Approved: 9/5
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter Jr. at

10:05 a.m. on March 2, 1992 in room 514-S of the Capitol.

All members were present except:
Senators Gaines and Feleciano

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:
William F. Hirschman, Kansas Professional Chapter of the Society of Professional Journalists
James Clark, Kansas County and District Attorneys Association
Sally Finney, Kansas Department of Health and Environment
Senator Don Sallee
Robert Pirtle, Special Counsel to the Prairie Band of Pottawatomie Indians

Chairman Winter brought the meeting to order by opening the hearing for SB 743.
SB 743 - affidavits supporting arrest warrants open for public inspection.

William F. Hirschman, Kansas Professional Chapter of the Society of Professional Journalists President, testified in support of SB 743. (ATTACHMENT 1) He stated that a large number of law enforcement officers also support the bill.

Written communications in support of SB 743 were received from:
Davis Merritt, Jr., The Wichita Eagle (ATTACHMENT 2) and
Dan Dillon, President of the Association of News Broadcasters of Kansas and for KFDI News Department. (ATTACHMENT 3)

James Clark, Kansas County and District Attorneys Association, spoke to SB 743 by stating those members of his association in western Kansas do not support the measure but the others do not object to the bill.

This concluded the hearing for SB 743. The hearing was opened for SB 287.
SB 287 - unlawful acts of individuals infected with human immunodeficiency virus.

The Chairman reviewed the 1991 actions on SB 287 and presented the Attorney General's opinion on the subject. (ATTACHMENT 4)

Sally Finney, Kansas Department of Health and Environment, testified in support of SB 287 as necessary for Kansas to continue to receive federal funds under the Comprehensive AIDS Resources Emergency Act of 1990. She offered suggested amendments to the measure. (ATTACHMENT 5)

Copies of a letter received by Chairman Winter from Governor Joan Finney in support of SB 287 was distributed. (ATTACHMENT 6)

This concluded the hearing for SB 287.

Senator Morris moved to adopt the amendment to SB 287 as suggested by the Department of Health and Environment. Senator Oleen seconded the motion. The motion to amend carried.

Senator Morris moved to recommend SB 287 favorable for passage as amended. Senator Oleen seconded the motion. The motion carried.

Committee discussion turned to SB 743. The question was raised that the affidavits in question are basically allegations, not subject to cross-examination. Mr. Hirschman responded by stating that in theory there is a check and balance built into the process. The probable cause is drawn up by the law enforcement entity and reviewed by the prosecutor who must agree to file charges on the basis of the affidavit. The affidavit is reviewed by the prosecutor and then reviewed again by the judge. Mr. Hirschman expressed the journalistic concerns with whether the check and balance really works. No action was taken on the bill at this time.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:05 a.m. on March 2, 1992.

The Chairman opened the hearing for SB 739.
SB 739 - legislative commission on State-Indian affairs.

Senator Don Sallee testified in support of SB 739. (ATTACHMENT 7) Senator Sallee stated that under the sovereign rights of the American Indians, there is a need to go to the negotiations process as soon as possible. He concluded that it is important to have the ability to begin the process in good faith at the earliest opportunity.

Responding to questions from the Committee, Senator Sallee stated there are times outside of the 90-day legislative session when decisions must be made due to the differences in federal time limits. He also expressed his intention that SB 739 not be considered a validation of any previous contract negotiations entered into by Governor Finney without legislative involvement.

Robert Pirtle, Special Counsel to the Prairie Band of Pottawatomie Indians, testified in support of SB 739 now before the Committee, and HB 2928 that remains in the House at this time. He expressed no preference of either bill, but supported passage of one of the measures. (ATTACHMENT 8)

Chairman Winter reiterated that the vast majority of Kansans, both in the legislature and the general public, had no idea that the 1987 passage of the lottery and pari-mutual amendments also would include casino-type gambling. He stated the intention of the 1992 Legislature is to firmly establish Kansas public policy. The questions that have arisen since the beginning of casino negotiations should be formally addressed before any agreements are entered into, even if the Supreme Court should rule differently at another time.

Mr. Pirtle was asked if he believed his clients would be willing to negotiate with the legislative body on the condition casinos would be allowed, and whether they would waive their right to continue to negotiate now and allow the legislative process to go forward. Chairman Winter suggested that the Legislature, in good faith, continue addressing the policy questions, allow the courts to ultimately answer the questions, and face the responsibility of establishing and clarifying policy. Meanwhile, the Legislature could come to the negotiation table with the tribes and make the best deal for all concerned but allow the federal court process to continue. That way the processes could proceed while at the same time preparations would be completed for a process ready to be implemented at the earliest opportunity. Mr. Pirtle responded that the offer would be an improvement over the current conflict situation.

Chairman Winter noted the lack of communications and knowledge about American Indian Affairs. He offered a suggestion for consideration of a permanent Commission of Native American Affairs, similar to the Advisory Committee on Hispanic Affairs in K.S.A. 74-6501. No action was taken on this date on the Chairman's suggestion.

The hearing was concluded.

Communications from C. Fred Lorentz, President of the Kansas District Judges' Association, regarding SB 479 were distributed to the Committee. (ATTACHMENTs 9 and 10)
SB 479 - enacting the Kansas sentencing guidelines act.

The meeting adjourned at 11:23 a.m.

Date March 2, 1772

VISITOR SHEET
Senate Judiciary Committee

(Please sign)

Name/Company	Name/Company
D Smith	M.I. American Gaming Industries Corp.
William Yoder	Intern - D. Kerr
George Wright	Gov.
Nick Roach	IGT
KEITH R HANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Paul Shelby	OJA
Carol McDowell	Kansas City
Esther Wahwassuck	Potawatomie Tribe - Mayetta
Alberta Wamego	Potawatomi Tribe - Mayetta, Kansas
Grace Wahwassuck	Prairie Band Potawatomi Tribe - Mayetta, Kansas
Jim Clark	KCPAA
Ralph Lecompte	Pottawatomie Tribal Council Wayside KS
Joseph W. Hale Jr.	PBP tribal Council, Mayetta KS.
Chris Steinegger	KC. KS.

