Approved: 2-8-95
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on February 2, 1995 in Room 514-S of the Capitol.

All members were present except:

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee:

Carla Stovall, Attorney General
Paul Shelby, Office of Judicial Administration
Charles Simmons, Acting Secretary of Corrections
Jim Clark, County & District Attorneys Association

Others attending: See attached list

Chair Emert called the meeting to order.

Bill Introduction:

A bill was proposed by Senator Bond, regarding funding of domestic violence shelters and CASA from filing fees. Motion made by Senator Bond to introduce as a Committee Bill, second by Senator Parkinson. Motion carried.

SB 3--concerning persons who commit sexually violent offenses; relating to such person's civil commitment, evaluation, care and treatment; jurisdiction of district magistrate judges; aggravated escape from custody; docket fees.

Carla Stovall, Attorney General appeared before the Committee supporting **SB 3**, with proposed changes. General Stovall recommended the changes: to provide prosecutors more time to file the petition, to require the probable cause hearing within 72 hours, to allow less than unanimous jury verdict, to allow SRS to contract with DOC for placement of these predators, and other technical changes(Attachment 1) General Stovall stated that Section 8 was not consistent with the sexual predator proceedings, and serves no purpose therefore it should be deleted.

> New Section 8. ~~Upon request of the prosecutor or the counsel for the respondent, the judge shall make available to the prosecutor or counsel any psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records or victim impact statements which have been submitted to the court under this act. Except as provided in this section, all these reports shall be part of the record, but shall be sealed and opened only on order of the court. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.~~

Attorney General Stovall addressed concerns of New Section 9 of **SB 3**, because the language allows the judge to exclude, "all persons not necessary for the conduct of this proceeding." Attorney General Stovall contended that victims could be excluded from attending hearings, since victims are not necessary at the proceeding and therefore, could be prohibited from attending, Attorney General Stovall recommended that the language needs to be amended to clarify this section allowing victims to be present at this kind of hearing as well as all proceedings, if they so choose.

> New Section 9. In order to protect the victims of any crime or the families of the victims, the judge may exclude all persons, *other than victims or families of victims of the person* , not necessary for the

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

conduct of the proceedings from the proceedings. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59a15 and amendments thereto.

The Attorney General recommended changes to Section 11 concerning Aggravated Escape of persons being held after the probable cause hearing or after commitment that would modify the language so that someone held prior to the probable cause hearing could also be found guilty of Aggravated Escape.

Section 11. K.S.A. 1994 Supp. 21-3810 is hereby amended to read as follows; 21-3810. Aggravated escape from custody is:

(a) Escaping while held in lawful custody upon a charge or conviction of felony, *while held in lawful custody upon the filing of a petition as provided in K.S.A. 59-29a05 , upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto. upon commitment to a treatment facility as a sexually violent predator as provided pursuant to K.S.A. 59-29a01 et seq. and amendments thereto* or upon a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting a felony; or

(b) Escaping while held in custody on a charge or conviction of any crime, *while held in lawful custody upon the filing of a petition as provided in K.S.A. 59-29a05, upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto, upon commitment to a treatment facility as a sexually violent predator as provided in K.S.A. 59-29a01 et seq. and amendments thereto ~~or~~ upon a* commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting any crime when such escape is effected or facilitated by the use of violence or the threat of violence against any person.

Paul Shelby, Assistant Judicial Administrator, Office of Judicial Administration, testified as a proponent of **SB 3**, however, Mr. Shelby stated that implementation of K.S.A. 59-104, 59a02,59-29a3,59-29a05,59-29a06 and 59-29a07 and K.S.A. 1994 Supp.20-302b and 21-3810 resulted in some unresolved policy issues which were addressed in Special Committee on Judiciary. Mr. Shelby contended that **SB 3** addresses the unresolved policy issues of: docket fees, confidentiality of the records and documents filed, and District Magistrate Judges jurisdiction (Attachment 2)

Mr. Shelby continued addressing specifically new sections eight (8), nine (9) and sections ten (10) and twelve(12). Mr. Shelby stated that New Section 8, page 5 addresses the confidentiality question stating that it is a policy issue. New Section 9, page 6 was included to protect the victim or families of victims from undue public exposure in case the respondent attempts to "retry" the original criminal case to prove he is not a sex predator. Section 10, page 6 9 [Amending K.S. A. 1994 Supp. 20-302b (page 7) line 20 No.16] denying District Magistrate Judges of hearing these cases due to the increased expenditures of time and money, since district magistrate judges ' decisions are appealed de novo to district judges, and the appeal suspends the operation of the magistrate's order until the appeal is determined or the judge hearing the appeal orders otherwise. Mr. Shelby continued by addressing Section 12, page 8 concerning docket fee issue, amending K.S. A. 59-104 to include a docket fee as specified in **SB 3** for these types of cases.

Questions and brief discussion from the Committee regarding who would pay the docket fee followed.

Charles Simmons, Acting Secretary of Corrections spoke as a proponent of **SB 3**. Mr. Simmons recommended changes in Section 2, Item 1. K.S.A. 59-2903:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, *except that in the case of persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;*

Mr. Simmons discussed Section 6(a) and problems in the language with "at all times" contending that the Corrections facility cannot say that at all times those persons under this law would be segregated from other inmates, or that there would be no type of incidental contact, so the preference of the Department of Corrections is that the language "at all times" be stricken and that the provision be that these people be housed and managed separately from inmate and that they be segregated except for occasional instances of supervised incidental contact, as in a hallway or be in the infirmary at the same time those types of contacts are not preventable and we would not want the current language to be interpreted in a way that would be contrary to the statute. Therefore we suggest the amendment set forth on page 2 of the testimony.

~~At all times~~ ~~s~~Such persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be ~~segregated~~ housed and managed separately from offenders in the custody ~~from any other person under the control and supervision~~ of the secretary of corrections, and shall be segregated from them except for occasional instances of supervised incidental contact.

Mr. Simmons spoke in support of New Section 7 and Section 11 (Attachment 3).

Questions and discussion, specifically in reference to the "at all times" language were addressed.

Jim Clark, County and District Attorneys Association, testified in support of **SB 3**, suggesting the addition of one word on Page 8, line 1.

Escaping while held in lawful custody upon a charge or conviction of *a* felony ----------

Mr. Clark outlined that Associations primary concerns addressed in the bill (Attachment 4), which makes technical changes to the Sexually Violent Predator Act.. Mr. Clark addressed the items listed that are included in **SB 3**. Mr. Clark discussed the number of cases filed under this Act.

