Approved: February 17, 1999
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:13 a.m. on February 18, 1999 in Room123-S of the Capitol.

All members were present except: Senator Pugh (excused)

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research (excused)
Mary Blair, Secretary

Conferees appearing before the committee:
Pat Baker, Kansas Association of School Boards

Others attending: see attached list

SB 203–concerning school safety and security

Conferee Bakers testified in support of **SB 203.** She revealed how language changes in the bill will clarify for local school boards and local school districts the duty to report potentially dangerous behaviors. She further cited **SB 191** and **HB 2201** and suggested these bills might be "hooked" together with **SB 203.** (attachment 1 - includes SB 191 with language changes) Discussion followed.

Written testimony opposing **SB 203** was submitted by Craig Grant, Kansas National Education Association. (attachment 2)

SB 168–concerning criminal procedure; relating to discovery; expert witness

The Chair briefly reviewed **SB 168** which had been scheduled to be heard on 2-17-99 but was not due to time constraints. He offered to hear opposing statements to the bill and, hearing none, called for a vote. Senator Vratil moved to pass the bill out favorably, Senator Goodwin seconded, carried. Previously submitted testimony not heard on **SB 168** on 2-17-99 is as follows: Jim Clark, Kansas County and District Attorneys Association (support); (attachment 3) Dave Debenham, Office of Attorney General (support); (attachment 4) and Thomas Bartee, Kansas Association of Criminal Defense Lawyers (oppose). (attachment 5)

Action on bills previously heard and subcommittee reports and action:

SB 143–an act concerning civil procedure; relating to exemptions from claims of creditors; pension and retirement assets
SB 92–an act concerning crime, criminal procedure and punishment; relating to parole hearings; comments of victims
SB 119–an act concerning the Kansas code for care of children; relating to post-termination dispositional alternatives following voluntary relinquishment of parental rights
SB 181–an act concerning crimes and punishment; relating to determination of criminal history classification; assault adjudications and convictions
SB 131–an act concerning crimes, criminal procedure and punishment; prescribing certain penalties
SB 97–an act concerning small claims procedure; relating to corporate representation

Following a summary of **SB 143** Senator Vratil moved to pass the bill out favorably, Senator Bond seconded, carried. (attachment 6) The Chair summarized **SB 92** which had been heard in Committee where an amendment had been recommended to clarify technological language. (See 2-10-99 minutes, att. 8) Senator Bond moved to pass the bill out favorably amending the language to read "pre-recorded comments by any technological means", Senator Vratil seconded, carried. Senator Oleen discussed **SB 119** stating that her subcommittee recommended a provision be added to the bill that would ensure that the action would be considered a Child in Need of Care action and the court would hear the adoption petition filed under Chapter 38 and also that the effective date of the bill is publication in the Kansas Register. Senator Oleen moved to

pass the bill out favorably with the amended language, Senator Vratil seconded, carried. (See 2-10-99 minutes, att. 8) In the absence of Senator Pugh, the Chair reviewed **SB 181.** (attachment 7) Following discussion Senator Bond moved to pass the bill out favorably, Senator Goodwin seconded, carried. The Chair reviewed **SB 131**, which called for adjustments to the sentencing grid. Sentencing Commissioner Tombs was present and offered clarification during discussion. (no attachment) Senator Bond moved to amend the bill to remove the references of going from a Hard 40 to a Hard 50, Senator Vratil seconded, carried. Senator Bond moved to pass the bill out favorably as amended, Senator Goodwin seconded, carried 9-1 with Senator Donovan voting nay. The Chair reviewed **SB 97** and suggested the bill be amended to state "corporations can be represented in small claims court by a president or treasurer of the corporation as long as that representative is not a lawyer." During discussion Senator Vratil moved to amend the jurisdiction limit in **SB 97** to $300, Senator Petty seconded. After further discussion and a vote, the motion was defeated. Senator Bond moved to adopt the amendment the Chair recommended, Senator Harrington seconded, carried. Senator Bond moved to pass the bill out favorably as amended, Senator Harrington seconded, carried.

The meeting adjourned at 10:57 a.m. The next scheduled meeting is Monday, February 22, 1999.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 18 February 1999

NAME	REPRESENTING
Eunice M. Schroeder	Stevens County Library / SWKLS
Ruby Martin	Rawlins County Library / SWKLS
Catherine Moreland	Morrill Public Library, Hiawatha
Ruth Kaye Clark	NEKLS executive Board
Patti Butcher	NEKLS, Lawrence
Laura DeBaun	NEKLS, Lawrence
Max M. Burson	Friends University Edmund Stanley Library
Bill Ulty	Librarian, Garden City Community College
Marilyn Daniels	Northeast Kansas Library System Gov. Appt. for Leavenworth Co.
Mary Simpson	NEKLS Exec. Bd. - Atchison Co.
David A. Hems	NEKLS Exec. Bd - Leavenworth
Ellen McNe	Johnson Co. L&T Bd.
Kathleen Ryan	Olathe Public Library
Frances Flynn	Johnson County Libraries
Cindy Stobbs	Coffey County Libraries
Stephanie Tafoya	Finney Co. Public Library
Mary Jo Cousins	Finney County Public Library
Gregory Tuch	Southwestern College
Teresa Burniewych	Augusta Public Library

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb 18, 1999

NAME	REPRESENTING
Roselyn James-Martin	SRS-Children & Family Services
Pat Baker	KASB
MELISSA BOISEN	THE FARM, INC.
Kevin A. Graham	KSC
Barb Jones	KSC
Steve Dickerson	KTLA
Diane Gjerstad	USD 259
Ben Aedrich	Leadership 2000
Carol Mott	" " , Pratt
Teresa Dodson	KLA
Carole Deblen	Kansas Library Assn.
Judy Montgomery	KLA
Jane Hahn	Kans. Library Assn.
Patrick Hershall	OJA
JAMES CLARK	KCDAA
Ernie Richardson	Leadership 2000 (Pratt)
JAKE FISHER	WHITNEY DAMRON
DOROTHEA JACKSON	NCKLS
Nathan Schroeder	Stevens Co. Library

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/18/99

NAME	REPRESENTING
Pat Gaunce	Wyandotte County Libraries
Carole Mitchell	Douglas County Library
Jim Mings	Northeast Kansas Library System
Karen Socha	South Central Kans Library System Hutchinson KS
Robert Banks	Topeka & Shawnee County Public Library Topeka, KS
GERALD SPENCER	BROWN COUNTY LIBRARIES
Annette Burks	BJCF Library
Melanie Miller	Hays Public Library

DAILY AGENDA

February 18, 1999

Hearing and possible action on:

SB 203 - concerning school safety and security

	Proponent	Opponent
SB 203	Pat Baker, Ks. Ass'n. of School Boards	Written testimony opposing the bill submitted by KNEA

-Subcommittee reports and action

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600

Testimony on Senate Bill No. 203
before the
Senate Judiciary Committee

by
Patricia E. Baker
Deputy Executive Director/General Counsel
Kansas Association of School Boards
February 18, 1999

Mr. Chairman, members of the committee, thank you for the opportunity to appear in support of Senate Bill 203.

We believe the provisions of this bill, especially Section 5, will clarify for local school boards and local school districts the duty to report potentially dangerous behaviors.

Under current law, school employees are required to report the identity of certain students as shown in Section 5, page 11, lines 20 through 36. We request that the laundry list be eliminated and the language in lines 36 through 39 be substituted. Information regarding behavior described in the list may not be known specifically by school officials although they may know of dangerous behavior which warrants greater diligence.

This is similar to language found in House Bill 2201 which had hearings in the House Education Committee earlier this week.

Also, we suggest a change in the language of the reporting to law enforcement of certain student behaviors. School officials are not trained to identify felonies and misdemeanors and the current language has caused confusion.

Finally, I would like to call your attention to Senate Bill 191, which had a hearing in the Senate Education Committee this morning. We support the changes in that bill as well as the above and hope that our recommended changes as well as those in Senate Bill 191 and House Bill 2201 might be looked at together.

Thank you.

Session of 1999

SENATE BILL No. 191

By Committee on Education

2-1

AN ACT concerning school safety and security; relating to the reporting of information regarding specified pupils; amending K.S.A. 1998 Supp. 38-1502, 38-1507, 38-1602, 72-89b02 and 72-89b03 and repealing the existing sections; also repealing K.S.A. 1998 Supp. 38-1502c and 38-1602a.

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

Section 1. K.S.A. 1998 Supp. 72-89b02 is hereby amended to read as follows: 72-89b02. As used in this act:

(a) "Board of education" means the board of education of a unified school district or the governing authority of an accredited nonpublic school.

(b) "School" means a public school or an accredited nonpublic school.

(c) "Public school" means a school operated by a unified school district organized under the laws of this state.

(d) "Accredited nonpublic school" means a nonpublic school participating in the quality performance accreditation system.

(e) "School employee" means any ~~teacher or other~~ *administrative,* professional or paraprofessional employee of a school ~~who has exposure to a pupil specified in subsection (a)(1) through (5) of K.S.A. 1998 Supp. 72-89b03 and amendments thereto~~.

~~(f) "Administrator" means any individual who is employed by a school in a supervisory or managerial capacity.~~

(f) "Superintendent of schools" means the superintendent of schools appointed by the board of education of a unified school district or the chief administrative officer of an accredited nonpublic school appointed by the board of education of the school.

New Sec. 2. (a) If a school employee has knowledge that a pupil is a pupil to whom the provisions of this section apply, the school employee shall report such knowledge and identify the pupil to the superintendent of schools. The superintendent of schools shall investigate the matter and, upon determining that the identified pupil is a pupil to whom the provisions of this section apply, shall provide the reported knowledge and identify the pupil to all school employees who are directly involved or likely to be directly involved in teaching or providing other school related

services to the pupil.

(b) The provisions of this section apply to:

(1) Any pupil who has been expelled for the reason provided by subsection (c) of K.S.A. 72-8901, and amendments thereto, for conduct which endangers the safety of others;

(2) any pupil who has been expelled for the reason provided by subsection (d) of K.S.A. 72-8901, and amendments thereto;

(3) any pupil who has been expelled under a policy adopted pursuant to K.S.A. 1998 Supp. 72-89a02, and amendments thereto;

(4) any pupil who has been adjudged to be a juvenile offender and whose offense, if committed by an adult, would constitute a felony under the laws of Kansas or the state where the offense was committed, except any pupil adjudicated as a juvenile offender for a felony theft offense involving no direct threat to human life; and

(5) any pupil who has been tried and convicted as an adult of any felony, except any pupil convicted of a felony theft crime involving no direct threat to human life.

(c) As used in this section, the term "knowledge" means familiarity because of direct involvement or observation of any incident specified in subsection (b) which causes the provisions of this section to apply to a pupil.

Sec. 3. K.S.A. 1998 Supp. 72-89b03 is hereby amended to read as follows: 72-89b03. (a) ~~School employees with knowledge that a pupil is a pupil specified in this subsection shall inform administrators and administrators with knowledge that a pupil is a pupil specified in this subsection shall inform all other school employees of the following:~~

~~(1) The identity of any pupil who has been expelled as provided by subsection (c) of K.S.A. 72-8901 and amendments thereto for conduct which endangers the safety of others;~~

~~(2) the identity of any pupil who has been expelled as provided by subsection (d) of K.S.A. 72-8901 and amendments thereto;~~

~~(3) the identity of any pupil who has been expelled under a policy adopted pursuant to K.S.A. 1998 Supp. 72-89a02 and amendments thereto;~~

~~(4) the identity of any pupil who has been adjudged to be a juvenile offender and whose offense, if committed by an adult, would constitute a felony under the laws of Kansas or the state where the offense was committed, except that this subsection shall not apply to an adjudication as a juvenile offender involving a felony theft offense involving no direct threat to human life; and~~

~~(5) the identity of any pupil who has been tried and convicted as an adult of any felony, except that this subsection shall not apply to any felony conviction of theft involving no direct threat to human life.~~

~~(b)~~ Each board of education shall adopt a policy that includes:

(1) A requirement that an immediate report be made to the appropriate state or local law enforcement agency by or on behalf of any school employee who knows or has reason to believe that an act has been committed at school, on school property, or at a school supervised activity and that the act involved conduct which constitutes the commission of a felony or misdemeanor or which involves the possession, use or disposal of explosives, firearms or other weapons; and

(2) the procedures for making such a report.

~~(c)~~ *(b)* ~~Administrators and other~~ School employees shall not be subject to the provisions of subsection (b) of K.S.A. 1998 Supp. 72-89b04, *and amendments thereto* if:

(1) They follow the procedures from a policy adopted pursuant to the provisions of subsection ~~(b)~~ *(a)*; or

(2) their board of education fails to adopt such policy.

~~(d)~~ *(c)* Each board of education shall annually compile and report to the state board of education at least the following information relating to school safety and security: The types and frequency of criminal acts that are required to be reported pursuant to the provisions of subsection ~~(b)~~ *(a)*, disaggregated by occurrences at school, on school property and at school supervised activities. The report shall be incorporated into and become part of the current report required under the quality performance accreditation system.

~~(e)~~ *(d)* Each board of education shall make available to pupils and their parents, to school employees and, upon request, to others, district policies and reports concerning school safety and security, ~~including those required by this subsection,~~ except that the provisions of this subsection shall not apply to ~~the disclosures required~~ *reports made by a superintendent of schools and school employees* pursuant to ~~subsection (a)~~ *section 2 and amendments thereto*.

~~(f)~~ *(e)* Nothing in this section shall be construed or operate in any manner so as to prevent any school employee from reporting criminal acts to school officials and to appropriate state and local law enforcement agencies.

~~(g)~~ *(f)* The state board of education shall extract the information relating to school safety and security from the quality performance accreditation report and transmit the information to the governor, the legislature, the attorney general, the secretary of health and environment, ~~and~~ the secretary of social and rehabilitation services, *and the commissioner of juvenile justice*.

~~(h)~~ *(g)* No board of education and no member of any such board shall be liable for damages in a civil action for the actions or omissions of ~~any administrator~~ *a superintendent of schools* pursuant to the requirements

and provisions of the Kansas school safety and security act and to this end such board and members thereof shall have immunity from civil liability related thereto. No ~~administrator~~ *superintendent of schools* or school employee shall be liable for damages in a civil action for the actions or omissions of such ~~administrator~~ *superintendent* or school employee pursuant to the requirements and provisions of the Kansas school safety and security act and to this end such ~~administrator or~~ *superintendent of schools and* school employee shall have immunity from civil liability related thereto.