SOCIETY OF
PROFESSIONAL
JOURNALISTS

KANSAS PROFESSIONAL CHAPTER
Box 2853 • Wichita, KS 67201

POSITION PAPER ON PROBABLE CAUSE AFFIDAVITS S.B. 743

To restore access to probable cause affidavits after a warrant is executed, we seek the repeal of KSA 22-2302 Sec. 2 as revised in 1979.

Probable cause affidavits are sworn statements, usually made by the chief investigator in a criminal case. The document relates the minimum facts necessary to prove to a judge that legitimate and sufficient grounds exist for filing a criminal charge against a suspect.

WHY SHOULD THE AFFIDAVITS BE OPEN?

* Kansans -- the very people named as the plaintiff in a criminal case -- have equal standing with defendants and alleged victims when interests are being balanced by their criminal justice system. Closure of the affidavits robbed the public of an essential check and balance over its judicial system. The ability to review that document dissuades the filing of frivolous, slipshod or malicious cases.

This is not a theoretical problem. For instance, one judge told me of law enforcement officers who are less than careful about the accuracy of allegations they have sworn to in affidavits. They have tried, and occasionally succeeded, in having people arrested based on sloppy and even erroneous facts cited in an affidavit. Similarly, I have watched judges barely skim affidavits before authorizing the arrest of someone, rather than ensuring that the document states sufficient grounds to deprive someone of their liberty and threaten their reputation. And even fewer go to trial. Even long after a case is tried, those records remain sealed.

* Affidavits based on police reports provide the public and their proxy, the news media, with the best and most accurate information about a charge. Without a reliable source, reporters often quiz investigators in the field or prosecutors at home where they speak off the top of their heads.

* Every charge encompasses a broad spectrum of situations, some of little interest to the public. The skimpy generalizations contained on the complaint/information sheet are often

Senate Judiciary Committee
March 2, 1992
Attachment 1

misleading. For example, possession of marijuana could refer to a single cigarette or 20 bales. Every day, reporters track down investigators and prosecutors about charges that sound of interest to the public, only to find that the case is relatively insignificant. In such cases, we waste not only our time, but that of public servants. Open affidavits not only prevent such problems, but often contain enough information to eliminate the need to bother officers of the court. For this reason, among others, this effort is supported by some law enforcement officers and prosecutors.

* Some law enforcement officers and prosecutors feel restrained by this law or by the canons from discussing information in the public interest, regardless of how insignificant it might be. Opening affidavits would allow them the freedom to discuss basic information that ought to be available to the public by most interpretations, including those of the Kansas Supreme Court.

* Furthermore, the Montana Supreme Court ruled on Oct. 29 that a 1991 law nearly identical to ours was unconstitutional. Their chief justice wrote,''The perception of fairness in our judicial system, the ability of the criminally accused to defend themselves, and the public's knowledge about criminal proceedings all benefit from allowing public access to affidavits filed in support of a motion for leave to file a charge or warrant.''

* No reason for closing the affidavits is stated in the law, nor in any legislative records that we reviewed. The bill's authors told us years ago that they do not recall what prompted the legislation.

* Opening affidavits would simplify complicated and expensive records-keeping systems. Presently, court clerks must maintain a second set of records under lock and key rather than just file the paperwork in one folder.

WHAT DANGERS MIGHT EXIST?

*** PRE-TRIAL PUBLICITY** -- Affidavits contain only enough information to obtain the charge. Affidavits do not lay out an entire case. In practice, they rarely include even a quarter of the facts that will be disclosed 10 days later at preliminary hearing. It would be a weak case -- a questionable case, indeed -- if the bulk of the evidence could be unveiled in those few paragraphs.

It can be proven that the meager information in the affidavit is not sufficient to prejudice a case. Neither we, nor anyone we have interviewed, nor Ron Keefover of the Kansas Supreme Court, is aware of any Kansas case thrown out or moved to another jurisdiction specifically because of pre-trial publicity, regardless of the status of the affidavit. Judges have believed that a local jury could be selected in cases with unprecedented

news coverage, such as the Richard Grissom and Bill Butterworth trials.

Most judges do not disqualify jurors simply because they have heard about the case in the media. They evaluate whether the juror can base a decision only on the evidence presented in court.

When affidavits were open before 1979, no law enforcement officer or prosecutor complained that releasing this information would jeopardize prosecution or even a continuing investigation.

Similarly, federal courts and neighboring states whose affidavits have remained open have reported no problems. We can submit scores of federal affidavits for Kansas cases ranging from simple bank robberies to complex conspiracies; not one has been compromised by the affidavits being made public.

Most importantly, disclosure has not posed a problem for the counties where judges have gone out of their way to reopen the affidavits with a standing court order -- indicating an uncommon commitment to public access. Judges and county attorneys in those counties said they have not experienced any problems because the affidavits were opened. Among these counties are Johnson, Lyon, Sumner, Crawford, Allen, Gove, Wilson and Franklin.

Affidavits were open from 1985 to 1990 in Shawnee County. The affidavits were closed while the Kansas Supreme Court considered an appeal of the Tyrone Baker case in which the affidavit's release was cited by the defense as prejudicial pre-trial publicity. On Oct. 25, 1991, the Supreme Court held that the release of the affidavit did not constitute prejudicial pre-trial publicity and did not prevent the defendant from receiving a fair trial.

* **CONFIDENTIAL INFORMANTS** -- No prosecutor, law enforcement official or journalist whom we have contacted has ever seen an informant named in an affidavit. The law does not require an informant to be identified in the affidavit to obtain a charge. The investigator need only cite the existence of an unnamed informant. In the highly unlikely event that an informant might be clearly identified simply by the fact of his existence, the prosecutor can always petition the court to seal the affidavit.

* **DISCLOSURE OF WITNESSES** -- The law's original proponent, then-prosecutor Paul Clark of Sedgwick County, was concerned at the time that the affidavit names witnesses. This intimidates a few witnesses who hope to anonymously accuse a suspect or to keep their name from being released to the media.