Andrew Warren, Attorney at Law, spoke as an opponent of **SB 3**, on behalf of The Kansas Association of Criminal Defense lawyers citing concerns that this bill would circumvent criminal procedure (Attachment 5). Mr. Warren contented that Section 9, troubles the civil defense bar and civil libertarians in this state that there is a proposal to make these closed proceedings. The lack of public scrutiny was addressed by Mr. Warren as well as the rights of the defendants' families to know if their love ones received a fair hearing. The subject of wrongful incarceration was addressed. Mr. Warren spoke of the funding mechanism , stating that more is expected of an increasing smaller segment of the bar in this state that are committed to seeing that innocent people are not sent to prison and that the trend in toward increased paperwork.

Discussion followed with questions from Committee members.

Written testimony was given to the Committee on behalf of John C. Donham, Attorney at Law, Overland Park, as an opponent of **SB 3** (Attachment 6).

Carla Dugger, Associate Director of the American Civil Liberties Union (ACLU), for Kansas and Western Missouri, spoke as an opponent of **SB 3,** addressing concerns that **SB 3** amends **SB 525**, exacerbating the problems the ACLU of Kansas had with **SB 525**, the rights taken away from the most vilified and vulnerable . Those rights can be taken away from others. Speaking for the ACLU, Ms. Dugger expressed concerns of having both civil and criminal procedures occurring in sex predator cases. Particular concerns cited by ACLU with **SB 3** are; mandated preventive detention, and the reduction of the number of jurors. Ms. Dugger closed with a recommendation from ACLU to reject **SB 3** and to repeal **SB 525** (Attachment 7).

Questions and discussion followed.

SB 131--concerning persons who commit sexually violent offenses; relating to indigent persons; payment of such persons counsel and experts by state board of indigents defense services

Attorney General, Carla Stovall, testified in favor of **SB 131** stating that this bill gives the responsibility for representation of those against whom a proceeding is brought to the State Board of Indigent Defense. General Stovall strongly urged consideration of initiating actions under the sex predator law at the state level. The Attorney General asked for inclusion within that department's budget for funds to prosecute and hire a sexual predator prosecutor as does the state of Washington for these kinds of cases (Attachment 1).

Senator Ranson spoke as a proponent of **SB 131** stating that she was a co-sponsor of the sexual predator act and that in the county she represents (Sedgwick), there have been several filings and convictions under the sex predator act at significant costs. Senator Ranson then introduced Tom Winters to present Sedgwick Countys official position.

Tom Winters, Sedgwick County Commissioner speaking on behalf of the Board of County Commissioners of Sedgwick County addressed the Committee as a proponent of **SB 131.** Mr. Winters stated that while the Board of County Commissioners agrees with the intent of the sexual predator law, the Board believes counties should not have to bear the cost of providing attorneys and expert witnesses for accused sexual predators. Mr. Winters explained that there were four cases in Sedgwick county that met the criteria of the sex predator act and that those four cases cost Sedgwick county approximately $60,000. Sedgwick County's

District Attorney advises that there may be as many as 170 individuals scheduled for release in the next year that need to be reviewed. On behalf of Sedgwick County Commissioners Board, Mr. Winters asked for assistance from the State in meeting the fiscal responsibilities associated with the Sex Predators law and the indigents defense fund of the state is the vehicle to meet this need, it is in place, it works well for those who can not afford their own defense counsel. In support of **SB 131**, Mr. Winters respectfully requested the Committees consideration of mutual responsibility in the cost of its implementation (Attachment 8).

Mr. Steve Plummer, Sedgwick County Counselor, spoke at a proponent of **SB 131** as it amends the sexual predator law. Mr. Plummer stated that there is already a system in place and that is the Board of Indigent Defense Services and that the proposed amendments, **SB 131** would simply be a logical extension of services already provided by the Board in criminal and civil cases. The proposed amendments would insure payment of uniform fees and shift the burden of these fee out of the counties who are also paying for the prosecution.(Attachment 9).

Questions and discussion followed regarding issues as to when the payment of defense becomes a county obligation and when is it a state obligation. Mr. Plummer responded by stating that the counties would first like the state pay these bills, but if that cannot be done then at lease allow the counties to do some planning for the cost of these cases.

Senator Emert referred **SB 3** to a sub-committee of two composed of Senator Vancrum and Senator Rock to meet at 10:00 a.m. a week from this Friday, because our whole committee will not be meeting. Senator Emert stated that the Committee would try to work in **SB 131** sometime next week with some additional information.

The Chair thanked the conferees and adjourned the meeting.

The next meeting is scheduled for February 3, 1995.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-2-95

NAME	REPRESENTING
Tom Winters	Sedgwick County Commissioner
Steve Plummer	Sedgwick Cunty Counselor
Willie Martin	Sedgwick Co.
Heather Kendall	Senator Jerry Karr
Jan Johnson	Dept of Corrections
Penny Sue Johnson	The Ks Coalition, Inc/on KAPs Adv. Council
Paul Shelby	QTA
Jeremy Kohn	KSC
Shannon Peterson	KBA
Paul Davis	Senator Hensley

SB-3

State of Kansas
Office of the Attorney General
2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

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TESTIMONY OF
ATTORNEY GENERAL CARLA STOVALL
SENATE JUDICIARY COMMITTEE
FEBRUARY 2, 1995
SENATE BILL 3 AND 131

I am a strong supporter of the concept of the sexually violent predator law as many of you may know. I found myself talking about it frequently on the campaign trail. I obviously did not explain it too well to one small town reporter who wrote that I supported the "sexually violent creditor bill." I trust we all know what we are discussing this morning.

Most of the changes proposed by SB3 were drafted by an Assistant Attorney General in my office. They are technical changes to provide prosecutors more time to file the petition, to require the probable cause hearing within 72 hours, to allow less than unanimous jury verdict, to allow SRS to contract with DOC for placement of these predators, and other technical changes.

New Sections 8 and 9 were proposed by the Office of Judicial Administration. New Section 8 serves no purpose and is not consistent with the sexual predator proceedings and I would recommend that it be deleted. New Section 9 causes me concern because the language allows the judge to "exclude all persons not necessary for the conduct of the proceedings." Victims are not <u>necessary</u> and could, therefore, be prohibited from the proceedings. I strongly believe that victims of past acts (whether or not convictions) of the respondent should be allowed in the courtroom and the language must clearly allow that. It is important that we allow all victims to attend whether or not the act committed against them was being relied upon to prove the respondent was a sex predator. I offer the following amendment: "...the judge may exclude all persons <u>other than victims or families of victims of the person,</u> not necessary for the conduct of the proceedings from the proceedings..."

Senate Judiciary Comm
2-2-95
Attachment 1

Section 11 would allow someone to be charged with Aggravated Escape if they were being held after the probable cause hearing or after commitment. The language needs to be modified so that someone held prior to the probable cause hearing could also be found guilty of Aggravated Escape and I offer the following amendment: (a) "Escaping while held in lawful custody upon the filing of a petition as provided in K.S.A. 59-29a05 ... (b) Escaping while in lawful custody upon the filing of a petition as provided in the same ..."

