten or~~
 24 ~~harass any person at the called number;~~

25 (B) *make or transmit a call, whether or not conversation ensues, with*
 26 *intent to abuse, threaten or harass any person at the receiving end;*

27 (C) *make or transmit any comment, request, suggestion, proposal,*
 28 *image or text with intent to abuse, threaten or harass any person at the*
 29 *receiving end;*

30 ~~(C)~~ (D) ~~make or cause the telephone of another ring a~~
 31 ~~telecommunications device to repeatedly ring or activate with intent to~~
 32 ~~harass any person at the called number receiving end;~~

33 ~~(D) make repeated telephone calls, during which conversation ensues,~~
 34 ~~or repeatedly transmit a telefacsimile communication with intent to harass~~
 35 ~~any person at the called number;~~

36 ~~(E)~~ (E) knowingly play any recording on a telephone, except recordings
 37 such as weather information or sports information when the number
 38 thereof is dialed, unless the person or group playing the recording shall be
 39 identified and state that it is a recording; or

40 (F) knowingly permit any ~~telephone or telefacsimile communication~~
 41 ~~machine~~ *telecommunications device* under one's control to be used in
 42 violation of this paragraph.

43 (2) Telefacsimile communication to send or transmit such

1 communication to a court in the state of Kansas for a use other than court
2 business, with no requirement of culpable mental state.

3 (b) Harassment by telecommunication device is a class A nonperson
4 misdemeanor.

5 (c) Every telephone directory published for distribution to members
6 of the general public shall contain a notice setting forth a summary of the
7 provisions of this section. Such notice shall be printed in type which is no
8 smaller than any other type on the same page and shall be preceded by the
9 word "WARNING."

10 (d) As used in this section, ~~"telefacsimile communication" means the~~
11 ~~use of electronic equipment to send or transmit a copy of a document via~~
12 ~~telephone line~~ "telecommunications device" includes telephones, cellular
13 telephones, telefacsimile machines and any other electronic device which
14 makes use of an electronic communication service, as defined in K.S.A.
15 22-2514, and amendments thereto.

16 (e) *An offender who violates the provisions of this section may also be*
17 *prosecuted for, convicted of, and punished for any other offense in sections*
18 *72, 73, 74 or 212 of chapter 136 of the 2010 Session Laws of Kansas.*

19 Sec. 4. K.S.A. 2010 Supp. 22-2502 and 22-2516 and section 184 of
20 chapter 136 of the 2010 Session Laws of Kansas are hereby repealed.

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