But this legislation did nothing to address that concern. The existing legislation allows the defendant to obtain a copy of the affidavit containing the names of witnesses. This is only proper under the commonly-accepted right of the accused to face his accuser.

Witnesses referred to in the affidavit are listed in the complaint/information or charge -- which is and should be open.

We do sympathize with the rare skittish witness. But a

witness whose courage cannot survive such a minor test will likely not have the courage to testify in court. We believe that the public's right to oversee what its judicial system is doing certainly has equal legal standing with a witness' transitory embarrassment.

Since the repeal would simplify the current system, rather than impose a further burden, we respectfully ask that the change become effective immediately upon its adoption.

If you have any questions, please call SPJ President Wm. F. Hirschman at 316-268-6228 or 265-6373.

The Wichita Eagle

DAVIS MERRITT, JR., Editor and Senior Vice President

February 27, 1992

Judiciary Committee
Kansas Senate
State Capitol
Topeka, KS 66612

Dear Mr. Chairman:

This is in support of SB743, which would restore public access to affidavits after a warrant is issued. I request its inclusion in the record of these hearings.

Access to affidavits is an important check-and-balance mechanism on the justice system and enhances the perception of fairness within that system. It also provides a factual, documented basis for public information about cases, as opposed to casual, sometimes erroneous, misleading and potentially damaging statements by investigators and others.

The public's need to know about crimes and its ability to evaluate how well or how poorly its investigators are functioning is also at stake. Public prosecutors are elected officials. Few documents speak more clearly to their level of performance that the reports of investigations carried out by them and their staffs.

For those reasons and many others detailed elsewhere, I urge passage of this bill so that public access can be once again possible.

Respectfully,

Davis Merritt, Jr.
Editor

825 E. Douglas
P.O. Box 820
Wichita, Kansas
67201-0820
(316) 268-6555

Senate Judiciary Committee
March 2, 1992
Attachment 2

Dan Dillon
President, Assoc. of News
Broadcasters of Kansas
KFDI News Department
Box 1402
Wichita, KS 67201

Kansas Senate
State Capitol
Topeka, KS

Dear Senators:

The Association of News Broadcasters of Kansas is made up of 80 radio and television journalists in Kansas. The organization fully supports the position paper on probable cause affidavits written by the President of the Kansas Chapter of the Society of Professional Journalists.

William Hirschman's three page paper adequately covers the ANBK's concerns on closed criminal affidavits.

In the late 70's some state law enforcement officers were apparently worried confidential informants' names would be printed in probable cause affidavits. It's my belief a journalist who does enough legwork to look into a probable cause affidavit is also knowledgeable enough to know "you don't release the names of confidential informants." I agree with the third page of the position paper. It's highly unlikely an informant would be clearly identified.

The Association of News Broadcasters of Kansas strongly recommends the repeal of KSA 22-202 Sec. 2.

Sincerely,

Dan Dillon
ANBK President &
KFDI News Director

Senate Judiciary Committee
March 2, 1992
Attachment 3

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

February 24, 1992

ATTORNEY GENERAL OPINION NO. 92- 29

The Honorable Wint Winter, Jr.
State Senator, 2nd District
State Capitol, Room 120-S
Topeka, Kansas 66612

Re: Crimes and Punishments -- Crimes Against Persons -- Assault; Battery; Prosecution for Intentional Exposure to Human Immunodeficiency Virus (HIV)

Synopsis: The present assault and battery statutes are not adequate to prosecute an HIV infected individual who engages in conduct defined in 42 U.S.C.S. § 300ff-47. Senate Bill No. 287 with its proposed amendments would allow such a prosecution. Senate Bill No. 358 which redefines the crime of battery, combined with the criminal attempt statute when appropriate, may permit such a prosecution. Cited herein: K.S.A. 21-3301; 21-3408; 21-3412; 21-3414; 42 U.S.C.S. § 300ff-41; 42 U.S.C.S. § 300ff-47.

* * *

Dear Senator Winter:

As state senator for the second district you ask our opinion regarding whether existing criminal statutes satisfy the requirements of 42 U.S.C.S. § 300ff-47. That section of what is commonly known as the Ryan White law requires states to make intentional exposure to another of the human immunodeficiency virus (HIV) virus a crime as a condition of receiving certain federal grants. If existing statutes are not satisfactory, you ask whether Senate Bill No. 358 or

Senate Judiciary Committee
March 2, 1992
Attachment 4

Senate Bill No. 287, with proposed amendments, would meet the federal requirement.

42 U.S.C.S. § 300ff-47 provides:

> "(a) In general. The Secretary may not make a grant under section 2641 [42 USCS § 300ff-41] to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual, subject to the condition described in subsection (b), who -
>
> "(1) makes a donation of blood, semen, or breast milk, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another [to] HIV in the event that the donation is utilized;
>
> "(2) engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV; and
>
> "(3) injects himself or herself with a hypodermic needle and subsequently provides the needle to another person for purposes of hypodermic injection, if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to such etiologic agent in the event that the needle is utilized."

Since the crimes of battery, K.S.A. 21-3412, and aggravated battery, K.S.A. 21-3414, are both defined in terms of a "touching or application of force," in our opinion neither statute would allow a prosecution for the conduct defined in 42 U.S.C.S. § 300ff-47(a)(1) or (3). Those sections mandate that states proscribe conduct which does not require any touching or application of force.

Because a prosecution for assault under K.S.A. 21-3408 requires an "immediate apprehension of bodily harm," in our opinion that statute would not permit a prosecution for

conduct required to be proscribed under 42 U.S.C.S. § 300ff-47.