SB 131 gives the responsibility for representation of those against whom a proceeding is brought to the State Board of Indigent Defense, requiring the state to pay the defense and not the county. I do not object to this but want to point out that this bill addresses the defense side of the equation--but not the prosecution. County and district attorney office budgets are impacted dramatically by the expense involved in these proceedings as well.

Many of them are desiring the responsibility for initiating these actions to be removed to the state level also--to the Attorney General's office. I strongly support that move and have asked for inclusion within my budget dollars sufficient to hire a sexual predator prosecutor. The Governor's budget message approves my office handling that responsibility--but did not provide adequate funding for such. I will urge legislators to add in the dollars to allow this to occur. As many of you know, our Kansas sex predator law was modeled after the state of Washington's. The experience there has shown that their Attorney General's office handles the cases statewide--with the exception of the state's largest two or three counties. I would expect that to be the practice here should I be able to assume this additional task.

In summary, I support both bills with the changes I have suggested this morning.

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Session of 1995

SENATE BILL No. 3

By Special Committee on Judiciary

12-16

AN ACT concerning persons who commit sexually violent offenses; relating to such person's civil commitment, evaluation, care and treatment; confidentiality; jurisdiction of district magistrate judges; aggravated escape from custody; docket fees; amending K.S.A. 59-104, 59-29a02, 59-29a03, 59-29a04, 59-29a05, 59-29a06 and 59-29a07 and K.S.A. 1994 Supp. 20-302b and 21-3810 and repealing the existing sections.

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

Section 1. K.S.A. 59-29a02 is hereby amended to read as follows: 59-29a02. As used in this act:

(a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, *if not confined in a secure facility.*

(b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

(c) "Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(d) "Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(e) "Sexually violent offense" means:

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

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

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

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

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

amendments thereto;

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

(7) aggravated indecent solicitation of a child as defined in K.S.A. 21-2511 and amendments thereto;

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

(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;

(10) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (9) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;

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

(12) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.

(f) "Agency with jurisdiction" means that agency ~~with the authority to direct the release of~~ *which releases upon lawful order or authority* a person serving a sentence or term of confinement and includes the department of corrections ~~and~~, the department of social and rehabilitation services *and the Kansas parole board.*

Sec. 2. K.S.A. 59-29a03 is hereby amended to read as follows: 59-29a03. (a) When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 *and amendments thereto*, the agency with jurisdiction shall give written notice of such to the prosecuting attorney of the county where that person was charged, ~~60~~ *90* days prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense;

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto; or

(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto.

(b) The agency with jurisdiction shall inform the prosecutor of the following:

(1) The person's name, identifying factors, anticipated future resi-

dence and offense history; and

(2) documentation of institutional adjustment and any treatment received.

(c) The agency with jurisdiction, its employees, officials and individuals contracting, appointed or volunteering to perform services hereunder shall be immune from liability for any good-faith conduct under this section.

Sec. 3. K.S.A. 59-29a04 is hereby amended to read as follows: 59-29a04. When it appears that the person presently confined may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition, within ~~45~~ 75 days of the date the prosecuting attorney received the written notice by the agency of jurisdiction as provided in subsection (a) of K.S.A. 59-29a03 *and amendments thereto*, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

Sec. 4. K.S.A. 59-29a05 is hereby amended to read as follows: 59-29a05. *(a)* Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody ~~and~~.

(b) Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.

(c) At the probable cause hearing as provided in subsection (b), the detained person shall have the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file.

(d) If the probable cause determination is made, the court shall direct that the person ~~shall~~ be transferred to an appropriate *secure* facility, *including, but not limited to, a county jail,* for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

Sec. 5. K.S.A. 59-29a06 is hereby amended to read as follows: 59-29a06. Within ~~45 days after the filing of a petition pursuant to K.S.A. 59-~~

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~~29a04~~ *60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto*, the court shall conduct a trial to determine whether the person is a sexually violent predator. *The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced.* At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The person, the county or district attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 22-3403, and amendments thereto. If no demand is made, the trial shall be before the court.

Sec. 6. K.S.A. 59-29a07 is hereby amended to read as follows: 59-29a07. (a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, ~~such determination shall be by unanimous verdict of such jury~~ *the agreement of 10 of 12 members of the jury shall be sufficient to render a verdict.* Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services and commencing June 1, 1995, such

ing separate from any other patient under the supervision of the secretary. *The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. At all times such persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be segregated from any other person under the control and supervision of the secretary of corrections.* If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

New Sec. 7. In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to the agency with jurisdiction, the county or district attorney or the attorney general for the purpose of meeting the notice requirement provided in K.S.A. 59-29a03 and amendments thereto and determining whether a person is or continues to be a sexually violent predator. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

New Sec. 8. ~~Upon request of the prosecutor or the counsel for the respondent, the judge shall make available to the prosecutor or counsel any psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records or victim impact statements which have been submitted to the court under this act. Except as~~

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~~provided in this section, all these reports shall be part of the record but shall be sealed and opened only on order of the court. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.~~

New Sec. 9. In order to protect the victims of any crime or the families of the victims, the judge may exclude all persons ~~not necessary for~~ other than victims or families of victims of the person the conduct of the proceedings from the proceedings. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

Sec. 10. K.S.A. 1994 Supp. 20-302b is hereby amended to read as follows: 20-302b. (a) A district magistrate judge shall have the jurisdiction, power and duty, in any case in which a violation of the laws of the state is charged, to conduct the trial of traffic infractions or misdemeanor charges and the preliminary examination of felony charges. In civil cases, a district magistrate judge shall have concurrent jurisdiction, powers and duties with a district judge, except that, unless otherwise specifically provided in subsection (b), a district magistrate judge shall not have jurisdiction or cognizance over the following actions:

(1) Any action, other than an action seeking judgment for an unsecured debt not sounding in tort and arising out of a contract for the provision of goods, services or money, in which the amount in controversy, exclusive of interests and costs, exceeds $10,000, except that in actions of replevin, the affidavit in replevin or the verified petition fixing the value of the property shall govern the jurisdiction; nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to hear any action pursuant to the Kansas probate code or to issue support orders as provided by paragraph (6) of *this* subsection ~~(a)~~;

(2) actions against any officers of the state, or any subdivisions thereof, for misconduct in office;

(3) actions for specific performance of contracts for real estate;

(4) actions in which title to real estate is sought to be recovered or in which an interest in real estate, either legal or equitable, is sought to be established, except that nothing in this paragraph shall be construed as limiting the right to bring an action for forcible detainer as provided in the acts contained in article 23 of chapter 61 of the Kansas Statutes Annotated, and any acts amendatory thereof or supplemental thereto; and nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to hear any action pursuant to the Kansas probate code;

(5) actions to foreclose real estate mortgages or to establish and foreclose liens on real estate as provided in the acts contained in article 11 of chapter 60 of the Kansas Statutes Annotated, and any acts amendatory thereof or supplemental thereto;

(6) actions for divorce, separate maintenance or custody of minor children, except that nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to: (A) Hear any action pursuant to the Kansas code for care of children or the Kansas juvenile offenders code; (B) establish, modify or enforce orders of support, including, but not limited to, orders of support pursuant to the Kansas parentage act, K.S.A. 23-451 *et seq.*, 39-718a, 39-718b, 39-755 or 60-1610 or K.S.A. 23-4,105 through 23-4,118, 23-4,125 through 23-4,137, 38-1542, 38-1543 or 38-1563, and amendments thereto; or (C) enforce orders granting a parent visitation rights to the parent's child;

(7) habeas corpus;

(8) receiverships;

(9) change of name;

(10) declaratory judgments;

(11) mandamus and quo warranto;

(12) injunctions;

(13) class actions;

(14) rights of majority; ~~and~~

(15) actions pursuant to the protection from abuse act*; and*

(16) actions pursuant to K.S.A. 59-29a01 et seq. and amendments thereto.