Sec. 4. K.S.A. 1998 Supp. 38-1502 is hereby amended to read as follows: 38-1502. As used in this code, unless the context otherwise indicates:

(a) "Child in need of care" means a person less than 18 years of age who:

(1) Is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;

(2) is without the care or control necessary for the child's physical mental or emotional health;

(3) has been physically, mentally or emotionally abused or neglected or sexually abused;

(4) has been placed for care or adoption in violation of law;

(5) has been abandoned or does not have a known living parent;

(6) is not attending school as required by K.S.A. 72-977 or 72-1111, and amendments thereto;

(7) except in the case of a violation of K.S.A. 41-727, subsection (j) of K.S.A. 74-8810 or subsection (m) or (n) of K.S.A. 79-3321, and amendments thereto, or, except as provided in subsection (a)(12) of K.S.A. 21-4204a and amendments thereto, does an act which, when committed by a person under 18 years of age, is prohibited by state law, city ordinance or county resolution but which is not prohibited when done by an adult;

(8) while less than 10 years of age, commits any act which if done by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-3105 and amendments thereto;

(9) is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;

(10) is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee;

(11) has been residing in the same residence with a sibling or another person under 18 years of age, who has been physically, mentally or emo-

tionally abused or neglected, or sexually abused; or

(12) while less than 10 years of age commits the offense defined in K.S.A. 21-4204a and amendments thereto.

(b) "Physical, mental or emotional abuse or neglect" means the infliction of physical, mental or emotional injury or the causing of a deterioration of a child and may include, but shall not be limited to, failing to maintain reasonable care and treatment, negligent treatment or maltreatment or exploiting a child to the extent that the child's health or emotional well-being is endangered. A parent legitimately practicing religious beliefs who does not provide specified medical treatment for a child because of religious beliefs shall not for that reason be considered a negligent parent; however, this exception shall not preclude a court from entering an order pursuant to subsection (a)(2) of K.S.A. 38-1513 and amendments thereto.

(c) "Sexual abuse" means any act committed with a child which is described in article 35, chapter 21 of the Kansas Statutes Annotated and those acts described in K.S.A. 21-3602 or 21-3603, and amendments thereto, regardless of the age of the child.

(d) "Parent," when used in relation to a child or children, includes a guardian, conservator and every person who is by law liable to maintain, care for or support the child.

(e) "Interested party" means the state, the petitioner, the child, any parent and any person found to be an interested party pursuant to K.S.A. 38-1541 and amendments thereto.

(f) "Law enforcement officer" means any person who by virtue of office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

(g) "Youth residential facility" means any home, foster home or structure which provides 24-hour-a-day care for children and which is licensed pursuant to article 5 of chapter 65 of the Kansas Statutes Annotated.

(h) "Shelter facility" means any public or private facility or home other than a juvenile detention facility that may be used in accordance with this code for the purpose of providing either temporary placement for the care of children in need of care prior to the issuance of a dispositional order or longer term care under a dispositional order.

(i) "Juvenile detention facility" means any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders which must not be a jail.

(j) "Adult correction facility" means any public or private facility, secure or nonsecure, which is used for the lawful custody of accused or convicted adult criminal offenders.

(k) "Secure facility" means a facility which is operated or structured so as to ensure that all entrances and exits from the facility are under the

exclusive control of the staff of the facility, whether or not the person being detained has freedom of movement within the perimeters of the facility, or which relies on locked rooms and buildings, fences or physical restraint in order to control behavior of its residents. No secure facility shall be in a city or county jail.

(l) "Ward of the court" means a child over whom the court has acquired jurisdiction by the filing of a petition pursuant to this code and who continues subject to that jurisdiction until the petition is dismissed or the child is discharged as provided in K.S.A. 38-1503 and amendments thereto.

(m) "Custody," whether temporary, protective or legal, means the status created by court order or statute which vests in a custodian, whether an individual or an agency, the right to physical possession of the child and the right to determine placement of the child, subject to restrictions placed by the court.

(n) "Placement" means the designation by the individual or agency having custody of where and with whom the child will live.

(o) "Secretary" means the secretary of social and rehabilitation services.

(p) "Relative" means a person related by blood, marriage or adoption but, when referring to a relative of a child's parent, does not include the child's other parent.

(q) "Court-appointed special advocate" means a responsible adult other than an attorney guardian *ad litem* who is appointed by the court to represent the best interests of a child, as provided in K.S.A. 38-1505a and amendments thereto, in a proceeding pursuant to this code.

(r) "Multidisciplinary team" means a group of persons, appointed by the court or by the state department of social and rehabilitation services under K.S.A. 38-1523a and amendments thereto, which has knowledge of the circumstances of a child in need of care.

(s) "Jail" means:

(1) An adult jail or lockup; or

(2) a facility in the same building or on the same grounds as an adult jail or lockup, unless the facility meets all applicable standards and licensure requirements under law and there is (A) total separation of the juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents in the respective facilities; (B) total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, health care, dining, sleeping, and general living activities; and (C) separate juvenile and adult staff, including management, security staff and direct care staff such as recreational, educational and counseling.

(t) "Kinship care" means the placement of a child in the home of the

child's relative or in the home of another adult with whom the child or the child's parent already has a close emotional attachment.

(u) "Juvenile intake and assessment worker" means a responsible adult authorized to perform intake and assessment services as part of the intake and assessment system established pursuant to K.S.A. 75-7023, and amendments thereto.

(v) "Abandon" means to forsake, desert or cease providing care for the child without making appropriate provisions for substitute care.

(w) "Permanent guardianship" means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining without ongoing state oversight or intervention. The permanent guardian stands in loco parentis and exercises all the rights and responsibilities of a parent.

(x) "Aggravated circumstances" means the abandonment, torture, chronic abuse, sexual abuse or chronic, life threatening neglect of a child.

(y) "Permanency hearing" means a notice and opportunity to be heard is provided to interested parties, foster parents, preadoptive parents or relatives providing care for the child. The court, after consideration of the evidence, shall determine whether progress toward the case plan goal is adequate or reintegration is a viable alternative, or if the case should be referred to the county or district attorney for filing of a petition to terminate parental rights or to appoint a permanent guardian.

(z) "Extended out of home placement" means a child has been in the custody of the secretary and placed with neither parent for 15 of the most recent 22 months beginning 60 days after the date at which a child in the custody of the secretary was removed from the home.

(aa) "Educational institution" means all schools at the elementary and secondary levels.

(bb) "Educator" means any administrative, professional or paraprofessional employee of an educational institution who has exposure to a pupil specified in subsection (b)(1) through (5) of section 2 and amendments thereto.

Sec. 5. K.S.A. 1998 Supp. 38-1507 is hereby amended to read as follows: 38-1507. (a) Except as otherwise provided, in order to protect the privacy of children who are the subject of a child in need of care record or report, all records and reports concerning children in need of care, including the juvenile intake and assessment report, received by the department of social and rehabilitation services, a law enforcement agency or any juvenile intake and assessment worker shall be kept confidential except: (1) To those persons or entities with a need for information that is directly related to achieving the purposes of this code, or (2) upon an order of a court of competent jurisdiction pursuant to a determination by the court that disclosure of the reports and records is

in the best interests of the child or are necessary for the proceedings before the court, or both, and are otherwise admissible in evidence. Such access shall be limited to in camera inspection unless the court otherwise issues an order specifying the terms of disclosure.

(b) The provisions of subsection (a) shall not prevent disclosure of information to an educational institution or to individual educators about a pupil specified in subsection ~~(a)~~ *(b)*(1) through (5) of ~~K.S.A. 1998 Supp. 72-89b03~~ *section 2* and amendments thereto.

(c) When a report is received by the department of social and rehabilitation services, a law enforcement agency or any juvenile intake and assessment worker which indicates a child may be in need of care, the following persons and entities shall have a free exchange of information between and among them:

(1) The department of social and rehabilitation services;

(2) the commissioner of juvenile justice;

(3) the law enforcement agency receiving such report;

(4) members of a court appointed multidisciplinary team;

(5) an entity mandated by federal law or an agency of any state authorized to receive and investigate reports of a child known or suspected to be in need of care;

(6) a military enclave or Indian tribal organization authorized to receive and investigate reports of a child known or suspected to be in need of care;

(7) a county or district attorney;

(8) a court services officer who has taken a child into custody pursuant to K.S.A. 38-1527, and amendments thereto;

(9) a guardian ad litem appointed for a child alleged to be in need of care;

(10) an intake and assessment worker; and

(11) any community corrections program which has the child under court ordered supervision.

(d) The following persons or entities shall have access to information, records or reports received by the department of social and rehabilitation services, a law enforcement agency or any juvenile intake and assessment worker. Access shall be limited to information reasonably necessary to carry out their lawful responsibilities to maintain their personal safety and the personal safety of individuals in their care or to diagnose, treat, care for or protect a child alleged to be in need of care.

(1) A child named in the report or records.

(2) A parent or other person responsible for the welfare of a child, or such person's legal representative.

(3) A court-appointed special advocate for a child, a citizen review board or other advocate which reports to the court.

(4) A person licensed to practice the healing arts or mental health profession in order to diagnose, care for, treat or supervise: (A) A child whom such service provider reasonably suspects may be in need of care; (B) a member of the child's family; or (C) a person who allegedly abused or neglected the child.

(5) A person or entity licensed or registered by the secretary of health and environment or approved by the secretary of social and rehabilitation services to care for, treat or supervise a child in need of care. In order to assist a child placed for care by the secretary of social and rehabilitation services in a foster home or child care facility, the secretary shall provide relevant information to the foster parents or child care facility prior to placement and as such information becomes available to the secretary.

(6) A coroner or medical examiner when such person is determining the cause of death of a child.

(7) The state child death review board established under K.S.A. 22a-243, and amendments thereto.

(8) A prospective adoptive parent prior to placing a child in their care.

(9) The department of health and environment or person authorized by the department of health and environment pursuant to K.S.A. 59-512, and amendments thereto, for the purpose of carrying out responsibilities relating to licensure or registration of child care providers as required by chapter 65 of article 5 of the Kansas Statutes Annotated, and amendments thereto.

(10) The state protection and advocacy agency as provided by subsection (a)(10) of K.S.A. 65-5603 or subsection (a)(2)(A) and (B) of K.S.A. 74-5515, and amendments thereto.

(11) Any educational institution to the extent necessary to enable the educational institution to provide the safest possible environment for its pupils and employees.

(12) Any educator to the extent necessary to enable the educator to protect the personal safety of the educator and the educator's pupils.

(e) Information from a record or report of a child in need of care shall be available to members of the standing house or senate committee on judiciary, house committee on appropriations, senate committee on ways and means, legislative post audit committee and joint committee on children and families, carrying out such member's or committee's official functions in accordance with K.S.A. 75-4319 and amendments thereto, in a closed or executive meeting. Except in limited conditions established by ⅔ of the members of such committee, records and reports received by the committee shall not be further disclosed. Unauthorized disclosure may subject such member to discipline or censure from the house of representatives or senate.

(f) Nothing in this section shall be interpreted to prohibit the secre-

tary of social and rehabilitation services from summarizing the outcome of department actions regarding a child alleged to be a child in need of care to a person having made such report.

(g) Disclosure of information from reports or records of a child in need of care to the public shall be limited to confirmation of factual details with respect to how the case was handled that do not violate the privacy of the child, if living, or the child's siblings, parents or guardians. Further, confidential information may be released to the public only with the express written permission of the individuals involved or their representatives or upon order of the court having jurisdiction upon a finding by the court that public disclosure of information in the records or reports is necessary for the resolution of an issue before the court.

(h) Nothing in this section shall be interpreted to prohibit a court of competent jurisdiction from making an order disclosing the findings or information pursuant to a report of alleged or suspected child abuse or neglect which has resulted in a child fatality or near fatality if the court determines such disclosure is necessary to a legitimate state purpose. In making such order, the court shall give due consideration to the privacy of the child, if, living, or the child's siblings, parents or guardians.

(i) Information authorized to be disclosed in subsections (d) through (g) shall not contain information which identifies a reporter of a child in need of care.

(j) Records or reports authorized to be disclosed in this section shall not be further disclosed, except that the provisions of this subsection shall not prevent disclosure of information to an educational institution or to individual educators about a pupil specified in subsection ~~(a)~~ *(b)*(1) through (5) of ~~K.S.A. 1998 Supp. 72-89b03~~ *section 2* and amendments thereto.

(k) Anyone who participates in providing or receiving information without malice under the provisions of this section shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceedings resulting from providing or receiving information.

(l) No individual, association, partnership, corporation or other entity shall willfully or knowingly disclose, permit or encourage disclosure of the contents of records or reports concerning a child in need of care received by the department of social and rehabilitation services, a law enforcement agency or a juvenile intake and assessment worker except as provided by this code. Violation of this subsection is a class B misdemeanor.

Sec. 6. K.S.A. 1998 Supp. 38-1602 is hereby amended to read as follows: 38-1602. As used in this code, unless the context otherwise

requires:

(a) "Juvenile" means a person 10 or more years of age but less than 18 years of age.

(b) "Juvenile offender" means a person who ~~does an act~~ *commits an offense* while a juvenile which if ~~done~~ *committed* by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-3105 and amendments thereto or who violates the provisions of K.S.A. 21-4204a or K.S.A. 41-727 or subsection (j) of K.S.A. 74-8810, and amendments thereto, but does not include:

(1) A person 14 or more years of age who commits a traffic offense, as defined in subsection (d) of K.S.A. 8-2117 and amendments thereto;

(2) a person 16 years of age or over who commits an offense defined in chapter 32 of the Kansas Statutes Annotated;

(3) a person ~~whose prosecution as an adult is authorized pursuant to K.S.A. 38-1636 and amendments thereto and whose prosecution results in the conviction of an adult crime; or~~

~~(4) a person who has been found to be an extended jurisdiction juvenile pursuant to subsection (a)(2) of K.S.A. 38-1636, and amendment thereto, and whose stay of adult sentence execution has been revoked~~ *under 18 years of age who previously has been:*

(A) Convicted as an adult under the Kansas code of criminal procedure;

(B) sentenced as an adult under the Kansas code of criminal procedure following termination of status as an extended jurisdiction juvenile pursuant to K.S.A. 38-16,126, and amendments thereto; or

(C) convicted or sentenced as an adult in another state or foreign jurisdiction under substantially similar procedures described in K.S.A. 38-1636, and amendments thereto, or because of attaining the age of majority designated in that state or jurisdiction.