We now turn to an evaluation of Senate Bill No. 287 with its proposed amendments:

> "Section 1. (a) it is unlawful for an individual who knows one self to be infected with ~~human immunodeficiency virus (HIV)~~ a life threatening communicable disease knowingly:
>
> "(1) To engage in sexual intercourse or sodomy with another individual with intent to infect ~~without first informing~~ that individual ~~of~~ with ~~the human immunodeficiency virus (HIV)~~ that life threatening communicable disease;
>
> "(2) to sell or donate one's own blood, blood products, semen, tissue, organs or other body fluids with the intent to infect the recipient with a life threatening communicable disease;
>
> "(3) to share with another individual a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from, the other individual's body with the intent to infect another person with a life threatening communicable disease ~~without first informing that individual that the needle or syringe, or both have been used by someone infected with human immunodeficiency virus (HIV)~~.
>
> "(b) As used in this section, the term 'sexual intercourse' shall not include penetration by any object other than the male sex organ; the term 'sodomy' shall not include the penetration of the anal opening by any object other then the male sex organ.

4-3/5

> "(c) Violation of this section is a class A misdemeanor. Sec. 2. This act shall take effect and be in force from and after its publication in the statute book."

This bill virtually mirrors the federal requirements as set forth in 42 U.S.C.S. § 300ff-47 with the exception that the more generic term of "a life threatening communicable disease" is substituted for an "HIV infected individual." In our opinion this bill with its proposed amendments would be adequate to enable a prosecution of any HIV infected individual who engaged in any of the conduct required to be proscribed by 42 U.S.C.S. § 300ff-47.

Senate Bill No. 358 would amend K.S.A. 21-3412, battery, to include in its prohibition "intentionally or recklessly causing bodily harm to another person." Such an amendment may provide a Kansas statute adequate to prosecute any HIV infected individual who engaged in the conduct defined by 42 U.S.C.S. § 300ff-47 if the recipient of donated blood, semen, breast milk, sexual activity, or a hypodermic needle actually became infected with HIV. In the absence of actual infection, such an HIV infected individual arguably could be prosecuted for attempted battery pursuant to K.S.A. 21-3301 which defines attempt as:

> "An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime."

However, in the absence of any identifiable victim, there is some question of whether the element of "harm to another person" would be established in a prosecution for attempted battery. We note this more as a potential question which could be raised in such a prosecution than as a definitive statement of an absolute defense to such a change.

In conclusion, the present assault and battery statutes are not adequate to prosecute an HIV infected individual who engages in conduct defined in 42 U.S.C.S. § 300ff-47. Senate Bill No. 287 with its proposed amendments would allow such a prosecution. Senate Bill No. 358 which redefines the

crime of battery, combined with the criminal attempt statute when appropriate, may permit such a prosecution.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Camille Nohe

Camille Nohe
Assistant Attorney General

RTS:JLM:CN:bas

4-5/5

State of Kansas
Joan Finney, *Governor*

Department of Health and Environment
Azzie Young, Ph.D., *Secretary*

Reply to:

Testimony Presented to

Senate Judiciary Committee

by

KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

Senate Bill 287

Senate Bill 287 as amended makes it unlawful for individuals who know they are infected with a life threatening communicable disease to engage in behaviors that could transmit that disease to others with the intent of infecting another person.

Approval of SB 287 as amended is necessary in order for Kansas to continue to receive federal funds under the Comprehensive AIDS Resources Emergency (CARE) Act of 1990 (also known as the "Ryan White" Act). CARE requires that any state receiving funding under the Act must have statutes in place by October of 1992 that make it illegal for any person infected with the HI virus and who knows of their infection to engage in behaviors that transmit HIV with the intent of infecting another individual.

The amended version of SB 287 was drafted and agreed to by representatives of eleven state organizations. All of these organizations provide HIV/AIDS-related services to Kansans.

The primary purpose of the suggested amendments is to replace references specific to AIDS and HIV with the phrase "life threatening communicable disease." This accomplishes two purposes: first, it removes the stigma of focusing a criminal law on persons with HIV infection and AIDS; and it strengthens the law by allowing prosecution of a person who attempts to harm another by intentionally infecting him or her with other potentially lethal bloodborne pathogens, such as hepatitis B virus. The words "life threatening communicable disease" were chosen after consultation with the acting state epidemiologist, who believes that the term would cover both HIV disease and hepatitis B.

Senate Judiciary Committee
March 2, 1992
Attachment 5

Landon State Office Building • 900 SW Jackson • Topeka, Kansas 66612-1290 • (913) 296-1500

By complying with this provision of the CARE Act, Kansas will continue to receive federal funding to provide HIV counseling and testing, diagnostic testing, home health care, AZT and drug reimbursement, and insurance premium reimbursement programs. Ryan White Federal funds will provide 50% or more of the funding for AIDS/HIV programs in Kansas for the next several years, and it replaces existing AIDS cooperative agreements Kansas has previously received from the Centers for Disease Control. Hundreds of HIV infected persons will depend upon Ryan White funded programs and services in Kansas.

The bill as amended meets the minimum requirements of the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 using the guidelines that were recommended by the grant management organization, which is the Health Resources and Services Administration.

Testimony presented by: Sally Finney, M.Ed.
Director, AIDS Section
March 2, 1992

PROPOSED AMENDMENT TO SENATE BILL NO. 287

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

Section 1. (a) it is unlawful for an individual who knows one self to be infected with ~~human immunodeficiency virus (HIV)~~ a life threatening communicable disease knowingly:

(1) To engage in sexual intercourse or sodomy with another individual with the intent to expose ~~without first informing~~ that individual ~~of~~ to ~~the human immunodeficiency virus (HIV)~~ that life threatening communicable disease;

(2) to sell or donate one's own blood, blood products, semen, tissue, organs or other body fluids with the intent to expose the recipient to a life threatening communicable disease;

(3) to share with another individual a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from, the other individuals's body with the intent to expose another person to a life threatening communicable disease ~~without first informing that individual that the needle or syringe, or both have been used by someone infected with human immunodeficiency virus (HIV)~~.

(b) As used in this section, the term "sexual intercourse" shall not include penetration by any object other than the male sex organ; the term "sodomy" shall not include the penetration of the anal opening by any object other then the Male sex organ.