(b) Notwithstanding the provisions of subsection (a), in the absence, disability or disqualification of a district judge, a district magistrate judge may:

(1) Grant a restraining order, as provided in K.S.A. 60-902 and amendments thereto;

(2) appoint a receiver, as provided in K.S.A. 60-1301 and amendments thereto;

(3) make any order authorized by K.S.A. 60-1607 and amendments thereto; and

(4) grant any order authorized by the protection from abuse act.

(c) In accordance with the limitations and procedures prescribed by law, and subject to any rules of the supreme court relating thereto, any appeal permitted to be taken from an order or final decision of a district magistrate judge shall be tried and determined *de novo* by a district judge, except that in civil cases where a record was made of the action or proceeding before the district magistrate judge, the appeal shall be tried and determined on the record by a district judge.

(d) Upon motion of a party, the administrative judge may reassign an action from a district magistrate judge to a district judge.

Sec. 11. K.S.A. 1994 Supp. 21-3810 is hereby amended to read as follows: 21-3810. Aggravated escape from custody is:

(a) Escaping while held in lawful custody upon a charge or conviction

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of felony, *upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto, upon commitment to a treatment facility as a sexually violent predator as provided pursuant to K.S.A. 59-29a01 et seq. and amendments thereto* or upon a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting a felony; or

(b) Escaping while held in custody on a charge or conviction of any crime, *upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto, upon commitment to a treatment facility as a sexually violent predator as provided in K.S.A. 59-29a01 et seq. and amendments thereto* or ~~on~~ *upon* a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting any crime when such escape is effected or facilitated by the use of violence or the threat of violence against any person.

(c) (1) Aggravated escape from custody as described in subsection (a) is a severity level 8, nonperson felony.

(2) Aggravated escape from custody as described in subsection (b) is a severity level 6, person felony.

Sec. 12. K.S.A. 59-104 is hereby amended to read as follows: 59-104. (a) *Docket fee.* Except as otherwise provided by law, no case shall be filed or docketed in the district court under the provisions of chapter 59 of the Kansas Statutes Annotated or of articles 40 and 52 of chapter 65 of the Kansas Statutes Annotated without payment of an appropriate docket fee as follows:

Treatment of mentally ill	$21.50
Treatment of alcoholism or drug abuse	21.50
Determination of descent of property	36.50
Termination of life estate	36.50
Termination of joint tenancy	36.50
Refusal to grant letters of administration	36.50
Adoption	36.50
Filing a will and affidavit under K.S.A. 59-618a	36.50
Guardianship	56.50
Conservatorship	56.50
Trusteeship	56.50
Combined guardianship and conservatorship	56.50
Certified probate proceedings under K.S.A. 59-213, and amendments thereto	11.50
Decrees in probate from another state	96.50
Probate of an estate or of a will	96.50

while held in lawful custody upon the filing of a petition as provided in K.S.A. 59-29a05

while held in lawful custody upon the filing of a petition as provided in K.S.A. 59-29a05

(b) *Poverty affidavit in lieu of docket fee and exemptions.* The provisions of subsection (b) of K.S.A. 60-2001 and K.S.A. 60-2005, and amendments thereto, shall apply to probate docket fees prescribed by this section.

(c) *Disposition of docket fee.* Statutory charges for the law library and for the prosecuting attorneys' training fund shall be paid from the docket fee. The remainder of the docket fee shall be paid to the state treasurer in accordance with K.S.A. 20-362, and amendments thereto.

(d) *Additional court costs.* Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. Other fees shall include, but not be limited to, witness fees, appraiser fees, fees for service of process outside the state, fees for depositions, transcripts and publication of legal notice, executor or administrator fees, attorney fees, court costs from other courts and any other fees and expenses required by statute. All additional court costs shall be taxed and billed against the parties or estate as directed by the court. No sheriff in this state shall charge any district court in this state a fee or mileage for serving any paper or process.

Sec. 13. K.S.A. 59-104, 59-29a02, 59-29a03, 59-29a04, 59-29a05, 59-29a06 and 59-29a07 and K.S.A. 1994 Supp. 20-302b and 21-3810 are hereby repealed.

Sec. 14. This act shall take effect and be in force from and after its publication in the statute book.

SB

SENATE BILL NO. 3
Senate Judiciary Committee
February 2, 1995

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

Mr. Chairman and members of the committee. We appreciate the opportunity to appear today and discuss Senate Bill No. 3 regarding the civil commitment of sexual predators act.

Implementation of the act uncovered some unresolved policy issues which we addressed to the Special Committee on Judiciary. The issues were: 1.) docket fees, (neither K.S.A. 59-104 nor the sexual predator commitment act specifies a docket fee for these cases). 2.) the act did not state whether or not any portions of the record or the documents filed in a case were confidential and 3.) District Magistrate Judges jurisdiction.

I wish to address specifically New Sections 8,9 and Sections 10 and 12 of Senate Bill No. 3.

New Section 8. Page 5. addresses the confidentiality question. "Upon request of the prosecutor or the counsel for the respondent, the judge shall make available any psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records or victim impact statements which have been submitted to the court. These records shall be part of the record but shall be sealed and opened only on order of the court".

New Section 9. Page 6. Judge Gregory L. Waller, Wichita, who has heard some of these cases recommends the language in Section 9. that to protect the victims of any crime or the families of the victims, the judge may exclude all persons not necessary for the conduct of the proceedings from the proceedings. His feelings are that in the future the respondent may attempt to "retry" the original criminal case to prove he is not a

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sexual predator and the judge wants the ability to protect the victim or families of victims for undue public exposure. This language would allow a judge this flexibility.

Section 10. Page 6 addresses the District Magistrate Judges jurisdiction. Under the current law, sexual predator commitment cases may be heard by district magistrate judges. We are requesting an amendment to K.S.A 1994 Supp. 20-302b (Page 7) line 20 No.16 which would mean that District Magistrate Judges would not have jurisdiction of these cases. We base our recommendations on the fact that decisions of district magistrate judges are appealed de novo to district judges, increasing the expenditures of time and money in each case, new pleadings may be filed, and the appeal suspends the operation of the magistrate's order until the appeal is determined or the judge hearing the appeal orders otherwise.