(c) "Parent," when used in relation to a juvenile or a juvenile offender, includes a guardian, conservator and every person who is by law liable to maintain, care for or support the juvenile.

(d) "Law enforcement officer" means any person who by virtue of that person's office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

(e) "Youth residential facility" means any home, foster home or structure which provides twenty-four-hour-a-day care for juveniles and which is licensed pursuant to article 5 of chapter 65 of the Kansas Statutes Annotated.

(f) "Juvenile detention facility" means any secure public or private facility which is used for the lawful custody of accused or adjudicated juvenile offenders and which ~~must~~ *shall* not be a jail.

(g) "Juvenile correctional facility" means a facility operated by the commissioner for juvenile offenders.

(h) "Warrant" means a written order by a judge of the court directed to any law enforcement officer commanding the officer to take into custody the juvenile named or described therein.

(i) "Commissioner" means the commissioner of juvenile justice.

(j) "Jail" means:

(1) An adult jail or lockup; or

(2) a facility in the same building as an adult jail or lockup, unless the facility meets all applicable licensure requirements under law and there is (A) total separation of the juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents in the respective facilities; (B) total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, health care, dining, sleeping, and general living activities; and (C) separate juvenile and adult staff, including management, security staff and direct care staff such as recreational, educational and counseling.

(k) "Court-appointed special advocate" means a responsible adult, other than an attorney appointed pursuant to K.S.A. 38-1606 and amendments thereto, who is appointed by the court to represent the best interests of a child, as provided in K.S.A. 1998 Supp. 38-1606a, and amendments thereto, in a proceeding pursuant to this code.

(l) "Juvenile intake and assessment worker" means a responsible adult authorized to perform intake and assessment services as part of the intake and assessment system established pursuant to K.S.A. ~~76-3202~~ 75-7023, and amendments thereto.

(m) "Institution" means the following institutions: The Atchison juvenile correctional facility, the Beloit juvenile correctional facility, the Larned juvenile correctional facility and the Topeka juvenile correctional facility.

(n) "~~Sanction~~ *Sanctions* house" means a facility which is operated or structured so as to ensure that all entrances and exits from the facility are under the exclusive control of the staff of the facility, whether or not the person being detained has freedom of movement within the perimeters of the facility, or which relies on locked rooms and buildings, fences, or physical restraint in order to control *the* behavior of its residents. Upon an order from the court, a licensed juvenile detention facility may serve as a ~~sanction~~ *sanctions* house. A ~~sanction~~ *sanctions* house may be ~~physically~~ connected *physically* to a nonsecure shelter facility provided the ~~sanction~~ *sanctions* house is not a licensed juvenile detention facility.

(o) "Sentencing risk assessment tool" means an instrument administered to juvenile offenders which delivers a score, or group of scores,

describing, but not limited to describing, the juvenile's potential risk to the community.

(p) "Educational institution" means all schools at the elementary and secondary levels.

(q) "Educator" means any ~~administrator, teacher or other~~ *administrative*, professional or paraprofessional employee of an educational institution who has exposure to a pupil specified in subsection ~~(a)~~ *(b)*(1) through (5) of ~~K.S.A. 1998 Supp. 72-89b03~~ *section 2* and amendments thereto.

Sec. 7. K.S.A. 1998 Supp. 38-1502, 38-1502c, 38-1507, 38-1602, 38-1602a, 72-89b02 and 72-89b03 are hereby repealed.

Sec. 8. This act shall take effect and be in force from and after its publication in the statute book.

S Jud 2-18-99 Att 2

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 W. 10TH STREET / TOPEKA, KANSAS 66612-1686

Craig Grant Testimony
Senate Judiciary Committee
Thursday, February 18, 1999

Mr. Chairman and Members of the Committee: I apologize for submitting testimony in writing. I am out of state today and Mark Desetti is testifying elsewhere on another issue. We did want to express our opinion about SB 203.

Although Kansas NEA is pleased with the language on page eleven of the bill which loosens the section on which conduct to report, we are not in favor of the additional language on lines 37-39 of the bill which indicates that we are only going to report that this is a potentially dangerous student for that current school year. I guess this means that if a student commits a dangerous act on the last day of school, teachers will not have that knowledge the next school year. This will not help us keep our schools safe.

We believe that if a child has been involved in any of the five different situations described in current law (and which have been struck), that student is potentially dangerous for a number of years following that incident. I certainly want a teacher of my child to be informed if there is a potentially dangerous student in that classroom. Even if the incident happened in the third year, I want my child's fifth grade teacher to know. That is why we probably should not change lines 20 through 36 as we should keep very specific what needs to be reported.

Because of our great concerns with SB 203, we would ask that you not pass it out of committee favorably. Thank you for listening to our concerns.

Telephone: (785) 232-8271 FAX: (785) 232-6012

Sen Jud
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Att 2

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2-18-99
att 3

Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(785) 357-6351 • FAX (785) 357-6352 • e-mail kcdaa01@ink.org
EXECUTIVE DIRECTOR, JAMES W. CLARK

February 17, 1999

TO: Senate Judiciary Committee

FROM: Kansas County and District Attorneys Association

RE: Testimony in Support of **SB 168**

The Kansas County and District Attorneys Association is in support of **Senate Bill No. 168**, introduced at the Attorney General's request, as it alleviates the "trial by ambush", or more specifically, the "ambush by expert witness".

First of all, absent specific constitutional protections for the defendant, the rules of evidence apply equally to both parties in a criminal case. State v. Thomas, 252 Kan. 564 (1993). The proposed amendments to K.S.A. 22-3212 merely extend the right of discovery of the other side's expert testimony to both parties.

Second, we are ending a century that has witnessed historic scientific advances. More specifically, advances in science have revolutionized the ability to investigate and solve crimes, i.e. fingerprints and DNA. Furthermore, because of these advances, i.e. television, internet, ordinary citizens are fully aware of such advances, and their application in criminal cases. If a case does not include scientific evidence, jury panels drawn from this informed citizenry want to know why ("Where are the fingerprints?") More importantly, the failure to rely on advanced scientific techniques is a disservice to the criminal justice system in general, and more specifically, may even result in an injustice to a defendant.

This bill addresses two procedural issues regarding scientific or expert opinion evidence: the complexity of the testimony itself, and reciprocal discovery of that testimony.I. RECIPROCAL DISCOVERY. The changes effected by this bill would allow the State to better prepare its case when an expert is called on behalf of the defendant. With the exception of alibi witnesses under K.S.A. 22-3218, and pre-trial orders, K.S.A. 22-3217, defense counsel has no reciprocal statutory disclosure requirement. State v. Coleman, 253 Kan. 335 (1993). Even under the latter, reciprocal discovery is a matter of agreement, and enforcement of an agreement against a defendant is always subject to the claim of "manifest injustice". State v. Bright, 229 Kan. 185 (1981). Because of Brady disclosure requirements and open file policies in most prosecutor offices, the specific disadvantages to defendants are few in appellate decisions. In State v. Dillard, 66527, an unpublished Court of Appeals decision (12/13/91) defendant was denied access to a marriage counselor's notes as not authorized under K.S.A. 22-3212 as the notes were not the results or report of a physical or mental examination. In State v. Davis, 66078, unpublished Court of Appeals decision (12/13/91) defendant was denied access to psychological reports of the child abuse victim, as they were prepared for the CINC case and not the instant criminal case. II. EXPERT TESTIMONY. In addition to lack of reciprocity, the complexity of expert testimony requires advance notice and preparation time. The Legislature recognized this fact back in 1989 when it extended the notice requirement a defendant must serve in an insanity defense to include other defenses in which a mental condition is at issue, i.e. battered woman's syndrome. L. 1989, Ch.92, Sec. 34.

In conclusion, by providing the right to discovery of expert opinion testimony by both the state and the defendant, the bill advances criminal procedure to keep pace with society's increasing reliance on science. If scientific evidence is to play a part in a criminal trial, it should be applied openly and fairly, and not by ambush.

Sen Jud
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att 3

2-18-99
att

State of Kansas

Office of the Attorney General

301 S.W. 10th Avenue, Topeka 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215
FAX: 296-6296
TTY: 291-3767

TESTIMONY OF
DEPUTY ATTORNEY GENERAL DAVID B. DEBENHAM
BEFORE THE SENATE JUDICIARY COMMITTEE
RE: SENATE BILL 168
FEBRUARY 17, 1999

Mr. Chairman and Members of the Committee:

I appear before you today on behalf of Attorney General Carla J. Stovall, to ask for your support of Senate Bill 168. This bill would amend the language of K.S.A. 22-3212 and add a new provision, which would specifically provide for reciprocal discovery of expert witnesses in a criminal matter.

The change sought under K.S.A. 22-3212(*d*) is based on Rule 16(b)(1)(B) of the Federal Rules of Criminal Procedure. This change would provide for reciprocal discovery of a defense witness's reports when the witness is expected to testify at a hearing and the reports were prepared by the witness and relate to the witness's testimony. This change would allow the prosecuting attorney access to these documents in those situations when the defense witness will be testifying and the reports relate to the witness' testimony but it is not the intent of the defendant to introduce the report itself into evidence.

Defense attorneys and some judges interpret K.S.A. 22-3212(c),as it is currently written, to mean that the prosecuting attorney is only entitled to discovery of scientific or medical reports when the defendant intends to produce these items at any hearing. Essentially, this applies when the defendant intends to introduce the reports into evidence. If the defendant intends to have a witness testify regarding this material but does not intend to introduce the reports themselves into evidence, then the prosecuting attorney is not entitled to discovery of this material.

Prosecuting attorneys have been confronted with situations in which a defense witness is instructed either not to bring their reports to court or not to prepare reports. The result is trial by ambush. The amendment to the statute would provide for the discovery of this material if the defendant intends to have a witness testify at a hearing and the reports relate to the witness's testimony, even if the defense does not intend to produce or have the actual report introduced into evidence at the hearing.

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This material is already required to be disclosed by the prosecuting attorney regardless of whether the material or the testimony of the witness which is based on the reports will even be introduced by the prosecuting attorney. This change will facilitate full disclosure of the relevant scientific and medical results or reports not only when the defendant seeks to introduce the material but also when the defendant, through witnesses, seeks to introduce testimony regarding the reports but does not intend to introduce the reports. These types of reports should be subject to discovery in the interest of justice, not only when the defendant intends to introduce the reports but also when the defense intends to introduce the testimony of a witness and the witness' testimony is based upon these types of scientific or medical reports.

K.S.A. 22-3212(*c*), is a new provision, which would require the prosecuting attorney to furnish the defendant a written summary of the findings and facts relied upon by any expert witness that the prosecuting attorney intends to use at any hearing. This subsection would also require the prosecuting attorney to furnish the defendant with the expert witnesses' qualifications. This change is based on Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure

K.S.A. 22-3112(*e*), is also a new provision. This provision would allow the prosecuting attorney to obtain reciprocal discovery from the defendant by way of a written summary of the findings and facts relied upon by an expert witness and the expert witnesses' qualifications, which the defendant intends to use at any hearing, if the defendant has first sought discovery pursuant to the discovery statute. If the defendant has not sought discovery but intends to use an expert witness on the issue of the defendant's mental condition at any hearing, the prosecuting attorney would also be entitled to discovery of a written summary of the findings and facts relied upon by the expert witness and the expert witnesses' qualification. This change is based on Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure.

These changes seek to address those situations in which either a prosecuting attorney or a defendant intends to rely upon the testimony of an expert witness and that witness has not prepared a written report or has been directed not to prepare a written report.

This amendment to the discovery statute would require the prosecuting attorney and the defendant to provide a written summary of the findings and facts relied upon by the expert witness and the qualifications of the expert witness, when either party intends to use an expert witness at a hearing. This change seeks to minimize the surprise that can result from the use of unexpected expert testimony, reduce the need for continuances, and provide each side with a fair opportunity to review and test the merits of the expert's testimony through focused cross-examination.

By requiring a party to provide the expert's written qualification, the requesting party is able to determine, prior to the actual hearing, if the witness is indeed an expert witness pursuant to K.S.A. 60-456(b). The written summary of the expert's findings and the facts relied upon will also enable the requesting party to adequately prepare prior to the hearing. These changes will more aptly allow the parties to engage in a search for the truth and at the same time provide decision makers with the

necessary credible evidence to return a decision based upon the evidence. This will take us away from the trial by ambush type of combat that has no place in our judicial system.

On behalf of Attorney General Stovall, I would urge your favorable consideration of Senate Bill 168.

Testimony Before the Kansas Senate
Judiciary Committee
re: Senate Bill No. 168
February 17, 1999

Thomas W. Bartee
on behalf of the
Kansas Association of Criminal Defense Lawyers

The proposed amendment to K.S.A. 22-3212 would require the parties to criminal cases to provide written summaries of expert testimony which the parties intend to introduce at any hearing. The summaries would include the qualifications of the witness, the witness' findings, and the facts relied upon by the witness.

The amendment would violate the Due Process Clause of the Fourteenth Amendment in that it fails to place reciprocal discovery duties on the State. The bill would impose nonreciprocal discovery burdens on the criminal defendant. Furthermore, the proposal lacks mechanisms to insure that the defendant is not forced to incriminate himself. For these reasons, the Kansas Association of Criminal Defense Lawyers opposes Senate Bill No. 168.

I. THE AMENDMENT UNCONSTITUTIONALLY IMPOSES NONRECIPROCAL DISCOVERY DUTIES ON THE CRIMINAL DEFENDANT.

Section (d) of the amended statute sets forth the defendant's duty to disclose information to the prosecution. This statute would require the defendant to disclose documents:

> which were prepared by a witness whom the defendant intends to call at the hearing when the results or reports relate to the testimony of that witness.