(c) Violation of this section is a class A misdemeanor.

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

5-3/3

STATE OF KANSAS

OFFICE OF THE GOVERNOR

JOAN FINNEY, *Governor*
State Capitol, 2nd Floor
Topeka, KS 66612-1590

913-296-3232
1-800-432-2487
TDD# 1-800-992-0152
FAX# (913) 296-7973

February 18, 1992

Senator Wint Winter, Jr.
Statehouse, Room 120-S
Topeka, Kansas 66612

Re: P.L. 101-381; Federal Aids Funding Requirement

Dear Senator Winter:

In response to your February 10, 1992, letter to me and the questions posed by you, it is my opinion that current Kansas law will not satisfy the federal law requirement that our criminal statutes allow in all cases the prosecution of persons who intentionally expose others to the HIV virus.

My suggestion for a change of current Kansas law is that put forward by Marvin Stottlemire, an attorney with the Department of Health and Environment. I have attached a copy of the proposed amendment to SB 287 prepared by Mr. Stottlemire (please note the changes in subsections (a)(1), (2) and (3) from "intent to infect" to "intent to expose").

It is my understanding that Mr. Stottlemire has contacted and met with various interest groups and anticipates support from those groups for the proposed amendment that he has prepared.

I trust this letter answers your questions adequately. If this is not the case please feel free to give me a call.

Sincerely,

Joan Finney

Joan Finney

JF:db
4667L

Attachment

Senate Judiciary Committee
March 2, 1992
Attachment 6 1/2

PROPOSED AMENDMENT TO SENATE BILL NO. 287

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

Section 1. (a) it is unlawful for an individual who knows one self to be infected with ~~human immunodeficiency virus (HIV)~~ a life threatening communicable disease knowingly:

(1) To engage in sexual intercourse or sodomy with another individual with the intent to expose ~~without first informing~~ that individual ~~of~~ to ~~the human immunodeficiency virus (HIV)~~ that life threatening communicable disease;

(2) to sell or donate one's own blood, blood products, semen, tissue, organs or other body fluids with the intent to expose the recipient to a life threatening communicable disease;

(3) to share with another individual a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from, the other individuals's body with the intent to expose another person to a life threatening communicable disease ~~without first informing that individual that the needle or syringe, or both have been used by someone infected with human immunodeficiency virus (HIV)~~.

(b) As used in this section, the term "sexual intercourse" shall not include penetration by any object other than the male sex organ; the term "sodomy" shall not include the penetration of the anal opening by any object other then the Male sex organ.

(c) Violation of this section is a class A misdemeanor.

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

6-2/2

STATE OF KANSAS

DON SALLEE
SENATOR, FIRST DISTRICT
ATCHISON, BROWN, DONIPHAN, JACKSON
AND JEFFERSON COUNTIES
R.R. 2
TROY, KANSAS 66087

TOPEKA

COMMITTEE ASSIGNMENTS
CHAIRMAN: ELECTIONS
VICE-CHAIRMAN: ENERGY AND NATURAL RESOURCES
MEMBERS: AGRICULTURE
LABOR, INDUSTRY AND SMALL BUSINESS
TRANSPORTATION AND UTILITIES
JOINT SPECIAL CLAIMS AGAINST
THE STATE

SENATE CHAMBER
MARCH 2, 1992

MR. CHAIRMAN AND COMMITTEE MEMBERS:

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOUR COMMITTEE ON SB-739.

SENATE BILL 739 WOULD CREATE THE KANSAS LEGISLATIVE COMMISSION ON STATE INDIAN AFFAIRS. IT WOULD CONSIST OF 6 MEMBERS THE PRESIDENT, THE MAJORITY LEADER, AND THE MINORITY LEADER OF THE SENATE AND THEIR COUNTERPARTS IN THE HOUSE.

THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE WOULD ALTERNATE AS CHAIRMAN OF THE COMMITTEE BY EVEN AND ODD YEARS. THE PURPOSE OF THIS COMMISSION IS TO HAVE THE LEGISLATURE INVOLVED IN NEGOTIATIONS FOR COMPACTS WITH THE INDIAN TRIBES OF KANSAS AT THE TIME THAT THE FULL LEGISLATURE IS NOT IN TOPEKA. THEY WOULD HANDLE THE NEGOTIATION OF COMPACTS AND SUBMIT THEM TO THE GOVERNOR FOR APPROVAL OR REJECTION. THE GOVERNOR WOULD THEN HAVE TEN DAYS TO ACCEPT OR REJECT THE COMMITTEE'S DECISION. IN THE EVENT OF REJECTION, THE GOVERNOR WOULD RETURN THE COMPACT TO THE COMMISSION WITH A WRITTEN STATEMENT OF THE OBJECTIONS. THE COMMISSION WOULD MODIFY THE DRAFT AND RESUBMIT IT.

IF THERE IS AN IMPASS BETWEEN THE GOVERNOR AND THE COMMISSION, THE COMMISSION WOULD REQUEST THAT THE GOVERNOR CALL A SPECIAL SESSION OF THE LEGISLATURE TO RESOLVE THE PROBLEM.

Senate Judiciary Committee
March 2, 1992
Attachment 7

IT WOULD REQUIRE A CONCENSUS OF AT LEAST 4 MEMBERS TO PASS ANY COMPACTS.

THE REASON I FEEL THIS COMMISSION MUST BE ESTABLISHED IS BECAUSE OF THE ACTIVITY THAT IT APPEARS WILL BE TAKING PLACE AMONG THE TRIBES. THE ACTIVITY IS NOT RESTRICTED JUST TO GAMING OPERATIONS. IT INVOLVES COORDINATION WITH LAW ENFORCEMENT, WILD LIFE AND PARKS AND MANY OTHER THINGS THAT WE DO NOT YET SEE.

AGAIN, I THANK YOU FOR THE OPPORTUNITY TO APPEAR HERE TODAY AND I STAND FOR QUESTIONS.