Section 12. page 8 addresses the docket fee issue. The act has been placed in Chapter 59 of the Kansas Statutes Annotated, making it part of the probate code. K.S.A. 59-104 states "Except as otherwise provided by law, no case shall be filed or docketed in the district court under the provisions of chapter 59 without payment of an appropriate docket fee". We are requesting an amendment to K.S.A. 59-104, Page 8, Line 43, recommending a docket fee of $21.50, the same as Treatment Cases.

We respectfully request these amendments and the solutions to these policy issues. Thank you.

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KANSAS DEPARTMENT OF CORRECTIONS

BILL GRAVES, GOVERNOR

CHARLES E. SIMMONS, ACTING SECRETARY

LANDON STATE OFFICE BUILDING — 900 SW JACKSON
TOPEKA, KANSAS — 66612-1284
913-296-3317

MEMORANDUM

To: Members of the Senate Judiciary Committee

From: Charles E. Simmons
Acting Secretary of Corrections

Subject: Senate Bill 3

Date: February 2, 1995

Senate Bill 3 amends the Sexually Violent Predator Act which was enacted during the 1994 legislative session. Provisions of the bill of direct interest to the Department of Corrections are discussed below, as are some suggested changes which the department requests be considered.

Section 2(a) - Changes the notification period from 60 days to 90 days prior to the release of certain offenders and other persons subject to the provisions of the act.

This provision is intended to give prosecutors additional time in which to evaluate individual cases prior to deciding whether to file a civil commitment petition. While the department concurs with this objective generally, there are certain circumstances in which we cannot meet the 90-day notification requirement--specifically when the release involves an inmate subject to the 90-day incarceration limit following revocation. We recommend that the bill be amended to adjust the notification period for these offenders. The language we propose is as follows:

> Page 2, line 33 (1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, *except that in the case of persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison*;

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Section 6(a) - Includes provisions authorizing the Department of Social and Rehabilitation Services and the Department of Corrections to enter into an interagency agreement for the confinement of sexually violent predators; further, requires that persons committed pursuant to the act who are in the confinement of the Secretary of Corrections to be segregated "at all times" from any other person under the control and supervision of the Secretary of Corrections.

To implement the provisions of the Sexually Violent Predator Act, the Department of Corrections and the Department of Social and Rehabilitation Services have agreed on short-term and long-term procedures whereby KDOC would house sexual predators at Larned Correctional Mental Health Facility, with SRS providing all operational supervision and programming for the sexual predators. While there are some issues remaining to be resolved in both the short- and long-term plans for the confinement of sexual predators, the language in Section 6(a) specifically authorizes the two departments to develop a formal interagency agreement detailing the responsibilities of each agency. The Department of Corrections believes that this specific authorization is necessary since the individuals who are committed as sexual predators are in the custody of SRS.

The department has concerns, however, about the language in Section 6(a) which requires civilly committed sexual predators to remain segregated "at all times" from KDOC commitments. The operational arrangements discussed with SRS would clearly keep the two populations separate in terms of housing, supervision, treatment, programming, recreation, and other activities. Although the populations would be managed separately and would not be mixed, the requirement that they be segregated at all times suggests that even incidental contact--such as passing in the hall on the way to sick call--is prohibited. We suggest that this provision be amended to give the department some flexibility regarding potential incidental contact between the predator and inmate populations. The language we propose is as follows:

> Page 5, line 4, following "confinement of such persons": ~~At all times s~~*S*uch persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be ~~segregated~~ *housed and managed separately from offenders in the custody* ~~from any other person under the control and supervision~~ of the secretary of corrections*, and shall be segregated from them except for occasional instances of supervised incidental contact*.

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New Section 7 - Authorizes the release of confidential information to the agency with jurisdiction, the county or district attorney, and the Attorney General, for their use in evaluating whether individuals are or continue to be sexually violent predators.

The department requested this provision to ensure that it is authorized by statute to release individual offender information which is relevant to determining whether the offender is a sexually violent predator, but which is by law confidential and therefore protected from release. Although the department received an Attorney General's opinion indicating that such information could be shared with prosecutors, statutory authorization more fully resolves this issue.

Section 11 - Amends KSA 1994 Supp. 21-3810 to include in the definition of aggravated escape from custody, escape upon finding of probable cause for evaluation as a sexually violent predator, and escape upon commitment to a treatment facility as a sexually violent predator.

The department supports this provision expanding the definition of aggravated escape from custody to include persons under evaluation or civilly committed as sexual predators. Because sexual predators are subject to civil commitment because they present a risk to the public, both public safety and staff safety will be enhanced if escape from custody is punishable as a felony offense.

OF S

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SB-3

Kansas County & District Attorneys Association

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Testimony in Support of
SENATE BILL NO. 3

The Kansas County and District Attorneys Association appears in support of Senate Bill 3, which makes technical changes to the Sexually Violent Predator Act, passed by the 1994 Legislature. Our primary interests concern:

Page 2, Line 32, extending the notice to prosecutor time from 60 to 90 days.

Page 3, Line 12, extending the time for filing a petition after the notice.

Page 3, Line 38, allowing detention in county jail after a probable cause determination.

Page 4, Line 1, extending time period for evaluations before trial, and giving the court authority to grant a continuance.

Page 4, Lines 29 - 30, allowing a non-unanimous jury.

Page 5, Lines 31 through Page 6, Line 9, allowing access to case files by prosecutors and allowing confidentiality of the proceedings.

Page 7, Lines 20 - 21, removing proceedings from magistrate judge jurisdiction.

Page 8, Lines 1 - 4, and 9 - 12, providing penalty for escape by sex predator We would suggest also that on Page 8, Line 1, insert "a" before "felony".

There is no question that this Act is a major piece of legislation. While the protection of the public is obviously enhanced, the impact on counties involved in the commitment proceedings is significant. Partly in response to this impact, former Corrections Secretary Stotts got the entities involved (SRS, DOC, Parole Board, AG and KCDAA) to enter into an interagency agreement in which a protocol was established in which the cases would be reviewed by both the custodial agencies and a committee of prosecutors prior to referral to the local prosecutor. The Prosecutor Advisory Committee is composed of Johnson County District Attorney Paul Morrison, Assistant Sedgwick County D.A. Debra Barnett, Greeley County Attorney Wade Dixon, Assistant Attorney General Camille Nohe, and Pawnee County Attorney Terry Gross. The latter was added because of expertise in mental commitment proceedings and access to Larned State Hospital. The former had experience either in the drafting of the bill or trying the first cases. Since November the PAC has reviewed 46 cases and recommended filing petitions in seven.

