

SESSION OF 2011

**SUPPLEMENTAL NOTE ON HOUSE SUBSTITUTE FOR
SENATE BILL NO. 63**

As Recommended by House Committee on
Corrections and Juvenile Justice

Brief*

House Sub. for SB 63 would amend KSA 22-2501, which codifies the exception to the warrant requirement for a search made incident to an arrest by a law enforcement officer. The amended language would allow a law enforcement officer, pursuant to a lawful arrest, to reasonably search the person arrested and the area within such person's immediate presence to the extent such search is allowable under the *United States Constitution* or the *Kansas Constitution*.

The bill also would amend the crime of sexual exploitation of a child. Among other actions, current law prohibits:

- Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age to engage in sexually explicit conduct with the intent to promote any performance; or
- Promoting any performance that includes sexually explicit conduct by a child under 18 years of age, knowing the character and content of the performance.

The bill would amend these provisions to also prohibit such conduct regarding a person the offender *believes* to be under 18 years of age.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

(Note: The bill, as formatted, appears to make additional changes. However, these actually are changes made by the 2010 Legislature. They must be formatted as amendments in this bill because the recodification of the Criminal Code, also authorized by the 2010 Legislature, will not go into effect until July 1, 2011.)

Background

The Kansas County and District Attorneys Association (KCDAA) requested the Senate Judiciary Committee introduce SB 63. As introduced, SB 63 would have amended the crime of sexual exploitation of a child. A similar “belief” provision is contained in the current electronic solicitation law.

In the Senate Judiciary Committee, a representative of the KCDAA appeared in support of SB 63, explaining that this change would allow a suspect to be charged under the statute even when the victim is actually an undercover law enforcement officer. A criminal defense attorney testified in opposition to the bill. The Senate Committee made no changes to the bill and recommended it be passed.

In the House Committee on Corrections and Juvenile Justice, the same conferees testified as before the Senate Committee. The House Committee modified the language of SB 6, regarding search incident to arrest, and placed the modified language into a substitute bill for SB 63. (Background information regarding SB 6 is included below.) The House Committee recommended House Sub. for SB 63 be passed.

The fiscal note on SB 63, as introduced, stated the bill would have no fiscal effect. The Kansas Sentencing Commission indicated the bill would have no impact on prison beds. Some members of the Senate Judiciary Committee stated they believed the bill might have a prison bed impact.

Background of SB 6

The Fourth Amendment of the *United States Constitution* and § 15 of the *Kansas Constitution* prohibit unreasonable searches and seizures. Under United States Supreme Court and Kansas Supreme Court case law, warrantless searches are assumed to be unreasonable unless they fall within a recognized exception to the warrant requirement. One such exception is for a search made incident to an arrest by a law enforcement officer. This exception is recognized by United States Supreme Court case law and is codified in Kansas in KSA 22-2501.

The bill, as introduced at the request of Senator David Haley, would have changed the word “a” to “the” in the subsection of KSA 22-2501 providing that a law enforcement officer may reasonably search a person incident to arrest for the purposes of discovering the fruits, instrumentalities, or evidence of “a” crime. The change would have reversed the action of the 2006 Legislature in SB 431 when it replaced the word “the” with “a” in the same subsection. In 2009, the Kansas Supreme Court, applying a recent United States Supreme Court decision more narrowly construing the search incident to arrest exception, held that the statutory language allowing a search for the fruits, instrumentalities, or evidence of “a” (rather than “the”) crime was unconstitutional.

A substantially similar bill, SB 435, was introduced in the 2010 Legislature. After significant amendments were made to 2010 SB 435 in the Senate Committee and House Committee on Corrections and Juvenile Justice, the bill, although passed in different form by both houses, was ultimately ruled materially changed and referred to the Senate Committee on Federal and State Affairs. No further action was taken on SB 435 in the 2010 Legislature.

In the Senate Committee hearing, Senator David Haley testified in favor of the bill, as introduced. The Kansas Association of Criminal Defense Lawyers submitted written testimony supporting the bill, as introduced. Representatives of the Kansas Peace Officers Association, the Kansas Association of Chiefs of Police, and the Kansas Sheriffs

Association testified in opposition to the bill, as introduced. These opponents requested the Legislature repeal, rather than amend, KSA 22-2501. The Kansas County and District Attorney Association submitted written testimony asking the Legislature to repeal KSA 22-2501, but to pass the bill, as introduced, if the Legislature decided not to repeal the statute.

The Senate Committee amended the bill by striking all language except the provision repealing KSA 22-2501. The Committee recommended the bill be passed as amended.

In the House Committee on Corrections and Juvenile Justice, a representative of the Kansas Association of Criminal Defense Lawyers and the Kansas Attorney General testified in support of SB 6. Senator David Haley provided neutral testimony. A representative of the Kansas Association of Defense Lawyers testified in opposition to the amended bill, stating they supported the bill as introduced. Before incorporating the language of SB 6 into House Sub. for SB 63, the House Committee modified the language regarding search incident to arrest to permit such a search to the extent allowed by the *United States Constitution* and *Kansas Constitution*.

The fiscal note on SB 6, as introduced, stated the League of Kansas Municipalities indicated the bill would have no effect on cities. There would be no fiscal effect to the state budget. There is no fiscal note for the bill as amended.