TESTIMONY OF ROBERT L. PIRTLE
REGARDING SENATE BILL 739
AND
TRIBAL-STATE GAMING COMPACT LEGISLATION

March 2, 1992

My name is Robert L. Pirtle. I am the senior partner in the law firm of Pirtle, Morisset, Schlosser & Ayer with offices in Seattle and Washington, D.C. Our firm practices exclusively in the field of Indian law, representing, at any given time, between 20 and 30 Indian tribes and tribal organizations scattered in States throughout the nation including Hawaii and Alaska. We are special counsel to the Prairie Band of Potowatomi Indians. On November 24, 1991, Chairman Wahquahboshkuk requested the State to enter negotiations for a Tribal-State Gaming Compact pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(7)(B)(i), thus triggering the 180-day period for completion of the compact. Accordingly, Kansas is required by IGRA to complete the Tribal-State Compact with the Potowatomi Tribe prior to May 25, 1992. On February 5, 1992, we delivered the proposed Gaming Compact Between the Prairie Band of Potowatomi Indians and the State both to Governor Joan Finney and to the Kansas Legislature.

In its Report to the Kansas Legislature on Proposed Gaming Compact Between the Prairie Band of Potowatomi Indians and the State of Kansas, dated February 17, 1992, the Potowatomi Tribe asked the Legislature for immediate negotiations upon its proposed gaming compact and requested that the Legislature establish, by legislation, a mechanism suitable to the Legislature for conducting the requested negotiations. I have

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reviewed Senate Bill 739 and House Bill No. 2928 and conclude that, consistent with IGRA, either would establish such a mechanism. It is not the place of the Potowatomi Tribe to recommend to Kansas which mechanism it chooses; however, the Tribe does recommend that one of the two measures be enacted into law at the earliest possible opportunity and because the entire matter of proposed gaming compacts between Kansas tribes and the State of Kansas has occurred within the last six months, it behooves me to advise this Committee of the urgency involved. The nature of the urgency is two-fold: it is both legal and practical. I will first address the legal aspects.

Under the American federal constitutional framework, the States possess no inherent sovereignty over Indian affairs. The exercise of State jurisdiction on Indian lands such as that exercised by Kansas under 18 U.S.C. § 3243, may only be done pursuant to a specific congressional authorization. Because of the special protective relationship of the federal government to Indian tribes, and because federal protection is often required to prevent State encroachments, such transfers of jurisdiction must be strictly construed to limit the scope of such delegated jurisdiction. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Prior to enactment of the IGRA by Congress, States had no jurisdiction to interfere or regulate Indian gaming in Indian country. *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Both the *Butterworth* and *Cabazon* opinions held that if the gaming conducted by an Indian tribe does not violate the State's public policy, that is, is not "criminal/prohibitory" in nature but merely "civil/regulatory" in nature, then

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the tribe can operate the gaming activity free of any State interference. In Senate Report No. 100-446, which accompanied S. 555 (the bill which became the IGRA), the Senate expressly recognized the lack of State power to regulate Indian gaming, summarizing the *Butterworth-Cabazon* rule as providing that ". . . tribes in States that otherwise allow gaming, have a right to conduct gaming activities on Indian lands unhindered by State regulation." Senate Report at 2-3.

The IGRA is unique: never in the history of Indian law has Congress enacted a statute which delegated a portion of its exclusive Indian jurisdiction to States while, at the same time, providing a regulatory mechanism founded on a Tribal-State compact and consequent inter-governmental cooperation. The uniqueness of the concept embodied in the IGRA includes cross-delegation of jurisdictional powers between the compacting parties. In the Senate Report, the Committee explained that the compact provision, as the legislative balancing of the governmental interests of tribes and States was ". . . the best mechanism to insure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as paramutuel horse and dog racing, casino gaming, jai alai, and so forth." Senate Report at 5. Thus Kansas has the opportunity of utilizing the control mechanisms embodied in the IGRA to compact with the four Kansas Indian tribes for Indian gaming activities in such a manner as to fulfill the purposes of the IGRA, that is, promote tribal economic development, tribal self-sufficiency and strong tribal government by providing a statutory basis for the

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regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences and assure that Indian gaming is conducted fairly and honestly.

The IGRA deferred to State law; accordingly, the State of Kansas must decide exactly which branch of Kansas State government is entitled to compact with Indian tribes. The IGRA neither designates the appropriate branch of State government nor makes any attempt to alter or influence State law in that respect. It is because of the conflicting opinions in this regard in the gubernatorial and legislative branches of Kansas State government that the Potowatomi Tribe has delivered its proposed Gaming Compact *both* to the Governor and to the Legislature. Only the State of Kansas can tell the Potowatomi Tribe who in Kansas is to compact with the Tribe; however, one thing remains clear - the Tribal-State gaming compact must be negotiated prior to May 25, 1992 or Kansas could be held by a federal court not to have negotiated with the tribe in good faith.

If a federal court were to hold that Kansas did not negotiate with the Potowatomi Tribe under the IGRA in good faith, the remedies set forth in 25 U.S.C. § 2710(d)(7)(A) could be initiated by the Tribe in the federal district court. The IGRA provides that the federal judge would order the State and the Tribe to conclude the gaming compact within sixty days. If the State and the Tribe failed to do so, the judge would appoint a mediator to select between proposed compacts from the State and the Tribe. The mediator would select the compact "which best comports with the terms of this Act

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(IGRA) and any other applicable Federal law and with the findings and order of the court." Finally, the Secretary of the Interior would approve the compact to govern gaming activities by the Potowatomi Tribe.