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C 1-3

TO: Senate Judiciary Committee
FROM: Andrew L. Warren, Attorney at Law
Private Practice Limited to Criminal Defense, Overland Park, Kansas
Kansas Association of Criminal Defense Lawyers
National Association of Criminal Defense Lawyers Kansas Legislative Coordinator
Former Western Kansas Regional Public Defender
DATE: January 31, 1995

RE: Senate Bill No. 3 ("Sexual Predator II")

To the Committee:

The Kansas Association of Criminal Defense lawyers has asked me to address Senate Bill No. 3. There are several problems with this legislation. It is an undisguised attempt to circumvent criminal procedure, it is an admitted attempt to lengthen incarceration for sex offenders, it continues an increasing trend toward corrupting our language for political purposes, it currently represents an unfunded mandate.

1. Although the bill purports to statutorily provide the constitutional and statutory rights of criminal proceedings, it immediately backs away from that claim. The reduction in jury verdicts from unanimity of 12, to 10 of twelve typifies a technique successfully applied by the prosecution/law enforcement lobby in recent legislatures. If law enforcement/prosecution can't convince a jury with their evidence, or a court with their arguments, they just get the legislature to change the rules! I would like to know what the justification for this reduction is. The obvious conclusion is to simply make it easier to commit this undesirable group of citizens to incarceration for uncertain, but nevertheless ever longer periods of time. The proponents of this legislation should have the forthrightness to say so. They should also admit that they are doing so by a gradualist method of eroding protection constitutionally afforded those being incarcerated by the government.

2. By concealing the actual motive for this bill, the legislature does by indirection what it seems to lack the fortitude to do by direction; lengthen prison sentences for sex offenders. The legislature has recently re-made the criminal code of Kansas by completely re-writing the sentencing scheme. Somehow, during that process the same legislature overlooked the perceived need to put these persons away for longer periods of time. An honest approach to this would be to simply ratchet up the severity levels for designated crimes.

3. As has been pointed out to this committee and others in the past, the classification of consensual indecent liberties involving post-pubescent participants as a "sexually violent offense" renders the language meaningless and begs for the disrespect of persons who value freedom and civil liberties. It would be laughable if the ramifications of 59-29a02 et seq. and the pending "strike-out" bills were not so serious. The counterfeiting of language to serve custodial purposes in civil commitment proceedings is remindful of nothing so much as the massive abuse of mental hospitals for persons in the Soviet Union who were found guilty of "crimes against the state" such as distributing New York Times Editorials or possessing Time Magazine. Describing teenagers, attending the same high-school engaging in consensual sex as "sexually violent offenders" is the same corruption of language to promote hidden agendas.

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4. This committee is well aware of the funding crisis provoked by the hasty enactment of the existing "sexual predators" bill. I am aware that legislation is pending to rectify this. The problem is that the entire criminal defense mechanism is significantly underfunded. If recent history is any example, provisions for the representation of the respondent in these actions will be completely insufficient -- far less than the state pays the lawyers who condemn highway rightaways or otherwise represent the government. The protection of the citizen from unjust incarceration should be viewed at least as importantly by the State of Kansas as it views the attempt to take land from the citizen. The legislature races with each other to see who can promote legislation likely to put the most Kansans behind bars. As unseemly as this is, it is only made worse by less and less funding made available to those obligated to ensure that innocent or undeserving persons are not put behind bars. Please see that adequate provisions are made to enable those who make it their unprofitable profession to protect the constitutional rights of the accused are not subsidizing the government as has increasingly become the case.

5. Provisions inviting the state to attack the staff at our various state hospitals essentially encourages the mental health professional to report in a manner catering to the prosecution. This problem is bad enough now. The nature and training of mental health professionals at some state hospitals is below what is necessary. This legislation will increase pressure on the staff to avoid antagonizing prosecution/law enforcement. A commitment to improving the quality of mental health treatment in state facilities would go along way toward alleviating the cynicism most of KACDL feel toward the sexual predators act. As long as state hospitals are staffed as they are in rural portions of the state, the suspicion will be strong amongst the criminal defense bar that this is just "incarceration, round two" rather than any real attempt to arrive at the solution of sexual offenders.

6. If treatment/rehabilitation really is the goal, why not undertake this proceeding immediately upon conviction, rather than commit the accused to the mental illness producing and reinforcing environments of our state penitentiaries?

The committee should also remain cognizant that innocent persons are more likely to be erroneously convicted of sex crimes than any other crime. The record in Kansas on this issue is not good. Recent legislation and judicial rulings have continued a decade long trend making mistaken convictions and unfair trials ever more possible. Compounding this by a enacting legislation indefinitely continuing incarceration transforms unjust erroneous convictions into cruel torture. Mistaken convictions occur, and occur in Kansas.

The Bill of Rights to the Constitution of the United States has been a model both for new nations and prospective immigrants around the world. The Constitution of the Former Soviet Union guaranteed its citizens more rights prior to incarceration than does ours. The Soviets, however, employed a variety of thinly veiled procedural devices to deprive those viewed as "undesirable" of those rights. The sexual predators act is a thinly veiled procedural device to circumvent both the Constitution of the United States, and traditional Anglo-American notions of fundamental fairness.

SB 3

Testimony submitted in writing this 2nd day of February, 1995.

Before Senate Judiciary Committee, Senator Tim Emert, Chair.

Re: Senate Bill 3

My name is John C. Donham. I am an attorney practicing in Overland Park, Kansas. I had wished to express my views in person before this Senate subcommittee but my caseload required me to be elsewhere. I want to thank you for taking the time to read my testimony. I have asked Mr. Andy Warren to make remarks concerning its content before you.

It saddens me that the people of the State of Kansas would allow a statute so reprehensible and so draconian as the Sexual Predator Act to come into being. When I was a youngster in the 50's, I read about the witch hunts in Salem. In those days, someone THOUGHT to be a witch would be weighted down with stones and thrown into the water. If she floated, she wasn't a witch. Or she might be burned at the stake. I had thought that this country had moved away from that type of attitude towards its citizenry.

Do not mistake my acidic remarks to be those of someone who is pro-sexual predator. I have four beautiful children and two beautiful step-children. The thought of my wife or my children or my step-children falling prey to a sexual predator chills me. Still, the thought of our country evolving into a nation where groups of people are punished because they have certain psychological disorders - either congenital or acquired - likewise causes me to worry.

The persons you seek to commit against their will into a custodial environment for probably the rest of their life are the same people who were victimized by sexual predators when they were young. What happened to the society that grieved over the young boy who was sodomized by a relative at the age of 8. Now that that young boy has "acquired" his personality disorder, and is acting the way he was acted upon, where is the grieving society today?

Where will "Predator 2" take us? Must we wait until the person has actually committed a crime? Should we move now against the young girl who has been raped and sodomized by her step-father? Psychiatrists will tell you that the young girl has an above-normal probability that as a result of the sexual abuse heaped upon her, she will respond in kind to others. Do we wait until she victimizes someone, or, for the good of our society, should we not now incarcerate her?