However, section (b) of the statute fails to impose *any* duty on the prosecution to disclose, upon request, documents which relate to the testimony of prosecution witnesses. In fact, K.S.A. 22-3212(b) explicitly authorizes the prosecution to *withhold*:

> reports, memoranda or other internal government documents made by officers in connection with the investigation or prosecution of the case, or ... statements made by state witnesses or prospective state witnesses, other than the defendant, except as may be provided by law.

K.S.A. 22-3213(1) provides:

> In any criminal prosecution brought by the state of Kansas, no statement or report in the possession of the prosecution which was made by a state witness or prospective state witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination at the preliminary hearing or in the trial of the case.

Kansas courts have repeatedly held that the defense does not have a right of access to prosecution witness statements unless and until the witness testifies. Thus, under the amendment, the prosecution would be granted statements of defense witnesses upon request, while the defense would only have access to prosecution witness statements after the witness has testified. The amended statute would violate due process. See Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) (statute which requires defendant to give notice of alibi but which fails to require prosecution to disclose rebuttal evidence is facially unconstitutional).

II. SECTION (e) OF THE STATUTE WOULD REQUIRE THE DEFENDANT TO DISCLOSE MATERIAL PROTECTED BY THE SELF-INCRIMINATION CLAUSE.

Under section (e) of the proposal, the defendant would be required to provide written summaries of expert testimony which the defendant intends to offer at any hearing. The summaries would include the "facts relied upon by the witness." This disclosure duty exists if the defendant requests summaries of prosecution expert witness testimony, or if the defense gives notice of intent to present expert testimony regarding the defendant's mental condition.
If a capital defendant is required to provide notice of an intent to offer expert psychiatric or psychological testimony at the sentencing proceeding, the amendment would seem to require that the defense disclose all "facts relied upon by the [psychological or psychiatric] expert." These facts would very likely include the defendant's statements during the course of a clinical interview.

The Self-Incrimination Clause would prohibit the court from requiring disclosure of any statements of the defendant, including statements made during the course of a clinical interview. It is arguably constitutional to require the defendant to waive his privilege against self-incrimination if he offers psychiatric or psychological evidence which is based on an interview of the defendant by a defense expert. However, the Self-Incrimination Clause would be violated if the defendant were forced to provide evidence which would assist the prosecution in convicting him of a crime. Under the statute, upon request of the prosecution, the capital defendant would have to turn over inculpatory statements. The prosecution request would likely be made before the trial to determine the defendant's guilt or innocence. In trying to establish the defendant's guilt, the prosecution would benefit from having the evidence concerning the defendant's statements to his mental health expert. This is a clear violation of the privilege against self-incrimination.

Senator Vratil's Judiciary Subcommittee

1. S.B. 103 was introduced by the Joint Committee on Corrections and Juvenile Justice. The bill would make significant changes to the Juvenile Justice Code. Some of the major provisions include:

   a. The bill repeals the provisions of the juvenile justice code which provide for control over a juvenile who is both a juvenile offender and a child-in-need-of-care. The provisions of the bill would allow the court to decide which code to use on an individual basis.

   b. S.B. 103 would allow a juvenile correctional officer, in addition to the court services officer, to take a juvenile into custody when a warrant is issued, or when probable cause to believe a warrant was issued, or when the juvenile has violated probation.

   c. The bill amends the sentencing matrix for the purpose of placement. When an offense that would increase the adult sentence from a misdemeanor to a felony is committed by the juvenile, it would increase a prior misdemeanor to a felony adjudication. It notes that placements established in the matrix would not be discretionary with the court. In establishing an appropriate sentence for a juvenile offender, in addition to reviewing the offense committed, the court could also evaluate the individual treatment needs of each juvenile offender.

   d. The Commissioner of Juvenile Justice, by rules and regulations, would allow local intake and assessment programs to create a risk assessment tool, as long as the tool meets the requirements established by the Commissioner.

   e. The bill would allow juvenile intake and assessment workers to deliver a juvenile to an emergency foster care facility or juvenile detention facility. Current statutory provisions allow the worker to deliver the juvenile to a shelter facility or a licensed attendant care center. Intake and assessment workers would make recommendations to the county or district attorney concerning immediate intervention programs that would be beneficial to the juvenile.

Conferees

Judge Mitchell, representing the Office of Judicial Administration (OJA) testified that there will be a meeting on Friday between the OJA, Social and Rehabilitation Services (SRS) and the Juvenile Justice Authority (JJA). Judge Mitchell testified that he felt the three groups are close to developing a compromise on the concept of duel adjudication that is contained in the bill. Joyce Allegrucci (SRS) and Michael George (JJA) concurred that they will be in attendance on Friday and that they felt that an agreement could be reached.

Senator Oleen asked Mr. George if she could give him a list of community planners to invite to the meeting. Mr. George agreed to contact Senator Oleen's list of individuals.

Subcommittee Action

The committee agreed to suspend any action on this bill until an agreement can be made between the OJA, JJA, and SRS. Senator Emert suggested that the entire Judiciary Committee hear this bill next Monday, February 22 following a compromise.

2. S.B. 143 would amend current law regarding property that is exempt from attachment or garnishment. Specifically, the law would include Roth IRA's in the list of pensions and retirement exemptions.

Conferees

Proponents of the bill included: Rick Friedstrom from the Kansas Association of Life Underwriters testified in support of this legislation. Mr. Friedstrom noted that this bill would make Roth IRAs consistent with other forms of retirement plans. He also testified that this legislation would assist in encouraging more Kansan's to use this retirement provision.

Ron Smith of the Kansas Bar Association also testified in support of SB 143. Mr. Smith noted that the KBA introduced this bill and that they feel that this bill will allow estate planners to recommend Roth IRAs in good conscience.

Opponents of the bill included: None

Subcommittee Action

The Subcommittee recommended this bill favorably for consideration by the entire Judiciary Committee.

3. S.B. 178 would amend K.S.A. Supp 8-1002 to require administrative hearings associated with alcohol or drug related offenses involving the operation of a vehicle to be heard in the county in which the offense occurred. The current law gives the Division of Vehicles authority to hold a hearing in a county adjacent to the county in which the violation occurred.

Conferees

Sheila Walker from the Department of Revenue testified that the Kansas Division of Motor Vehicles has concerns with this legislation. Specifically, Ms. Walker noted added fiscal costs that would be incurred as a result of this legislation. She also noted additional administrative difficulties that would be placed on the Kansas Division of Motor Vehicles.

6-2

Senator Harrington asked why the offenders would not appear in front of a judge for a DUI. Gordon Self answered that this legislation dealt with administrative hearings for test failure and refusal. Gordon stated that an individual will still face a criminal proceeding.

Subcommittee Action

The committee agreed to refer the bill back to the entire Judiciary Committee without a recommendation.

2/9/99

State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 West 10th
Topeka, Kansas 66612-1507
(785) 296-2256

February 9, 1999

Hon. Tim Emert, Chairman
and Members of the Senate Judiciary Committee
300 SW 10th Ave., Room #123-S
Topeka, KS 66612-1504

Dear Senator Emert and Senate Judiciary Committee Members:

Attached are letters from judges who wrote to the SRS Transition Oversight Committee last December about a provision that is now addressed in subsection (d) on pages 1 and 2 of 1999 SB 103. By deleting the language of K.S.A. 38-1604(d), as SB 103 does, the bill continues to allow Kansas judges who hear juvenile cases the discretion to apply either the Kansas Code for Care of Children or the Kansas Juvenile Justice Code when a juvenile is adjudicated a juvenile offender and has previously been adjudicated a child in need of care.

The attached letters were written from the perspective of urging the SRS Transition Oversight Committee not to make a recommendation that would require application of the Code for Juvenile Offenders when a child in need of care commits any type of juvenile offense. The judges who wrote these letters would very much support subsection (d) on pages 1 and 2 of SB 103.

Several of the judges who wrote these letters were interested in appearing in support of SB 103, but were unable to clear their dockets so that they could appear. On their behalf, I urge your support for subsection (d) of SB 103, and I thank you for consideration of this issue.

Sincerely,

Kathy Porter

Kathy Porter
Executive Assistant to Judicial Administrator

KP:ps
Attachment

6-4

SUMNER COUNTY DISTRICT COURT

THIRTIETH JUDICIAL DISTRICT
Division No. 2

District Judge:
Thomas H. Graber

Sumner County Courthouse
Wellington, Kansas 67152

To: Senator Morris and the Members of the SRS Transition Oversight Committee.

Re: K.S.A. 38-1604(d)

I cannot over emphasize to the committee the critical need for the amendment or total deletion of K.S.A. 38-1604(d). The current language puts children and families at risk by disrupting placements, by terminating services already paid for by the State of Kansas, by increasing the risk of out of home placements, by preventing the court from having any ability to protect children from established risks by denying the court a reasonable opportuinty for transition of children from SRS custody to JJA custody.

The danger of disrupting placements can be illustrated by my family's personal example. I have a foster grandson who has been placed with my step-daughter since he was 9 years old and he is now 16. He came to live with Renee two days before Thanksgiving in 1991 because his grandparents were retired and wanted to travel without responsibility for him. He had not seen his mother in 2 years, had never known his father and both parents' parental rights have been severed. He was in B.D. classes at the time. Until this last year, he and Reneee lived in a trailor home in our yard on the farm. He is now a junior in high school, main streamed in all classes. He is starting on the varsity basketball team as a junior and is making better grades than he ever has. However, he has an adjudication as a juvenile offender for shoplifting and is currently under supervision for that offense. As K.S.A 38-1604 is now written on July 1, 1999 he will no longer be subject to placement with Renee under his CINC case unless the offender case is terminated. If the adjudication had happened after July 1, 1999 he would automatically have been removed from

her home because she is a foster parent for United Methdist Youthville and they do not contract with JJA. Tony is as much a part of our family as any of our grandchildren and I do not believe he nor anyone else will benefit from his being removed from the only home and family he has.

An example of the termination of services already paid for by the State are family preservation services being provided by the SRS contractor which are immediately terminated to any child who is adjudicated as a Juvenile Offender. That means that if the family is receiving family preservation services from an SRS contractor they immediately stop even though paid for. If they are later provided by JJA, they will be paid for again. A related problem is with a family that has more than one child receiving benefits fom the provider. Upon adjudication the provider cannot provide the JO with services even though continuing service to other family members. If the JO is to get services, they will have to be paid for by JJA even though they had previously been paid for under the SRS contract.

The existing provisions increase the likelihood of out of home placements because of the interruption of services as described above. A family already determined to be at risk and being provided services has them interrupted by an adjudication and the court cannot get any like services instituted through JJA until after sentencing, which will probably not happen for at least 30 days after adjudication. It is highly likely that many of the family situations will not survive the delay and the removal of needed services.

The current provisions prevent the court from being able to continue protecting children from established risks. For example, a girl, who has been sexually abused by mother's boyfriend and is being protected in the mother's home by an order which orders the perpetrator out of the home and orders no contact with the child, will automatically loose that protection if she is

adjudicated as a juvenile offender or even a simple shoplifting. Once the CINC proceeding is suspended, the court has no way to protect her in the home. The court can't even remove her from the home until sentencing in the offender case, if then.

The current provisions of the statute take effect upon adjudication and the court does not have any orders entered until sentencing . The sentencing by statute and by simple common sense should not take place until after a presentrence investigation report is provided to the court. In most courts sentencing does not take place for at least 30 days after the adjudication. In the meantime any orders entered in the CINC case are suspended and the child is in limbo. SRS has taken the position, in some cases that a child in their custody who they brought to court will not even be transported from the court room after an adjudication. They child has no placement under the offender code or with JJA.

The critical language is that **suspending** the Kansas code for care of children and doing so at the time of **adjudication**. I would urge you to support repeal of the provisions. If you connot support that I would offer as an alternative the proposed language in exhibit "A" , attached to this letter.

I wish that I felt that I had found the right words to convey my concern over the need to change the effect of the current language.I honestly believe that there is no greater single threat to the effective implementation of privitaziation and the Juvenile Justice Act than the existing provisions of K.S.A. 38-1604(d). We critically need to be able to have the two codes complimenting, supporting and enhancing the efforts being made in regard to the most needy and at risk children in our society. The current provisions absolutely defeat those ends and create greater risk while contributing nothing for the children involved, their families or society.

If I can be of any assitance or you have any questions please contact me.

Sincerely,

Thomas H. Graber
District Judge

EXHIBIT "A"

Jurisdiction K.S.A. 38-1604 (d) as amended in 1998 Session Chap.187

(d) *Effective July 1, 1999, if a juvenile is adjudicated a juvenile offender and has previously been adjudicated a child in need of care, the Kansas juvenile justice code shall apply to such juvenile and the Kansas code for care of children shall suspend during the time of jurisdiction pursuant to the Kansas juvenile justice code. Prior to july1, 1999, the court may apply the provisions of either code to a juvenile adjudicated under both codes.* Nothing in this subsection shall preclude such juvenile offender from accessing services provided by the department of social and rehabilitation services or any other state agency if such juvenile is eligible for such services.

If a juvenile is adjudicated a juvenile offender is subject to sentencing as a Violent Offender I, Violent Offender II, Serious Offender I, Serious Offender II, Chronic Offender I, Chronic Offender II, or Chronic Offender III as defined by K.S.A. 38 16,129, the sentence imposed by the court shall have precedence over any orders entered because of a prior adjudication of the juvenile as a child in need of care. In all other instances both codes may apply to a juvenile who has a prior adjudication as a child in need of care, however, the sentencing court shall give full consideration to promoting public safety, holding the juvenile offender accountable for the juvenile's behavior and improving the ability of the juvenile to live more productively and responsibly in the community while assuring that the services provided under both of the codes are

coordinated to those aims and services are not duplicated or paid for by both SRS and JJA or any othe state or local agency. If the sentencing Judge is not the Judge having jurisdiction under the child in need of care proceeding the sentencing Judge in the juvenile offender proceeding and the Judge in child in need of care proceeding shall consult with each other to assure that as both codes are applied full consideration to promoting public safety, holding the juvenile offender accountable for the juvenile's behavior and improving the ability of the juvenile to live more productively and responsibly in the community while assuring that the services provided under both of the codes are coordinated to those aims and services are not duplicated or paid for by both SRS and JJA or any other state or local agency.