In addition to the mandate of the IGRA and the need to prevent an expensive federal court suit, I recommend that the Legislature act with expediency because of an urgent practical consideration. Indian tribes have sued States in a number of instances; those States include Florida, Washington, Mississippi, Michigan, Alabama, Wisconsin, Connecticut and New Mexico. Other States about to be sued include Arizona and North Dakota. A standard pattern of defense by the States being sued is to raise the defense of State sovereign immunity under the Eleventh Amendment to the U.S. Constitution. In short, the defense is that States have sovereign immunity from suit in federal courts under the Eleventh Amendment and Congress does not have legal authority to waive the sovereign immunity of the States through enactment of legislation such as the IGRA. In one such case, *Poarch Band of Creek Indians v. State of Alabama*, 1991 WL 220712 (S.D. Alabama) (October 30, 1991), the federal judge upheld the sovereign immunity defense and dismissed the State of Alabama from the suit. It might seem at first blush that the upholding of the sovereign immunity defense in the *Poarch Band* case is a victory for States, a simple method whereby States can now defeat the promised federal court remedy, eliminate any need to enter into gaming compacts with tribes, and result in the destruction of Class III gaming by Indian tribes.

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The reality, however, is much more grim - not for Indian tribes, but for States. The reason is that the federal court remedies included in the IGRA are so integral to the IGRA that if the State sovereign immunity defense prevails, *the entire IGRA will probably fail.*

The IGRA contains a "severability" clause, 25 U.S.C. § 2721, which provides that in the event any provision of the Act is held invalid, the remainder of the Act shall continue in full force and effect. But such a severability clause creates no more than a rebuttable presumption of validity. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The test for whether such a clause can operate to save a statute when one provision is declared unconstitutional is simple: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 684, *quoting Buckley v. Valeo*, 424 U.S. 1, 108 (1976), *quoting Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932).

This means that the remaining provisions of a particularly invalid statute are also invalid if it appears that (1) Congress would not have enacted the remainder in the absence of the affected provision or (2) what remains of the statute is not fully operative as law. Therefore, if Congress would not have enacted the remainder of the IGRA in the absence of the federal court remedies provision, then the remainder of the IGRA is not severable and the entire statute falls. As the Supreme Court held in the *Alaska*

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Airlines case "[t]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 685. In summary, then, the test is whether the constitutional and unconstitutional provisions of a statute are so inter-dependent that one cannot stand without the other; in such case, both must fail.

A close examination of the entire history of the IGRA leads me to the conclusion that the federal court remedy promised to Indian tribes is so integral to the entire IGRA that if it is defeated by the sovereign immunity defense, the entire IGRA must fail. This conclusion follows from the fact that the jurisdictional provision granted tribes access to federal court is an integral part of the fundamental compromise reached in the IGRA to balance tribal and State interests. Before the IGRA, States had no jurisdiction whatsoever with respect to Indian gaming on Indian lands if the *Butterworth-Cabazon* test were met. The IGRA was a compromise, reached after many years of struggle between the States and tribes. In the IGRA, Congress sought to strike a balance between the demands of the States and the gaming industry that Indian tribes only be allowed to engage in gaming specifically permitted by State law and under State regulation, on the one hand, and the tribes' demands that they be free to continue to engage in any kind of gaming which was legal under the *Butterworth-Cabazon* test, on the other.

But success by the States in hiding behind the sovereign immunity defense would turn the carefully crafted congressional compromise embodied in the IGRA on its head,

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for no State would be required to give "good faith" consideration or any real consideration to tribal requests for gaming compacts, even if the kind of gaming involved were undeniably available to the Tribe prior to passage of the IGRA and, therefore, were clearly eligible for inclusion in a gaming compact.

Failure of the IGRA by virtue of its being struck down in the federal court in any of the States now engaged in litigation with Indian tribes is the grim reality I have already mentioned; it would leave Kansas tribes with the right to conduct all Class III games in Kansas Indian country without any compact with the State and without any State oversight or control whatsoever. Such a result would eliminate the careful control mechanisms established by the Potowatomi Tribe in its proposed gaming compact and would leave the Tribe, the game and the State of Kansas without any regulatory protection other than that supplied by the federal government. But the federal government makes no promise of such protection at the site of Indian gaming operations and has no facilities or manpower in place to provide such protection. Perhaps more important, the federal government has no funds to pay for any such activity.

On the other hand, the IGRA was carefully crafted to allow the Potowatomi Tribe and the State of Kansas to erect the protective mechanisms that both believe necessary to regulate Indian gaming in the State. To insure success of such shared regulation, the IGRA provides that the cost will be borne as an expense of each Indian tribes engaged in gaming activities pursuant to a Tribal-State gaming compact.

Let me reiterate that the threat to Kansas is not that the Potowatomi Tribe will file an action in federal court to which the State will raise the sovereign immunity defense and out of which the IGRA will fall. The threat to Kansas and to the Potowatomi Tribe, as well as other Kansas Indian tribes, is that a federal district court in one of the other States will do so and will thus seal the fate of Kansas as well. Thus, in my opinion, it is urgent that the Kansas Legislature establish the appropriate mechanism for negotiating and concluding gaming compact negotiations with the Potowatomi Tribe prior to May 25, 1992.

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The Kansas District Judges' Association
C. FRED LORENTZ, PRESIDENT
Wilson County Courthouse, Room 206
Fredonia, Kansas 66736
Telephone: (316) 378-4361

February 21, 1992

Senator Wint Winters
Chairman, Senate Judiciary
State Capital Building
Topeka, Kansas 66612

Representative John Solbach
Chairman, House Judiciary
State Capital Building
Topeka, Kansas 66612

Re: SB 479 - Sentencing Guidelines

Dear Senator Winters and Representative Solbach:

Our association has elected to take a position in opposition to the proposed sentencing guidelines. We understand a good deal of time and effort was put into the proposal by the sentencing commission, and though the result might be the best possible combination of grid and guidelines available, we are not satisfied that such a radical change from the current system is practical nor advisable at this time.

Following are some of our specific concerns with the proposed legislation, and we offer these concerns not with an eye toward between critical of the efforts of the sentencing commission, but because of our very real concerns with the proposal.

1. SB 479 does not appear to contain any provision for reviewing an inmates's progress in prison to determine his/her suitability for release. Our Association is concerned that the public will not be protected in the absence of any review to determine suitability for release.

2. SB 479 fails to provide an incentive system to encourage inmates to complete programs (e.g., drug treatment, counseling, education) while incarcerated.