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But I digress. Please forgive the initial emotional appeal to you. At 52 years of age, I accept the fact that an emotional appeal to a government body rarely succeeds. I accept the fact - but do not agree - that in this climate of "get tough on crime" we are going to lock people up for crimes they MAY do in the future as well as those they have already done. So let me proceed then to point out some substantive problems that I detect in "Predator 2":

1. Since the State has opted to place the burden upon itself to treat these individuals until they can be returned to society, and since these individuals are being held against their will until the State performs its duty to rehabilitate them, anything short of an all out psychiatric effort to bring these citizens (note they're not prisoners but citizens) back into the majority of society as quickly as possible is negligence. This means utilizing the finest psychiatric care available. This means doctors that are specialists in treating the disorder that the State has entitled "Sexually Violent Predator." I challenge this Senate sub-committee to go on record by saying that provisions have already been made to secure the finest psychiatrists available within the United States of America to treat these Individuals so that they can be returned to the freedom as guaranteed to them by both the Kansas and United States Constitutions.

2. Keeping in mind that the Kansas legislature has burdened the State with the responsibility for the treatment and rehabilitation of "sexual predators" and noting from the preamble of Senate Bill 525, the concession on the part of the State that the "prognosis for rehabilitating sexually violent predators in a prison setting is poor," I challenge the amendment to "Predator 2" which allows for the return of those adjudged to be a "Sexually Violent Predator" to the Department of Corrections. This return to a setting which the State concedes will not provide adequate rehabilitation and care is negligence of the first order. May I remind this Committee that the State has deprived these citizens of their freedom until such time as the State completes its work.

3. I challenge that portion of "Predator 2" - as it remains unchanged from "Predator 1" - wherein the individual will not be considered to be reviewed for sexual predator status until such time as they have completed their prison sentence. My challenge is based upon two aspects: (a) if the "Sexually Violent Predator" is to be segregated from all other inmates, why does the State allow them to roam freely among the current prison population; and (b) if the State truly desires to treat these individuals so they can be returned to society, then the commencement of care and treatment should begin immediately while they are serving their current prison term so as to satisfy the oft-stated goals of the Department of Corrections of "rehabilitating" the prisoner.

Allowing an individual to languish in their lengthy prison sentence knowing full well that down the road the Sexual Predator Act will be employed against them after they have served their debt to society, constitutes cruel and unusual punishment and is a violation of the Eighth Amendment to the United States Constitution.

4. I challenge the validity of Section 4(d) which, on its face, is contradictory. First the section says that the Court will conduct a probable cause hearing to determine

if the individual is a Sexually Violent Predator. If the Court so finds, the person will be transferred to an appropriate secure facility for an evaluation as to whether or not the person is a Sexually Violent Predator. Does this language strike anyone besides myself as being peculiar? If the Court has enough probable cause to place the person in custody, why is the follow-up evaluation required? Or vice versa, if this Committee feels that an evaluation must be performed to determine if a person is a Sexually Violent Predator, why do we bother with the probable cause hearing?

5. My biggest objection to the Sexual Predator Act is that the decision as to what will probably become a life time incarceration is left up to a jury. Even more repulsive is the proposed amendment in "Predator 2" to reduce the verdict of that jury from one which is unanimous to one that only needs a 10-2 split. I suggest that this proposed amendment to remove the requirement for the unanimous jury vote was brought on by prosecutors who seek a lower burden to place someone in prison for the rest of their life. The whole idea of allowing a jury to make a psychiatric decision is repulsive. I would ask this committee to amend that portion of the Sexual Predator Act to require clear and convincing psychiatric evidence by a panel of independent psychiatrists who have examined and studied the individual exhaustively and have reached their unanimous decision that the individual does in fact have psychiatric tendencies which would make him or her a higher risk to society.

6. I would ask this Committee to consider amending "Predator 2" to provide independent psychiatric evaluation of the defendant throughout the proceedings against him. Where the State seeks to invoke the Act, and the State - through the Department of Corrections or the parole board - notifies the State attorney that the person is about to be released, and the State furnishes the medical records and otherwise privileged information concerning the defendant to the State attorney, and whereas a hearing is conducted by the State against the defendant's will for purposes of incarcerating him in a State institution, it would seem a conflict of interest of the highest order for any state-employed psychologist and/or psychiatrist to conduct any psychiatric evaluation of the defendant at any stage of these proceedings. I would suggest that the State contract with the American Medical Association or the Kansas Medical Association to maintain on retainer a large pool of Board Certified psychiatrists who are skilled and proficient in treating the psychological disorder complained of in the "Predator 2" Act for purposes of independent evaluations. May I point out that under the Predator Act, once the person has been adjudged to be rehabilitated, the State attorney has the option of demanding a jury trial and to present evidence to rebut that psychiatric finding. Obviously, we cannot allow such a conflict of interest to exist where the State will be in a position of trying to ridicule its own psychiatrist. The propensity to always diagnose on the side of the State to avoid such a conflict is obvious.

7. I take issue with the "Predator 2" legislative decision that the defendant who is incarcerated under "Predator 2" will be kept in segregation. This should be a decision left to the independent psychiatrists to determine whether or not it is to the defendant's benefit to have controlled contact with other people.

8. I take issue with that portion of "Predator 2" that says that a person will not be released until such time as they are cured. Where medication is available and the Board certified psychiatrist says that by proper medication, the person is no longer a risk to society, this committee should not intervene in that person's right to his or her freedom. Finally, I ask this Committee to read carefully a November, 1994 decision from the United States Supreme Court entitled, *Department of Revenue of Montana vs. Kurth Ranch*, 521 U.S. _____, 128 L.Ed.2d 767 (1994). May I also draw your attention to *United States vs. 405,089.23 in U.S. Currency*, ____ F.2d _____, 1994 W.L. 476736 (9th Cir. Cal. September 6, 1994). These two cases should be sufficient to convince this Committee that the "civil" action contemplated in "Predator 2" punishes an individual for activities for which criminal prosecution has been sought (and had) and therefore, constitutes multiple punishment and is barred pursuant to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

In conclusion, I ask this Committee to repeal the Sexual Predator Act in totality. May I remind this Committee that history has taught us that when nations have moved against a class of people based upon their race or mental infirmities, history has not looked kindly upon them. I cite as an example, the efforts of the United States Government in clearing out those dangerous hostiles, the Native Americans, who infested this land and made inhabitation by the European races unsafe. May I point out the efforts of Nazi Germany in the 1930's and 1940's to eradicate those with psychological disorders - either congenital or acquired - less they taint the Ayrian race. And, may I point out the efforts of the United States Government in rounding up Japanese following Pearl Harbor because they "might" commit a crime of espionage. The Indians, Japanese and mentally retarded all shared one thing in common with those being prosecuted under the Sexual Predator Act - they were all punished not for what they'd done but for what the current society feared they <u>might</u> do in the future. History does not look favorably upon the governments who acted in such a fashion. And, I dare say, history will not look kindly upon those of you who maintain the Sexual Predator Act.