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DOUGLAS COUNTY DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
JUDICIAL CENTER, 111 E. 11TH
LAWRENCE, KANSAS 66044-2966

785-832-5230

JEAN F. SHEPHERD, Judge
Third Division

PATTY HOBBS
Administrative Assistant

COURT REPORTERS

MELISSA HERRIOTT
832-5123

TAMMARA HOGSETT
832-5249

MARY KAY SCHEETZ
832-5250

SHELEE SHAFER
832-5234

December 15, 1998

Senator Steve Morris
Chair, Legislative SRS
Oversight Committee

REF: Dually Adjudicated Youth

Dear Senator Morris and Committee Members:

It appears to me that the "heated" discussion involving who should have jurisdiction over dually adjudicated youth is more about who will pay for services and what is easiest for agencies rather than what is in the best interest of kids.

As we all know, not every youth who comes to court as a juvenile offender is a violent or chronic offender. Indeed, many of the kids we see in juvenile court are kids we see one time for one stupid act. Under the law which now will take effect July 1, 1999, when a child in a foster care home, a home which contracts with one of our three foster care contractors, commits a minor juvenile offense such as shoplifting, disorderly conduct, or even misdemeanor battery which might involve a school yard fight, at the time of adjudication that child would have to be moved to a home which contracts with the Juvenile Justice Authority or be returned to his/her own home. This is extraordinary punishment for a child in order to simplify bookkeeping for adults. Under circumstances when any other child would be kept in her parent's home and placed on probation through court services, a child who is in the foster care system would lose his child in need of care foster home to be placed on probation, and he could be returned to an inappropriate family home or placed in a new foster or group home. I can see this as only a downward spiral for the child. An attorney for a child in need of care treated in this way might well raise an equal protection argument in that the state is mandating that children who are in one system for their own protection are punished more severely than children who commit identicl offenses who live in their own homes. Most children in need of care are in custody due to their being abused and neglected; this does not justify treating them more severely than other kids because they are offenders.

Staying a child in need of care action due to adjudication as a juvenile offender will also have possible ramification for children who have already been victimized: changes in therapist, changes in schools, and possibly changes in community. These are children who are most in need of continuity and on-going assistance.

6-11

Children who have been the victims of severe physical, sexual and emotional abuse often reach a point in therapy when they begin to have some behavior problems. At this time, some are adjudicated as juvenile offenders; at this critical point do we really want these children moved from a therapeutic process in which they are making progress and moved from a placement they know and from a school environment which is familiar with them?

On the other hand is not appropriate for a child who is a child in need of care who breaks the law to be given no consequences in order to keep him/her in the child in need of care system. However, courts have done this in order to prevent a child's being removed from the system and/or home which best meets his/her needs. Courts will continue to attempt to manipulate the system in order to see that a child's needs are being served.

Some dually adjudicated youth do need to be immediately placed in JJA custody; some do not. These children are not cookies cut with the same cookie cutter; I would hope that the legislature allows the court to continue to have the discretion to determine which placement system will best meet the needs of our youth for both rehabilitation and consequences.

If the legislature has concerns about inappropriate children being kept in custody as children in need care rather than placed in custody as offenders, the legislature could create a list of factors for the court to consider. These might include; a. the nature of the offense; b. the youth's number of prior adjudications; c. the youth's community and family ties; d. the youth's age; e. the availability of appropriate consequences if a youth remains a child in need of care; f. the youth's history of violent or seriously assaultive behavior, even if there have been no prior adjudications; g. the child's prior runaway behavior; h. protection of the community; i. whether the offense was against persons or property; j. the sophistication and maturity of the youth; or j. which system offers the programs most likely to rehabilitate the youth and to best meet his needs.

I have heard SRS say they do not "have services to meet the needs of offenders;" many young first-time offenders need no different services than any other child in need of care. They may simply need to be placed on probation through court services, which is not a service necessary for SRS to provide. In addition, some youth can be maintained as children in need of care in a foster home or a group home with supervision by community corrections. Again, this is not a service for SRS to provide.

Again, I urge that you leave the determination as to whether a youth should be in the custody of SRS as a child in need of care or in the custody of the Juvenile Justice Authority as a juvenile offender up to the discretion of the court familiar with the child. Mandating a change in the child's custody status solely due to adjudication as an offender appears to me to be totally driven by systems which purportedly exist to benefit the youth of this state; this request does not address the needs of the youth the systems are there to serve. Instead, it only simplifies life for people managing those systems by making youth fit into neat slots whether or not the slot is right.

I thank you for your usual courteous attention my perspective, and I am available to answer questions from any committee members.

Very truly yours,

Jean F. Shepherd
District Judges

JFS:ph

DISTRICT COURT OF KANSAS
TWELFTH JUDICIAL DISTRICT
Cloud, Jewell, Lincoln, Mitchell, Republic and Washington

Cloud County Courthouse
Post Office Box 423
Concordia, Kansas 66901
Facsimile 913-243-8188

THOMAS M. TUGGLE
District Judge
913-243-8125

JO ANNE RICE
Administrative Assistant
913-243-8131

BECKY L. HOESLI, C.S.R.
Official Court Reporter
913-243-8193

December 15, 1998

Hon. Stephen R. Morris
SRS Transition Oversight Committee
State Capitol
Topeka, KS 66601

Dear Senator Morris and Members of the Committee:

It is my understanding that Secretary Rochelle Chronister has recommended legislation that the authority of judges to place children be restricted by requiring that any child in SRS custody convicted of an offense be automatically placed with the Juvenile Justice Authority.

There are times when a child in need of care may have committed a minor offense while in SRS foster care. It may or may not make sense to move the child to a foster care placement operated by JJA.

Certainly, a local judge should be able to make the decision after hearing all the facts, rather than having a preordained legislative outcome.

I respectfully urge you to recommend to the legislature that the current flexibility in the law be retained indefinitely.

Sincerely,

Thomas M. Tuggle

TMT/jr

DISTRICT COURT OF KANSAS
TENTH JUDICIAL DISTRICT
JOHNSON COUNTY COURTHOUSE
OLATHE, KANSAS
66061
(913) 764-8484 x5492

CHAMBERS OF:
ALLEN R. SLATER
DISTRICT COURT JUDGE
DIVISION NO. 9

December 18, 1998

Attn: Senator Steve Morris

Re: K.S.A. 38-1604 - Dually Adjudicated Children

Fax: (785) 296-7076

Dear Senator Morris:

A judge hearing a case of a child adjudicated as a child in need of care as well as a juvenile offender can apply the provisions of either the child in need of care code or the juvenile offender code depending on what is best for the child and the child's family. It is critical that Judges continue to have this authority in the future. Currently, this authority is to "sunset" on July 1, 1999 and it is my understanding your committee will receive a recommendation to eliminate the "sunset" provision and allow Judges to retain this authority. There are a number of cases where a child who is adjudicated as a CINC will commit a juvenile offense. Under the law to go into effect on July 1, 1999 this child once adjudicated as a juvenile offender will be under the exclusive control of our juvenile code. To assume the juvenile code and the Juvenile Justice Authority can meet the needs of all children in need of care and their families is unrealistic. Some children in need of care do

act out and commit juvenile offenses due to the abuse and/or neglect they suffer in their homes; however they need CINC services not offender services. The Juvenile Justice Authority does not have the trained and experience social workers necessary to provide the case management for these difficult cases. An experienced social worker is an important resource to a court in crafting an appropriate case plan and reintegration plan. Additionally, under the child in need of care code the parents are parties to the case and can be ordered to complete extensive requirements outlined by the court. This is not true under the juvenile offender code. If a child in need of care child commits a juvenile offense I lose important remedies to help the parents become better parents and to modify the child's behavior.

The Commissioner of SRS is opposed to any changes in this statute and wants to transfer as much responsibility to other agencies as possible. With all due respects to the commissioner, she does not attend court on a daily basis and does not have to meet face to face with family members who are looking for a solution for a child. It is difficult to tell a crowded courtroom the judge is not going to enter the orders to help the child because of a legal technicality. The families are not interested in nor do they understand legal technicalities and simply expect the court to do what is best for the child. These family members do not care which state agency pays for the care of the children but simply want the best for the child.

I strongly encourage you to reject the Commissioner of SRS' position and accept the recommendation that courts have the authority to select the code which best meets the needs of the child and the child's family. I am confident a number of judges are concerned

about this important matter that we would be willing to meet with your committee and provide any information you request.

Please feel free to call me if you have any questions or comments.

Very Truly Yours,

Allen R. Slater

cc: Honorable Jean Shepard

District Court of Kansas
Third Judicial District

Shawnee County, Kansas

Chambers of
Daniel L. Mitchell
Judge of the District Court
Division No. Ten
Shawnee County Courthouse
Topeka, Kansas 66603-3922

Lee Ann Froelich
Administrative Assistant
(913) 233-8200 Ext. 4361

December 16, 1998

Senator Stephen Morris and Members of
SRS Transition Oversight Committee
State Capitol
Topeka, Kansas

Dear Senator Morris and Committee Members:

It is my understanding that consideration is being given to amending K.S.A. 38-1604 (d) in the upcoming session. I offer my strong support to modify K.S.A. 38-1604 (d) to allow the Court continuing discretion to utilize either the Child in Need of Care Code or the Juvenile Justice Code for the benefit of the juvenile and the community.

As of July 1, 1999, if a child is dually adjudicated, the Child in Need of Care Case is to be suspended until jurisdiction is terminated under the Juvenile Justice Code. Currently the Court may utilize either jurisdiction as controlling and thus insure the best interest of the child. Obviously a serious, violent, chronic offender will be subject to the Juvenile Justice Code exclusively and I would not oppose language to that effect. But a child who is already under Child in Need of Care jurisdiction and is appropriately placed who commits a misdemeanor or felony that does not constitute a serious, violent offense should not be summarily expelled from in-place services to be put under the jurisdiction of the Juvenile Justice Code. Some level of minor offender behavior is not unexpected from children in the system because of abuse and or neglect. To impose hard line criteria of any juvenile offender adjudication without some court discretion is a disservice to children and not the intent of the Juvenile Justice Reform Act of 1996 as I understand it.

The goals of the Juvenile Justice Reform Act can and will be served to insure protection of the community, accountability of the juvenile and rehabilitation without sacrificing those services needed for the legitimate child in need of care by allowing judicial discretion to continue.

Thank you for your attention to and consideration of this issue.

Very truly yours,

Daniel L. Mitchell
District Court Judge

DLM:laf

6-18

Timarie Walters
Clerk of the District Court

Lee Nusser
District Magistrate Judge

Stafford County Courthouse
P.O. Box 365
St. John, Kansas 67576
Telephone (316) 549-3295
FAX (316) 549-3298

December 16, 1998

Senator Stephen R. Morris
Members of the SRS Transition Oversight Committee:

Dear Senator Morris and Members:

This letter is written in regards to KSA 38-1604 and amendments, which you and your committee are reviewing. As you are aware, effective July 1, 1999, the court will no longer have discretion over a child in need of care, who is later adjudicated as a juvenile offender. I have grave concerns if this statutue as written is allowed to become law without being amended. A child in need of care who is in foster care and commits a minor crime (shoplifting, fight, disorderly conduct, etc.) and is then adjudicated as a juvenile offender would then be removed from foster care, and any services this child would be receiving will be discontinued or interputed.

We, (the courts, SRS, and the state of Kansas) will be doing a very great disservice to these children. When services are interputed, the prospects of a child overcoming any disabilities or problems they have will be severely diminished. This harkens back to the days when foster children were moved 3 to 4 times a year. This is very upsetting to the child.

Senator Morris, I would urge you and the committee to amend the statute by very simply striking the effective date, "July 1, 1999, and allow the court to have the discretion it needs in working with children. Simply allowing SRS to have the authority to remove a child for being adjudicated as a juvenile offender, we lose the check and balance we now have monitoring CINC cases.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Lee Nusser

DISTRICT COURT OF KANSAS

CHAMBERS OF
JAN A. WAY
DISTRICT JUDGE

WYANDOTTE COUNTY

COURTHOUSE
KANSAS CITY, KANSAS
66101

December 16, 1998

Senator Stephen R. Morris and
Members of the SRS Transition Oversight Committee
State House
Topeka, Kansas 66612

Dear Senator Morris and Members:

It is this Court's position that the Court should have the discretion to continue to proceed with a juvenile in a CINC case even if a juvenile offender case is filed, or vice versa. Currently, KSA 38-1604(d) requires the child in need of care case be suspended during the time the juvenile offender case applies. No automatic conflict between these two types of proceedings is seen. Rather, prohibiting the Court from using its full discretion in these matters is not only not in the best interest of respondents and society; it limits common-sense solutions evident to the parties in the Court room.

Children don't fit into nice, neat packages. Some children who have been seriously abused (whether sexually, physically, or otherwise) have a liklihood of acting out in placements. This acting out can lead to charges. I see cases where the children have been charged with disorderly conduct for disruptive behavior while in a group home or a CINC placement. This doesn't mean that their treatment or their family's CINC action should be interrupted. In these cases, there may be other siblings, and the family's CINC case must continue anyway.

In other CINC cases, the District Attorney and Court may be moving towards terminating parental rights. These cases should not stop because of an act of shoplifting by a twelve year-old girl while in foster care.

Sometimes the parental rights have already been terminated. If the Court closes the juvenile offender case after sentencing with a reprimand so the CINC case prevails, the juvenile then may learn there are no sanctions. The current statute is problematic

and not curative of the juveniles' problems.

It is hoped the State opts for the best interests of the child over limitations based on categories or departmentalization. The Court should have discretion and be allowed to use Court Services staff and others to bring information to the Court that will allow good decisions on a case-by-case basis.

Sincerely,

Jan A. Way
District Judge

JAW/js

C:\MyFiles\proposal

Thirteenth Judicial District of Kansas

Rebecca D. Lindamood - MAGISTRATE JUDGE
Greenwood County Courthouse
Eureka, Kansas 67045
316-583-8155

December 15, 1998

Senator Stephan Morris and Committee Members
SRS Transition Oversight Committee

Dear Senator and Committee members:

I am deeply concerned about any move to prevent dual adjudication of children in the Court system. There are times when dual adjudication is the tool a judge needs to provide the most appropriate care for children. Children are often CINC and offender. Dual adjudication allows the Court to protect and care for these children, while at the same time, being able to mete out consequences where appropriate. Too many children we are seeing now are not just CINC, or, not just juvenile offenders.