3. We do not believe the fiscal impact of the bill on either state or local government is fully known, nor has provision for funding of additional services been made. Reducing the number of offenders sent to prison and in some cases reducing the amount of time they spend in prison must of necessity coincide with increased staffing in parole supervision, community corrections and court services/probation supervision, all at a considerable additional funding cost to the state. Anyone who has spent time looking into the existing shortages of staff cannot realistically expect the existing network to absorb the additional case load

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of supervision necessitated by the enactment of this bill.

On the local level, county court budgets may be strained by an increase in the number of jury trials brought about because of the inflexibility of the sentencing guidelines. Much expense and time involved in trial is currently avoided by the ability of prosecutors to negotiate for pleas with recommended dispositions. When that "plea bargaining" is removed or severely limited, the result will very obviously be additional trials for the very simple reason accused persons will have nothing to lose.

In addition, it is our understanding that the Kansas Bureau of Investigation and other law enforcement agencies are very concerned about the additional need for personnel and computer storage required to track criminal histories. Under the guidelines, there will be a need to track prior A and B misdemeanors for the purpose of the histories, and we understand that those are not currently maintained or tracked.

4. Our Association questions statements which suggest that the guidelines will provide a saving of tax dollars. If in fact guidelines will result in a decrease in the prison population, will the budget of the Department of Corrections be reduced proportionately to offset some of the other costs which may very well increase?

5. SB 479 provides for an inherently inflexible approach to sentencing. Although some provision is made for a judge to depart from the guidelines, the determinate grid allows for almost no individualized treatment of offenders, even when merited. Discretion is shifted from the judicial branch of government to the executive branch in that the initial use of discretion will be by the prosecutor in charging. Particularly in rural areas, the prosecutor is generally the least experienced link in the criminal process. Although plea bargaining is limited, it is virtually unenforceable, as nothing prevents the prosecuting attorney from dismissing and refiling a prosecution. This will result in cases where the grid is being applied to a class of felony which may bear little relationship to the actual felony committed.

6. K.S.A. 21-4601 reads as follows:

> "This article shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, fine or assignment to a community correctional services program whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law."

The foregoing statement has been the public policy in this state for over 20 years. Sentencing guidelines fly in the face of this policy, yet this statute is not repealed by SB 479.

Guidelines as set forth in SB 479 would treat all offenders essentially the same with very limited variance to allow consideration of mental or behavioral problems, drug or alcohol addiction, support structure for the offender, or lack thereof, or any other problem or situation unique to an individual.

7. The American Bar Association Standards relative to sentencing state:

> "The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case."

We believe this philosophy is ignored by the proposed legislation.

8. SB 479 fails to consider the results of presumptive sentencing laws in other states. The Sentencing Commission relied on the experience from Oregon, Minnesota and Washington. Since Kansas is not the first state to venture in this direction careful evaluation must be made of the results from other jurisdictions. Many grid states which originally

eliminated discretionary parole have now returned to that system after experience and mistakes (e.g., Colorado, Florida and Connecticut.) Kansas should not repeat the same mistakes which have been experienced in other jurisdictions.

The questions of sentencing and release of inmates pose important concerns for public safety. Public confidence in the judicial systems' ability to protect public safety must not be compromised by prison overcrowding concerns.

The Kansas District Judges Association opposes passage and enactment of SB 479. In the alternative, KDJA strongly recommends that passage be deferred to the 1993 session to afford appropriate opportunity to debate the concerns enumerated herein and to complete a comprehensive fiscal impact statement. SB 479 should not be enacted without benefit of a detailed impact statement from all state and local agencies which might be affected. Additionally, some provision for determining release suitability should be incorporated into the guidelines, if they are to become law.

Judge Clark Owens from Wichita together with one or two other judges from our association would like an opportunity to appear and testify before the House Judiciary committee which we understand will be conducting hearings on SB 479 during the week of February 24, 1992. Please advise me specifically of your hearing schedule and when our representatives might appear. If possible, later in the week would help with scheduling conflicts which must be worked around.

Thank you for taking the time to review this letter, and we appreciate your considering the matters set out herein. I would very much appreciate your circulating this letter among the committee members.

Respectfully,

C. FRED LORENTZ
KDJA President

CFL:kc

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SENATE CHAMBER

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JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE
KANSAS JUDICIAL COUNCIL
KANSAS PUBLIC EMPLOYEE RETIREMENT STUDY COMMISSION

February 28, 1992

The Honorable C. Fred Lorentz
Wilson County Courthouse, Rm. 206
Fredonia, Ks. 66736

Re: SB 479--Sentencing Guidelines

Dear Judge Lorentz,

Thanks for your letter of February 21 regarding the new position of the Kansas District Judges' Association in opposition to the Sentencing Guidelines proposal.

I appreciate the benefit of the considerable experience and wisdom of the individual members of the Association. It is important that the House Judiciary Committee take your opinions into consideration.

Nonetheless, I must say that I am a bit disappointed that the Association has chosen to wait so long to take a position. As you know, this issue has been debated for the last two or three years in the Legislature and the proposed sentencing guidelines are the product of several years of intense study by the Sentencing Commission. Several members of your Association served on the Commission and those District Judges most familiar with the details of the proposal and with the issues in the criminal justice system overall are strongly in support of the measure.

I hope we have the opportunity at some point to sit down together and share information. The Senate Judiciary Committee has been very careful to be certain that Judges have sufficient discretion to allow them to consider and act on compelling circumstances in each case. I believe that there is a clear and adequate response to each specific concern set forth in your letter and, while an opportunity for further discussion may not change your position, that of individual members of the District Judges' Association or mine, it would be beneficial to developing a mutual understanding of the challenges we all face.

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Thanks again for your letter and I do hope we have the opportunity to discuss this in more detail in person.

Very truly yours,

Senator Wint Winter, Jr.

WW:ac

CC: Rep. John Solbach, Chairman, House Judiciary Committee
Members of the Senate Judiciary Committee
The Honorable Mike Malone

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