SB 3

Testimony in Opposition to Senate Bill 3
Thursday, February 2, 1995
Senate Judiciary Committee
Hon. Tim Emert, Chair

My name is Carla Dugger. I am the Associate Director of the American Civil Liberties Union of Kansas and Western Missouri, a membership organization which supports and defends civil liberties.

ACLU submitted testimony last year in opposition to SB 525, which enacted the Sexual Predators Act. Our position on the enacting legislation has not changed, and the provisions of Senate Bill 3 have not alleviated any of our previous concerns. These amendments do in fact exacerbate and underscore the problems we raised last year, and give what seems to be a truer picture of the intent of proponents than was admitted to in the 1994 legislative session.

Senate Bill 525 mandates preventive detention in the name of treatment. Last year we cautioned, "To the extent that the state fails to keep the treatment promise by providing real services, the court is likely to find substantive due process violations and a statute that is punitive in purpose." Certainly the new provision in Senate Bill 3 which allows SRS to contract with the Department of Corrections for the confinement of those found to be sexual predators is a big step away from adequate treatment facilities, and is further logical evidence of the criminal, not civil, nature of this legislation at its heart.

Last year, when an early version of SB 525 specified six, not twelve, jurors would be all that would be needed for the commitment hearing, ACLU's testimony stated, "In recognizing the right to trial by jury, the state recognizes the high standard of proof in the proceedings and the appropriateness of a jury determination of the need for involuntary commitment ... however, where a lifetime commitment with little opportunity for release is at issue, the jury number should be set at twelve."

There are many ways to skin a cat, and the proponents have found one in Senate Bill 3 -- not by reducing the number of jurors but by allowing a verdict reached by 10 of 12 to stand. Can a verdict of 9 of 12, 8 of 12, 7 of 12 be far behind? At least legislators next year will have somewhere to go to appear "tough on crime."

ACLU is criticized by proponents of this legislation for defending the rights of sexual predators, as if such exclusions were written into the Bill of Rights (something like, "everyone has the right to a fair trial except the people we really hate.") Yes, even sexual predators need the protection of due process and protection from legislation such as this, which pretends to exchange rights in an even swop for treatment, and then -- finding the treatment too expensive and the process too cumbersome -- furiously backpedals on the promise.

However, ACLU's underlying premise in this case as in all others is that rights taken away from the most vilified and vulnerable can be taken away from others. This legislation, which pretends to be civil and is really criminal, which pretends to provide meaningful treatment but doesn't, and which -- worst of all -- "convicts" persons based not on what they've done but on what they may do in the future -- provides a dangerous precedent for other crimes and other people.

ACLU urges your rejection of Senate Bill 3, and the repeal of Senate Bill 525.

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Attachment 7

TOM WINTERS
Commissioner - Third District
CHAIRMAN PRO TEM

BOARD OF COUNTY COMMISSIONERS

SEDGWICK COUNTY, KANSAS

COUNTY COURTHOUSE • SUITE 320 • 525 NORTH MAIN • WICHITA, KANSAS 67203-3759
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Senate Judiciary Committee

Senate Bill 131

Testimony of Commissioner Tom Winters
Sedgwick County Commissioner, District Three

February 2, 1995

Chairman Emert and members of the Committee, I am Commissioner Tom Winters. I am speaking on behalf of the Sedgwick County Commission regarding a problem we have with the current sexual predator law. Thank you for the opportunity to appear before you.

First let me assure you that we are not disagreeing with the legislative intent to keep sexual predators out of society. We wholeheartedly support that objective.

However, it has created a problem for Counties. As County Commissioners, we have been put in the position of paying for both the District Attorney's cost for evaluation and prosecution of the individual predators, as well as paying to hire outside legal counsel to defend those predators.

In the last few months of 1994, we were involved in four cases where individuals met the criteria that needed investigation. Two cases went to trial, two did not. The cost to Sedgwick County to handle these four cases was approximately $80,000. Our District Attorney advises us that there may be as many as 170 individuals scheduled for release in the next year that need to be reviewed. We would like to have assistance from the state in meeting the fiscal responsibilities associated with this law.

We believe the Indigent Defense Fund of the State is the vehicle to meet this need. It is in place and works well for those who cannot afford their own defense counsel.

This is a law the entire states wants. We respectfully request your consideration of mutual responsibility in the cost of its implementation.

Senate Judiciary Comm
2-2-95
Attachment 8

SEDGWICK COUNTY, KANSAS

LEGAL DEPARTMENT

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Senate Judiciary Committee

Senate Bill 131

Testimony of Stephen B. Plummer
Sedgwick County Counselor

February 2, 1995

> Chairman Emert and members of the Committee, I am Steve Plummer, Sedgwick County Counselor. I am speaking on behalf of the Sedgwick County Commission regarding proposed amendments to the sexual predator law. Thank you for the opportunity to appear before you.

The Board of County Commissioners of Sedgwick County supports the overall objective of the sexual predator law: namely, to keep dangerous sexual predators off the streets and in an appropriate institutional setting. However, the Board believes counties should not have to bear the cost of providing attorneys and expert witnesses for accused sexual predators.

We support the amendments contained in Senate Bill 131. We urge you to pass the bill out of committee for the following reasons.

First, the Board of Indigent Defense Services already provides payment for attorneys and expert witnesses assisting indigent criminal defendants and also indigent persons pursuing certain civil remedies, such as habeas corpus relief. The proposed amendments would simply be a logical extension of services already provided by the Board in criminal and civil cases.

Secondly, the Board of Indigent Defense Services already has a system in place for reviewing and paying bills submitted by attorneys and expert witnesses. The proposed amendments would take advantage of the existing system and expand its usefulness.

Third, the Board of Indigent Defense Services already has a fee schedule in place for attorneys and expert witnesses. The proposed amendments would insure that attorneys and expert witnesses are paid uniform fees

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rather than have each county set its own fees. This, in turn, would insure that representation is uniform across the state, whereas it may not be if each county sets its own fee schedules.

Fourth, counties would have to duplicate the efforts of the Board if counties pay these defense costs. Each county would have to create a system for reviewing and paying bills and setting fee schedules. This would prove extremely wasteful, particularly when the Board already provides these services statewide.

Fifth, counties already pay the cost of prosecuting criminal defendants and now sexual predators. It is extremely unfair to saddle the counties with the additional cost of defending the same individuals counties are paying to have prosecuted. County taxpayers are being doubly taxed for helping resolve a statewide problem.

We support Senate Bill 131 and urge you to adopt it. I'll be glad to answer any questions you may have about our position on this bill.

Thank you.