One particular case I have right now, case in point: one of three siblings in a CINC case is dual-adjudicated. The parent of these children will not care for them, and abuses drugs. The twelve year-old, now, has a misdemeanor theft charge. Such behavior from a child in this kind of situation, though not condemned, is common. Without dual adjudication, in this kind of case, the Court's hands are tied, and this boy would be without proper care.

Another question: What would happen with children in a sexual abuse case who strike out toward others while in foster care? This could, and does, make these children offenders. But, they are first, and formost, CINCS. How can their needs be met without dual adjudication?

To expect children, or anyone for that matter to fit into one tight little category might make things appear better, neater and more easily managed on paper. However, people, particularly children, do not often lend themselves to such nice predictable packaging and pidgeon holing. And, if what we are about is to care and protect children, all children, then none should be allowed to fall through the cracks. Without dual adjudication, how many of our children would fall through the cracks?

I sincerely appreciate your time to consider my thoughts and feelings on this matter, and hope this will help give you some incite as to the problems the judges have to face, where children are concerned.

Sincerely,
Rebecca D. Lindamood
Rebecca D. Lindamood
District Magistrate Judge

6-23

DISTRICT COURT
ELEVENTH JUDICIAL DISTRICT, DIVISION 1
CRAWFORD COUNTY COURTHOUSE
P.O. BOX 69
GIRARD, KANSAS 66743

DONALD R. NOLAND
JUDGE

TELEPHONE
316 724-6213

December 16, 1998

Senator Stephen R. Morris and
Members of SRS Transition Oversight Committee

Re: Proposed Amendment to K.S.A. 38-1604(d)

Dear Senator Morris and Members
of SRS Transition Oversight Committee:

I have been advised that a request to amend K.S.A. 38-1604(d) will be introduced in the next legislative session. The amendment as proposed will restore judicial discretion in proceeding with dually adjudicated youth. K.S.A. 38-1604(d) presently provides that effective July 1, 1999, any Child in Need of Care (CINC) who is adjudicated a juvenile offender shall have the CINC case automatically suspended and all further proceedings regarding the child will be conducted solely under the juvenile justice code. It is my understanding that SRS opposes the amendment.

I have a great concern for the mandate imposed by the statute and would respectfully request that you and the other members of the SRS Transition Oversight Committee favorably consider the proposed amendment.

The statute as presently enacted will remove all judicial discretion as to what code (CINC or juvenile offender) should apply to dually adjudicated youth. We will be summarily prevented from using the CINC code to address a youth's needs, even though it may be determined that the CINC code most appropriately answers those needs.

In my experience, I have observed that certain youth need the protection of the CINC code, even though they may be dually adjudicated. The absolute mandate of the statute will not allow for the continued protection of the CINC code. For instance, a CINC should not automatically be transferred to the juvenile justice system simply because he or she is convicted of a minor theft or vandalism. In such a scenario, the youth will have fewer placement alternatives as typically JJA youth are more difficult to place. This potentially then results in youth who have been adjudicated of minor offenses being placed with serious and chronic offenders.

Moreover, it is much more difficult to order family counseling in juvenile offender cases as by statute (K.S.A. 38-1663) parents of juvenile offenders can object to court-ordered family counseling and are even entitled to a court-appointed attorney to represent

them in contesting the order for family counseling. This unwieldy process does not apply in CINC cases. Further, we are allowed to use Reintegration Plans (an Order to the parents requiring specific improvements in housing and parenting skills) in CINC cases. We cannot do this in juvenile offender cases. In short, CINC cases allow us to address nuclear family problems before a return of the youth to the home. We cannot do this in juvenile offender cases, which often results in the return of a youth to a home where the same problems exist which initially caused the illegal conduct.

In summary, I respectfully request that consideration be given to amending K.S.A. 38-1604 to provide for judicial discretion in determining which code to utilize for dually adjudicated youth. Allow us to use our experience and the input of all involved in a case to make decisions which are based on the best interests and needs of the child.

Thank you for your valuable time and please feel free to contact me if any of you have any questions.

Very truly yours,

Donald R. Noland
District Judge

DRN:tc

2/15/99

BILL GRAVES, GOVERNOR OF THE STATE OF KANSAS

KANSAS DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES
915 SW HARRISON STREET, TOPEKA, KANSAS 66612

ROCHELLE CHRONISTER, SECRETARY

MEMORANDUM

To: Members of Senate Judiciary Subcommittee on Dually Adjudicated Youth (SB 103)

Date: 15 February 1999

From: Joyce Allegrucci, Commissioner Children & Family Services

Subject: **Senate Bill 103**

Legislators and juvenile judges in Kansas have expressed concern about KSA 38-1604 as it will impact a certain population of Kansas youth after June 30, 1999. The Commission of Children and Family Services of SRS shares the concern about this population of children.

That population is described as youth who have been found to be children in need of care. These youth are in the custody of the Secretary of SRS and are receiving services in a stable placement, but commit a minor offense and are subsequently adjudicated as juvenile offenders. Under KSA 38-1604, after June 30, 1999, those youth must be served under the Juvenile Offender Code.

The concern is the disruption of a youth's services and placement which are deemed stable and productive prior to the juvenile offender offense, and for whom it is believed the offense behavior would not be repeated with corrective consequences, and could be completed within the setting of the current placement, without placing other children or adults in the placement in danger or destabilizing the placement for other children in need of care. The examples of behaviors which would define this population include youth who committed a minor theft or go AWOL from a facility or foster home for a short period of time, maybe with other youth, and are involved in joyriding.

To understand the complexities of considering this issue at this time, I believe interested parties need to have the following information:

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Juvenile offenders are not a part of the SRS contracting partnership for children in need of care.

As a transition accommodation to judges and the Juvenile Justice Authority (JJA), dually adjudicated children in need of care/juvenile offenders have been served temporarily by SRS workers in community placements without any additional financial resources until they are transferred to JJA on July 1, 1999.

The new system of child welfare under SRS has no structure and no resources for serving juvenile offenders. Over the past two and one-half years, the system has been designed solely to serve children in need of care, focused entirely on their safety and permanency. That means the ideal placement for most children is a family foster home for a short period of time then reunification with their family or placement for adoption or permanent guardianship. Serving juvenile offenders in this new system could be both dangerous and destabilizing.

In order to once again serve this population of *minor offenders*, it would be necessary to negotiate an amendment to the foster care and adoption contracts or develop a new system/contract serving dually adjudicated children.

SRS and the contractors have expressed the following concerns about amending their contracts to serve dually adjudicated youth:

- Safety for other children and workers in the placement.
- Destabilization of foster homes and other placements by allowing offender to return unless offense is truly minor and consequences are applied immediately and consistently.
- Immediate removal of a youth if the offense is against another person, is a sex offense, or constitutes danger to any person or criminal destruction of property, or if the youth re-offends.
- Additional case management duties and additional costs. Costs for case management, treatment, meeting conditions of probation would include staff time for keeping records, reporting, transportation, day reporting, electronic monitoring, etc.
- Coordination of case management for transportation, appointments, etc. Will they have to assign staff for transporting youth to probation appointments, community service, etc.? Will they be blamed if youth misses probation appointments?
- Offense cannot be plea bargained down from a more severe offense in order to place the youth on probation back to the placement.

In order to advance discussion of this issue, the Commission of Children and Family Services of SRS offers the attached proposal.

Attachment

Dually Adjudicated - CINC/JO

Youth who are adjudicated as a Child in Need of Care (CINC) and are in the custody of SRS and subsequently are charged with a minor offense may remain in the custody of SRS and the CINC case will continue until sentencing,
PROVIDED:

- The offense charged is of a minor nature that will not endanger any other child or adult, nor destabilize the placement setting for other children.
- Youth cannot continue under CINC placement if offense is plea bargain down from a more serious offense.
- Adjudication occurs within 10 days of the occurrence of the offense.
- Sentencing must occur within 30 days of adjudication or the CINC case is suspended on the 31st day and the youth cannot continue as a CINC.

Following a comprehensive investigation by the Court, the Court may determine that: the youth's foster care placement is stable; the youth is receiving appropriate services for his/her status as a CINC; the youth's offense was of a minor nature; the offense consequences can be satisfied within the setting of the current placement; and that the youth should receive probation for the minor offense.

Upon those findings, the youth may remain in the custody of the Secretary of SRS and the CINC case will continue until permanency,
PROVIDED:

- The youth's plan for permanency will continue uninterrupted and the CINC case will not remain open solely because of incomplete compliance with probation. The conditions for probation will follow the youth to his/her permanent placement.
- A juvenile offender component will immediately be added to the youth's case plan setting out consequences, conditions and actions required for satisfaction of the probation.
- All elements, including transportation, coordination of case planning and scheduling, supervision, and any additional services and all costs of same, of the JO component of the case plan shall be the responsibility of the Court's designee.
- If the youth violates the conditions of probation or commits a subsequent offense, the CINC is immediately suspended and the youth is served as a JO.
- The youth presently in the custody of the Secretary of SRS and scheduled to be remanded to the custody of JJA on July 1, 1999 shall have their cases reviewed in light of the criteria outlined above and the only those, meeting criteria will remain as a CINC in the custody of SRS.

TESTIMONY
SENATE JUDICIARY COMMITTEE
SENATOR JOHN VRATIL, CHAIRMAN
MONDAY FEBRUARY 15, 1999

Mr. Chairman, Members of the Committee, thank you for the opportunity to visit with you regarding Senate Bill 143.

My name is Rick Friedstrom and I am a full-time insurance agent located here in Topeka. I appear before you today as Chairman of the State Law and Legislative Committee of the 1,500 member strong Kansas Association of Life Underwriters.

KALU supports the proposed legislation as found in Senate Bill 143.

In 1976, Congress created the first Individual Retirement Account concept. This first generation IRA allows an individual to make tax-deductible contributions for his or her retirement. Today one has access to at least seven additional IRA concepts for various accumulation purposes. This discussion today is not to review the 20-year history of the IRA, but rather bringing the newest IRA under the umbrella of creditor protection available in Kansas.

In August 1997, Congress passed legislation creating the Roth IRA. This new retirement vehicle allows individuals to contribute funds on an after-tax bases that will grow free of future income taxation unlike the traditional IRA which is fully taxable at retirement.

Question 240 of the 1998 Edition of Tax Facts posses the following: "Are individual retirement accounts and annuities subject to attachment?" The response, "ERISA (Employer Retirement Income Security Act) provides that benefits under pension plans must not be assigned or alienated under ERISA Section 206(d)(1). This provision has been construed as protected pension benefit from claims of creditors. However, ERISA defines as a "pension" as a plan established and/or maintained by an Employer to provide retirement income to employees. An IRA is generally not maintained by an employer, and thus, is not protected under federal law by an anti-alienation clause of ERISA. Generally, then, whether, an IRA is subject to attachment by creditors is a matter to be decided based on applicable state law.

In Kansas, we have determined that it is good public policy for Pension Plans, Profit-Sharing/401(k) plans, Qualified Stock Bonus Plans, Employee Stock Ownership Plans, and Traditional Individual Retirement Accounts be considered exempt property in the event of a creditor situation.

In creating the Roth IRA, Congress allowed individuals the opportunity to convert their tradition IRA to a Roth IRA. Many in Kansas have, are, and will take advantage of this provision, however, many Kansas taxpayers will not take advantage of this provision that should do so. The overriding concern for not taking advantage of this provision is of exposing their hard-earned retirement funds to possible creditor issues.

I am not an attorney and I do not practice law, however, Kansas does have a problem statute, KSA 60-2308. Passage of Senate Bill 143 will afford the Roth IRA similar creditor protection now given Traditional IRAs and qualified retirement plans.

Thank you!

Richard K. Friedstrom,CLU
1414 Ashworth Place
Topeka, Kansas 66604
785.228-5233

Legislative Testimony

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
Email: ksbar@ink.org

TO: Members, Senate Judiciary Committee

FROM: Ron Smith
Kansas Bar Association

SUBJ: SB 143

DATE: February 15, 1999

The KBA supports this legislation.

This legislation simply allows Roth IRAs to be treated for debtor-creditor purposes on attachments and garnishments -- and bankruptcy -- exactly the same way we treat any other IRA or retirement accounts under Kansas law.

There was concern that Section 408A of the internal revenue code, the Roth IRA, was not specifically listed even when indicating that Section 408 plans are exempt. This bill clarifies that Kansas policy on exemptions for retirement accounts also includes Roth IRAs.

There may be concern in other quarters that Kansas is too liberal with its exemptions. I understand that argument but the policy question of exempting retirement accounts from creditor's claims already has been decided. If the legislature wants to revisit that policy question, you may want to choose a different forum or vehicle for that discussion.

Without this legislation, estate planners tell me that they cannot in good conscience recommend Roth IRAs to their clients because if the client later has to take bankruptcy or is personally liable on a judgment, the trustee or the plaintiff may get the retirement income. The gist of current law is that if Mr. Jones has two IRAs -- one a Roth IRA and the other an ordinary IRA at the bank, the bank IRA would avoid creditors while the Roth IRA might not. This raises the question of "why?"

I would point out that HB 2342 is introduced in the house by several members and has a hearing this afternoon at 3:30 in the House Judiciary Committee. My comments will be the same there as they are here. KBA would like one of these bills to pass, but we are not wedded to which one.

Thank you.

STATE OF KANSAS
B[illegible]wes, Governor

DEPARTMENT OF REVENUE
Karla J. Pierce, Secretary

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Office of the Secretary

TESTIMONY

TO: Sen. Tim Emert, Chairman
Senate Judiciary Committee Members

FROM: Sheila Walker, Special Assistant Sheila Walker

DATE: February 15, 1999

SUBJECT: Senate Bill 178

Senator Emmert and members of the Senate Judiciary Committee, my name is Sheila Walker, and I serve as Special Assistant to the Secretary of the Kansas Department of Revenue. I appreciate the opportunity to provide testimony today regarding Senate Bill 178.

The mission of the Kansas Division of Motor Vehicles (DMV) is to provide the best service possible to our vehicle customers. Holding hearings in the county where an alleged "driving under the influence" violation occurred would probably be seen as a positive change by the individuals being scheduled for a hearing. However, the DMV would respectively like to express a few concerns with this bill.

We currently hold driver license hearings in 27 locations throughout the state, with hearings in the county where the alleged violation occurred or in an adjacent county. Approximately 11,000 of these hearings are held each year and are performed with two part-time and two full-time staff attorneys.

