

House Committee on Corrections and Juvenile Justice
February 14, 2022
SB 366

Written Testimony of the
Kansas Association of Criminal Defense Lawyers
Opponent

Dear Chairman Owens and Members of the Committee:

We oppose this bill because (1) the unit of prosecution is not defined creating ambiguity, (2) the severity of the newly specified criminal act is potentially disproportionate, and (3) the gap created by *Glover* is already covered by other crimes.

A unit of prosecution defines what conduct constitutes the same or different charges. Under the current law, entering into a building is one unit of burglary. It is not a new and separate charge to enter into each room within a house.

This amendment creates a new definition of burglary which makes it illegal to “enter into or remaining within any locked or secured portion of any [dwelling/non-dwelling], with intent to commit a felony, theft or sexually motivated crime therein.” This creates a potentially infinitely recursive string of separate and ill-defined burglaries.

Take the following examples:

- A person breaks into a detached garage and takes tools out of a locked toolbox.
 - Is this one count of burglary or two?

- A person breaks into a home and within that home enters into a locked bedroom. Inside that locked bedroom is a locked safe from which they take property.
 - Entering into the home is burglary to a dwelling. Is entering into the bedroom an additional count of burglary?
 - Is breaking into the safe an additional burglary?

- A person breaks into a school, takes the master key out of the principal’s office and breaks into all 600 lockers.
 - Is this 601 counts of burglary to a non-dwelling?

- A person is allowed to spend the night at a friend’s house. During the night while the friend is asleep, they go into the bathroom and pick the lock on the locked medicine cabinet to steal prescription medication.
 - Is this an aggravated burglary to a dwelling because the friend is home asleep? It is a “locked ...portion of a dwelling” and there is a human being within the dwelling.

These scenarios outline the ambiguities created by this modification to the existing statute as well as the potentially disproportionate charges that could result. In the above sleepover scenario, that action is absolutely a theft. Depending on the damage to the locked medicine

cabinet, it could be a criminal damage to property as well. It does not need to be a level 4 person felony simply because someone was sleeping in another room.

Proponents of this bill say that the amendment is necessary to cover a gap in *State v. Glover*, 56 Kan. App. 2d 1234 (2019). In *Glover*, a man lawfully entered a church and then exceeded the scope of the lawful entry by unlawfully going into a locked portion of the church to commit a theft. While this may not be a burglary, it is still a theft, a trespass, and potentially a criminal damage to property. Not every crime which occurs within a building also needs to be charged as a burglary – some are simply trespass, some are just theft.

If the legislature desires to criminalize this behavior please consider the following potential modifications.

- If you would like to criminalize breaking into a locked room or container, consider creating a Class A Misdemeanor Burglary. This could be effectuated by creating a new subsection. Our stance is that there should not need to be an aggravated form of this burglary.
- If you would like to criminalize exceeding the scope of an otherwise lawful entrance into a building or unlawfully entering into a dwelling, there could be an aggravated trespass created at either a Class A misdemeanor level or level 10 nonperson felony level. Current case law has determined that trespass is not a lesser included charge of burglary due to the required “notice” element. A sign saying “no trespassing” or “employees only” could satisfy notice.
- In either case you should clarify how this amendment or other changes effects Special Sentencing Rule 27 and 29¹.

KACDL opposes SB 366 in its current iteration. It would create confusion and excessive litigation over what was a straightforward charge. The language is ambiguous at best and potentially violates the 5th Amendment’s Double Jeopardy Clause. The ambiguity in the undefined unit of prosecution creates the potential for disproportionate charges and sentences for comparatively benign conduct. Lastly, the conduct which this bill seeks to cover is already illegal under other charges.

Respectfully submitted,
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¹ K.S.A. 21-6804(p)