To hold all hearings in the county where the alleged violation occurred would require us to secure an additional 78 locations with some associated rental costs. Additionally, we estimate that six additional unclassified hearing officers and one full-time office assistant would be needed to handle the additional locations. The total fiscal note is estimated at $485,841.

In summary, eliminating the ability to centralize hearing locations is expected to cause difficulties in coordinating hearings; additional hearing officers are likely to be needed; and there may be some impact upon the time in which a hearing can be provided to a licensee, which may affect the issues raised in hearings and appeals.

The Kansas Division of Motor Vehicles appreciates your consideration.

MEMORANDUM

To: Mr. Duane Goossen, Director
Division of Budget

From: Kansas Department of Revenue

Date: 02/03/99

Subject: Senate Bill 178
Introduced as a Senate Bill

Brief of Bill

Senate Bill 178, as introduced, amends K.S.A. 1998 Supp 8-1002 relating to administrative hearings associated with alcohol or drug related offenses involving the operation of a vehicle. Specifically, the bill deletes a reference to the Division of Vehicles' authority to hold a hearing in a county adjacent to the county in which the violation occurred.

The effective date of this bill would be July 1, 1999.

Fiscal Impact

Passage of this bill would not affect State Highway Fund revenues.

Administrative Impact

The Division of Vehicles currently holds driver license hearings in 27 locations throughout the state; with hearings being scheduled in the county where the violation occurred or in a county adjacent thereto. Approximately 11,000 of these hearings are held each year and are performed with 2 part-time and 2 full-time staff attorneys.

The requirement to hold hearings in the county where the alleged violation occurred would require the Division to secure an additional 78 locations at which hearings could be held with some associated rental costs. Additionally, the Division estimates that 6 additional unclassified hearing officers and 1 full time Office Assistant III support person would be required to handle the additional locations.

The following costs would be first incurred in fiscal year 2000. As mileage reimbursement rates, per diem, salaries, etc. escalate over the years, these costs would continue to grow and need to be funded:

6 Addl. Hearing Officers

@ $40,700 each	$244,200
1 Addl. Office Assistant III	$ 25,891
Hearing Officer Travel	$150,000
Office Rentals	$ 61,200
One-Time Operating Exp. for OAIII	$ 4,550
TOTAL	$485,841

Administrative Problems and Comments

Taxpayer/Customer Impact

The requirement, under this bill, for the Division of Vehicles to hold hearings in the county where the violation occurred would be seen as a positive change by those individuals being scheduled for a hearing.

Legal Impact

Senate Bill 178 proposes a change concerning the administrative hearing processes under the Kansas implied consent law. The suggested change could have considerable impact on the administrative hearing processes under the implied consent law. The substantive change is in K.S.A. 1997 Supp. 8-1002(g).

The bill would delete a reference to the Division's authority to hold a hearing in a county adjacent to the county in which the violation occurred. The effect of this change would be to require the Division to hold administrative hearings under the implied consent law in all 105 counties. Although there is no legal bar to this change, it will noticeably impact the hearing process. Elimination of the ability to centralize hearing locations will necessarily cause difficulties in coordinating hearings. Additional hearing officers are likely to be needed. There may be some impact upon the time in which a hearing can be provided to a licensee, which may affect the issues raised in hearings and appeals.

Approved By:

Karla J. Pierce
Secretary of Revenue

5 Jud 2-99 Att 7

Senator Pugh's Judiciary Subcommittee

1. S.B. 102 would exempt capital improvements projects for Kansas Correctional Industries from the regular state agency capital improvements process; would extend the power of the Secretary of Corrections to enter into contracts or leases for prison industries if the amount does not exceed $500,000 from 10 to 20 years and permit these agreements for buildings; require the director of prison industries to advise and consult with the Joint Committee on State Building Construction concerning such capital improvements projects.

Conferees

Proponents of the bill included: Chuck Simmons, Department of Corrections

Opponents of the bill included: none

Subcommittee Action

Senator Bond made a motion to recommend the bill to the Senate Judiciary Committee. He noted that he would check with the Chair of the Senate Ways and Means Committee about the bill to insure that Chair had no concerns. Senator Gilstrap seconded the motion and it carried.

The bill has been referred to the Senate Ways and Means Committee.

2. S.B. 148 would amend the qualifications of district magistrate judges to require a candidate for that office be a resident of the judicial district at least six months prior to being elected or nominated for that office.

Conferees

Proponents of the bill included: Lowell May, Republic County; and John Bingham, Attorney, Belleville (submitted testimony)

Opponents of the bill included: None

Subcommittee Action

The Subcommittee took the bill under advisement.

3. S.B. 180 would establish a one-year statute of limitations for K.S.A. 60-1507 post conviction relief type actions. Currently, there is no statute of limitations on these actions.

Sen Jud 2-18-99 Att 7

Conferees

Proponents of the bill included: Jim Clark, Kansas Association of County and District Attorneys requested the bill.

Jared Maag, Assistant Attorney General, suggested an amendment to clarify when the one-year statute would begin to run which parallels federal law.

Opponents of the bill included: Whitney Damron, Kansas Bar Association

Subcommittee Action

The Subcommittee took no action on the bill.

4. S.B. 181 clarifies that the three-year period for aggregating three prior class A or class B misdemeanors to equate to one person felony for criminal history purposes. The three-year period would commence prior to the date of conviction for the current crime.

Conferees

Proponents of the bill included: Barbara Tombs, Kansas Sentencing Commission.

Opponents of the bill included: none

Subcommittee Action

The Subcommittee recommended the bill for passage by the full Senate Judiciary Committee.

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
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Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

To: Senate Judiciary Subcommittee

From: Charles E. Simmons, Secretary

Subject: Senate Bill 102

Date: February 15, 1999

This bill was introduced by the Joint Committee on Corrections and Juvenile Justice Oversight. It provides the Department of Corrections with certain authority relative to the financing and construction of correctional industry space. This authority was granted on a one-year basis by the 1998 Legislature in a proviso contained in the Omnibus Appropriations Bill.

SB 102 provides the department with additional flexibility in expanding industrial space available for use by private companies who employ inmate workers. The additional flexibility is afforded through: (1) expedited processes in implementing KCI financed projects; and (2) newly established options for private financing of construction and/or renovation of industries space.

More specifically, it exempts Kansas Correctional Industries from the requirements of KSA 75-3717b, pertaining to preparation and review of state agency five-year capital improvement plans. It authorizes expenditure of unencumbered balances in the correctional industries fund for new construction or renovation of buildings for correctional industries. It authorizes the Secretary of Corrections to enter into agreements with private parties for the purpose of accepting as a donation any building or renovation of a building to be used for a commercial enterprise if such enterprise contributes to the training and rehabilitation of inmates. And finally, it exempts industry buildings renovated or constructed pursuant to an agreement with a private party from the competitive bid process, architectural services review, and state engineering services review.

SB 102 will facilitate negotiations with private firms who express an interest in locating or expanding operations within KDOC facilities by allowing a more timely response to proposals and by creating more options for financing adequate space for industry operations. The

department has been negotiating with a private firm for financing a correctional industries building expansion project and we are close to finalizing an agreement.

As the fiscal note from the Division of the Budget indicates, the bill will have no fiscal impact in FY 2000. The projected balances in the correctional industries fund are used to meet KCI's operating reserve requirements and are not now sufficient to finance any expansion projects.

The department's strategic action plan includes the objective of optimizing offender work programs, which includes increasing the number of offender jobs in both traditional and private correctional industries. The passage of SB 102 will assist the department in meeting those objectives. I urge your favorable action on this bill.

Lowell May 2/15/99

Good morning Senators. I would like to thank you for the opportunity to speak to you today.

I was one of the nominees for the District Magistrate Judge position in Republic County. I am not here because I was not selected. I am here because of the inconsistency in the interpretation of the residency requirement. I also feel an obligation to the twenty people that wrote letters in my behalf and now do not understand how someone they consider a nonresident was selected.

Before the nominating committee met, Justice Larson stated that the statutes were confusing about the residency requirement. The committee met in executive session to determine the residency requirement. Their decision was to let each member vote their conscience.

K.S.A 20-331(b) and 20-334(b)(2) state that a person must be a resident of the county at the time of nomination, election or appointment. No where in the statutes does it define resident. This leaves it up to each Judicial District Nominating Committee to determine who is a resident and what constitutes being a resident. These decisions vary greatly throughout the state. In Clay County, the 21st Judicial District, it was determined that having an apartment or house for three weeks did not qualify as being a resident. Yet in Republic County, 12th Judicial District, it was determined that simply leasing a house and registering to vote the day before the nominating committee met, qualified the person as a resident.

In Republic County there were seven nominees for the Magistrate Judge position. One person withdrew his name before the nominating committee met. Of the six remaining nominees, four owned homes in the county and were without a doubt residents of Republic County. Of these four, three were lay persons and one was an attorney. The other two were attorneys. One of them leased a house and registered to vote the day before the committee met. He never did actually reside in the house. The other attorney was raised in Republic County, and his parents still reside there, but he lives in Manhattan. He told the committee that he had ethical problems saying he was a resident of Republic County when he was not. I might add that the attorney that leased the house was the county attorney in Washington County and three members of the committee are County Attorneys Needless to say this is the person selected for the District Magistrate Judge.

When one of the spectators questioned Justice Larson about the residency of the person selected, he told them that, " If you do not like it go back to electing judges", or words to that effect.

Other places in the statutes the length of time to qualify as a resident is spelled out. For instance, if a person wants to file for divorce they must live the state sixty days before they are considered a resident. A student must live in the state six months to be considered a resident and be eligible for instate tuition.

Does renting or leasing a dwelling for one night and never actually residing there make one a resident? I do not think so, nor do I think this is what the legislature had in mind when they put in the statute that a person must be a resident. It appears the only way to have consistency in the interpretation of resident, is to define resident.

I understand that in some people think that in the western counties there may not be anyone that would be qualified to be a magistrate judge if there is a six month residency requirement. I find this hard to believe. There may not be many attorneys in those counties that would apply for the position, but I think there are qualified lay people that would apply. Remember, you do not have to have a college degree to be a Magistrate Judge. It could also be put in the statute that should no qualified person apply for a vacant Magistrate Judge position within 60 days that a nonresident could be selected provided they move to the county upon selection.

Another thing that upset the residents of Republic County about the selection was that their wishes were not listened to. I have had numerous people in the county tell me that they did not want an attorney for the Magistrate Judge. As one of the lay nominees, I had twenty letters of recommendation. Some of the letters were signed by more than one person and two were from attorneys in the county. I also had two letters from attorneys from outside the county that know me well. The other nominees from the county had letters and people that spoke at the public portion of the selection process. The person that was selected had one attorney speak on his behalf, but not at the public portion, and no letters that I know of.

Overall the selection process of the magistrate judge in Republic County only proved that the attorney good ole boy network is alive and well.

In closing I urge you to adopt a definite residency requirement for magistrate judges and to also require background investigations for all judges.

K.S.A. 20-331(b) "No person shall be eligible for nomination, election or appointment to the office of judge of the district court in any county of any judicial district for which there has been established residence requirements for holding of such office if such person is not a resident of the county at the time of nomination, election or appointment."

K.S.A. 20-334(b)(2) "...be a resident of the county for which elected or appointed to serve;..."

Respectfully,

Lowell A. May

JOHN BINGHAM

Attorney at Law

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February 13, 1999

Written Statements to Kansas Senate Committee

in reference to Senate Bill # 148

I was a "nominee" in the recent hearings to choose the replacement District Magistrate Judge for Republic County, Kansas; and may not be able to appear personally. By this letter,

It is neither my intention to criticize the Commission members nor the current Magistrate Judge chosen in that procedure. I do believe that I can summarize comments and complaints made by citizens of this county who were, and remain, unhappy with the procedure, as it applies to the non-partisan selection of a District Magistrate Judge, i.e. "the local county judge" to our citizens.

Those comments are:

a. Their were numerous well qualified local candidates to choose from;

b. Local leaders and voters have a certain resentment with Republic County being split between two legislative Districts. This situation is aggravated by a perceived attitude that Washington County "politicians" exclude Republic County from any selection process for the 105th District, i.e. "it's ours";

c. After decades of having a "native son," on the local bench, a person from that neighboring county was selected by the recent Commission;

d. In larger geographical districts, like the 12th Judicial District, the current non-partisan nominating procedure may work well for *recommending* a list of qualified nominees for the position of DISTRICT JUDGE while creating problems when Commission members from six counties, only two members being local, make the *final* selection of the District Magistrate Judge. (The prior makeup of this Commission has had only one member from smaller counties, while larger counties had three members.);

e. When the Commission is more than a screening committee on QUALIFICATIONS, the six lay members of the Commission are greatly swayed by the opinions of the attorneys;

f. This Commission was composed of three County Attorneys, causing more than several citizens to question the wisdom of such a makeup, especially when these attorneys have so much sway in making the FINAL choice;

g. Regardless of how qualified the final nominee, a packed Court Room in these proceedings expressed disbelief at the final choice and resentment that their opinions and testimony were ignored;

h. The person selected is undoubtedly qualified and will perform admirably in the position, but critics have vowed to run a NO campaign against him in the future causing more division;

i. I have heard comments that are critical of government and of my profession from local citizens; who are good citizens, good Kansans and good church members; that imply the procedure was fixed by a good old boy club, or worse comments;

j. Public Government must instill a respect and trust in our citizens for the "rule of law" and develop procedures for our processes that are above reproach and distrust;

k. One solution is to legislatively return the final appointment to the Governor's Office who can make that choice from a list screened by the Nominating Commission; checked by the KBI; and after listening to the local citizens and bar;

l. In examining any legislation on residency requirements, please consider that locals still use the term "outsider" for a nice person from 35 miles away; and

perhaps somebody from England can govern these colonies adequately but the citizens resented it; and,

perhaps a Chief Justice from New York would be fair and have a grasp of Kansas issues but we do not follow that procedure for our high court,

so that the selection of a local District Magistrate Judge, whether it be in Clay County, Republic County, or Jewell County, may deserve some special requirements.

Your honest consideration of these issues will allow the citizens of this District to keep faith in the non-partisan selection process rather than returning to the election of judges.

It is important to me that you believe that I was over any personal disappointment within 48 hours and have not participated in any backbiting, but that I am, by this letter, fulfilling a duty to local citizens and to my profession.

Sincerely,

John L. Bingham

John L. Bingham
(785) 527-5902

Kansas County & District Attorneys Association

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EXECUTIVE DIRECTOR, JAMES W. CLARK

Testimony in Support of SB 180

The Kansas County and District Attorneys Association appears in support of **SB 180**, which was introduced as a committee bill at our request.

The bill simply reflects federal law passed in 1996 (attached), which imposes a one-year period in which post-conviction relief may be sought. The statute in question is K.S.A. 60-1507. According to Larry Yackle, a graduate of K.U. Law School, state post-conviction remedies were developed in the 1930's not as a constitutional right on behalf of defendants, but in response to the United States Supreme Court's expansion of the scope of federal habeas corpus cases filed by state prisoners, who had few post-conviction remedies at the state level. Post-Conviction Remedies, p. 2. Since the federal cases were the result of the vacuum in state law, state post-conviction proceedings only naturally reflected the federal procedure. The passage of this bill only continues that reflection of federal law.

The purpose of the bill is not to limit access to courts by criminal defendants, but to give some finality to criminal cases, and to give some relief to counties. As the subcommittee members are aware, Kansas is unusual in that the county of conviction also represents the state in all post-conviction proceedings. That responsibility has increased greatly in the years since the creation of the Appellate Defender Office of the Board of Indigent Defense Services as well as other programs providing representation for state prisoners. Presently, there are 20 attorneys assigned to that office, and since appeals are their only function, their diligence has caused a huge increase in costs to counties. (This level of staffing and diligence also assures us that direct appeals are given the attention they deserve, hence should reduce meritorious post-conviction relief cases.) When a petition is filed pursuant to K.S.A. 60-1507, the county is often required to restore the trial record, some or all of which may be in county storage in caves near Hutchinson or Kansas City, Kansas. The retrieval of these records alone is a huge cost, in addition to the litigation costs in responding to these petitions. For example, the Court of Appeals recently rejected a 60-1507 petition filed in 1995 by a defendant who was convicted back in 1972, and his conviction affirmed in State v. Pyle, 216 Kan. 423 (1975) . (Although defendant had changed his name, he has previously filed at least three post-conviction actions under his original name.) To defend the claim, the county attorney not only had to locate the trial record in the county storage area, but also had to locate a retired Supreme Court Justice, who had served as defense counsel on the case. In rejecting the inmate's argument, the Court of Appeals deals with the first issue by merely finding that defendant had waived the defense of insanity as a matter of trial strategy, and the second claim by finding that indigent defendants were at that time allowed funds for psychiatric experts, and that no such request was ever made by defendant.

In conclusion, state post-conviction remedies are not constitutionally mandated, but were passed in an effort to keep federal courts from deciding issues in state criminal cases. State remedies were a viable alternative to federal habeas corpus proceedings, and as a result were similar to federal proceedings. Since federal habeas corpus is now limited to a one-year period after a direct appeal becomes final, it is only fitting that state procedures also contain such a limitation.

UNITED STATES CODE ANNOTATED

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

PART VI—PARTICULAR PROCEEDINGS

CHAPTER 153—HABEAS CORPUS

§ 2255. Federal custody; remedies on motion attacking sentence

[See main volume for text of first to fifth undesignated paragraphs]

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(As amended Apr. 24, 1996, Pub.L. 104–132, Title I, § 105, 110 Stat. 1220.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104–179 and House Conference Report No. 104–518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

References in Text

Section 408 of the Controlled Substances Act, referred to in text, is classified to section 848 of Title 21, Food and Drugs.

Amendments

1996 Amendments. Pub.L. 104–132, § 105, added three new undesignated paragraphs beginning "A 1-year period of limitation", "Except as provided in section 408 of the Controlled Substances Act", and "A second or successive motion must be certified", and struck out former second and fifth undesignated pars., providing, respectively, that "A motion for such relief may be made at any time." and "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

7-10

NOT DESIGNATED FOR PUBLICATION

No. 79,268

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DANIEL J. PARRISH,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Kiowa District Court; JAY DON REYNOLDS, judge. Opinion filed December 24, 1998. Affirmed.

Steven R. Zinn, deputy appellate defender, and *Jessica R. Kunen*, chief appellate defender, for appellant.

Charles W. Banks, county attorney, and *Carla J. Stovall*, attorney general, for appellee.

Before ROYSE, P.J., LEWIS, J., and THOMAS E. MALONE, District Judge, assigned.

ROYSE, J.: Daniel J. Parrish appeals from the decision of the district court

7-11

denying his motion under K.S.A. 60-1507. We affirm.

Parrish, formerly known as Michael Pyle, was convicted in 1972 of first-degree murder and arson in the death of his grandmother. His conviction was affirmed on appeal.

Parrish filed this K.S.A. 60-1507 motion in 1995. The district court appointed counsel to represent Parrish on the motion and conducted an evidentiary hearing. The district court rejected Parrish's argument that his due process rights were violated because the defense did not have an independent insanity evaluation prior to his trial. The district court, in fact, observed that Parrish's attorney had waived the insanity defense at trial as a strategic move.

Parrish first argues on appeal that the insanity defense is a personal right belonging to the defendant which cannot be waived by defendant's counsel. This argument was rejected in *State v. Rambo*, 10 Kan. App. 2d 418, 423, 699 P.2d 542, *rev. denied* 237 Kan. 888 (1985): "The right to assert the insanity defense is not such an inherently personal fundamental right that it can be waived only by the accused and not by his attorney." Moreover, Parrish makes no attempt to dispute the district court's finding that his counsel waived the insanity defense as a matter of defense strategy. Counsel even objected to the State conducting further mental evaluations of Parrish, saying that Parrish had undergone enough examination. Finally, Parrish

overlooks the fact that he explicitly agreed, on the record, with his trial attorney's decision not to present expert testimony of insanity.

Parrish's second argument on appeal is that his right to due process was violated, because the statutes in effect at the time of his trial did not require the appointment of a psychiatrist to assist an indigent defendant in preparing an insanity defense. He points out that a defendant could request an independent insanity examination, but that K.S.A. 22-3219 made no provision for the expenditure of state funds for such an examination.

This argument is moot, as the State notes, because Parrish never requested an independent insanity examination or sought state funds for such an examination. This factor distinguishes this case from *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), upon which Parrish attempts to rely. In addition, Parrish's argument fails to acknowledge K.S.A. 22-4508, which at that time allowed an indigent defendant to apply to the court for funds for expert services.

For these reasons, we conclude that Parrish's arguments are without merit. The district court did not err in denying his K.S.A. 60-1507 motion.

Affirmed.

exclusionary rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment," 585 F.2d at 1211. The district court said "it is doubtful that this statement continues accurately to reflect the current state of Supreme Court jurisprudence." In its most recent exclusionary rule case, *Pennsylvania Board of Probation and Parole v. Scott*, 118 S.Ct. 2014, 63 CrL 393 (1998), the high court held that the exclusionary rule does not apply in state parole revocation proceedings. "It follows inescapably from *Workman's* teachings that the Fourth Circuit panel in *Workman*, under its own analysis, would reach a different result today in light of *Scott*," the district court said. "Thus, *Workman's* conclusion that the exclusionary rule applies in probation revocation hearings can no longer be considered authoritative circuit precedent." (*U.S. v. Armstrong*, DC EVa, Crim. No. 91-526-A, 12/17/98)

Grand Juries—Criticism of Unindicted Persons—Mandamus

Individuals who are aggrieved by a grand jury's violation of an Oklahoma statute limiting grand jury comment about individuals the grand jury does not name as subjects for indictment or ouster from public office may successfully bring a mandamus action requiring the supervising judge to expunge the statutorily prohibited language from the grand jury's report, a majority of the Oklahoma Supreme Court declared Dec. 8. A grand jury investigating the death of a child issued a report calling for the indictment and ouster of a county sheriff. The grand jury also criticized the petitioners in this mandamus action, the chief deputy sheriff and a supervisor in the human services department, and recommended that they be terminated from the supervisory position they held, but it did not indict them or institute ouster proceedings against them. The relevant statute, 22 OS 346, allows grand juries to make formal written reports about public offices and public institutions they investigate but adds that "[n]o such report shall charge any public officer, or other person with willful misconduct or malfeasance, nor reflect on the management of any public office as being willful and corrupt misconduct." The statute explains its purpose as follows: "It being the intent of this section to preserve to every person the right to meet his accusers in a court of competent jurisdiction and be heard, in open court, in his defense." Vice Chief Justice E. Hardy Summers said the report's language about the mandamus petitioners ran afoul of the statute and, furthermore, that the statutory bar is mandatory. Proceeding to the issue of whether a trial court has authority to expunge a report containing matter in violation of Section 346, the majority pointed out that Oklahoma trial courts have long been held to have authority to refuse a grand jury's report or to require that such a report be submitted in the proper form. The failure to exercise that authority in this case "has resulted in the plaintiffs being accused of willful and improper conduct without having any avenue by which to confront their accusers," the majority complained. If a report contains unauthorized accusations, "the court has a duty to expunge such material in order to safeguard the individual's right of confrontation. When, as here, the trial court fails to do so, it may upon Petition for Writ of Mandamus do so, and if it does not this Court may require expungement so as to conform with the statute," the majority concluded. Justice Marian P. Opala dissented in part, and Justice Ralph B. Hodges dissented, both without opinion. (*Stonecipher v. Taylor*, Okla SupCt, No. 87,898, 12/8/98)

Habeas Corpus—Limitations Period—Suspension of Writ

In an unsigned, one paragraph opinion, the U.S. Court of Appeals for the Second Circuit Dec. 21 affirmed "for substantially the reasons stated by the district court" a decision holding that the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations for bringing federal habeas corpus petitions, 28 USC 2244(d), does not amount to an unconstitutional suspension of the writ. The district court's decision was based on its conclusion that the limitations period neither makes it impossible for a petitioner to ever raise a federal claim in habeas nor creates an unreasonable burden on doing so. (*Rodriguez v. Artuz*, CA 2, No. 98-2252, 12/21/98, affirming 990 F.Supp. 275, 62 CrL 1400)

Immunity—Breach of Non-Prosecution Agreement—Standard for Determining Whether Breach Is 'Material'

The U.S. Court of Appeals for the Fifth Circuit Dec. 9 offered guidance on determining whether a defendant's breach of the conditions set forth in a non-prosecution agreement is "material" so as to allow the government to be released from its reciprocal obligations under the agreement. Judge Jacques L. Wiener Jr. observed that in the context of general contract law, which informs the interpretation of non-prosecution agreements, the court has recognized that "a breach is not material unless the non-breaching party is deprived of the benefit of the bargain." Furthermore, the court observed, courts in the Fifth Circuit have sought to clarify the concept of material breach by comparing it with the "converse" concept of substantial performance. In a decision earlier this year in a contract case, *White Hawk Ranch Inc. v. Hopkins*, No. CIV.A.91-CV29-DD, 1998 WL 94830 at *3 (Feb. 12, 1998), the U.S. District Court for the Northern District of Mississippi held that if a party's non-performance "is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance," the party has substantially performed, and the other party is not entitled to recision. "We think that this approach is equally applicable in determining the materiality of a breach in the context of nonprosecution agreements," the appeals court said. The court went on to conclude that the conduct identified by the government as a breach comprised only relatively insignificant omissions of what the defendant knew about one other individual, and that the omissions "did nothing to frustrate the government's prosecution" of that person. In closing, the court commented: "It ill behooves government agents and prosecutors to enter into agreements of transactional immunity with mid-level co-conspirators, milk them of substantial leads and information that literally make the government's case against the 'big fish' while coincidentally giving the government a lay-down winning hand against the cooperating co-conspirator; then, at the last moment, rely on some technical or relatively minor deficiency in performance to pull the rug from under the cooperating informant by claiming a breach and proceed to prosecute him in a slam-dunk

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

PAUL J. MORRISON, DISTRICT ATTORNEY
Steven J. Obermeier, Assistant District Attorney

February 15, 1999

Sen. Edward Pugh
Kansas Statehouse
Topeka, KS

RE: Testimony concerning **1999 SB 180**

Dear Senator Pugh and Members of the Senate Subcommittee,

I apologize for not being able to be present testify today concerning SB 180, a measure that would impose a statute of limitations on inmates' claims of ineffective assistance of counsel. I have a CLE presentation to a group of lawyers and cannot get away.

Under K.S.A. 60-1507, an inmate may raise the issue of ineffective assistance of counsel "at any time." The current law gives inmates more rights than law-abiding citizens, who must operate under statutes of limitation. See K.S.A. 60-501 *et seq.* As a prosecutor since 1985 who handles most of the appeals in the Johnson County District Attorney's Office, I have seen the current law lead to absurd results.

Thomas P. Lamb was convicted of two counts of kidnapping and one count of murder. He committed these crimes in 1969 and 1970. His conviction was affirmed by the Kansas Supreme Court in 1972 in State v. Lamb, 209 Kan. 453, 497 P.2d 275 (1975). More than 26 years after he committed the murder and kidnappings, Lamb filed a writ raising three issues: whether he was denied effective assistance of counsel; whether his trial was so unfair because of his amnesia as to violate due process; and, whether he was actually innocent of the murder and kidnapping charges involving Karen Sue Kemmerly. He was able to do this "at any time" under the language of K.S.A. 60-1507. Had a new trial been ordered for Lamb, it would have been very difficult to marshall the evidence and witnesses in an effort to re-prove his guilt beyond a reasonable doubt.

Charles Peck was convicted in 1984 of aggravated kidnapping, robbery, aggravated battery, burglary and felony-theft. He committed these crimes in 1983. His convictions were affirmed in State v. Peck, 237 Kan. 756, 703 P.2d 781 (1985). In 1995, Peck filed a K.S.A. 60-1507 action claiming ineffective assistance of counsel, among other things. The denial of this petition is currently on appeal in Peck v. State, Court of Appeals Case Number 96-76927-A. One of the arguments Peck raised on appeal was that he was denied due process because the Clerk of the District Court cannot find the transcript of the closing arguments. Depending on how the Court of Appeals rules, Peck may receive a new trial for the crimes he committed in 1983.

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Randall Murphy was convicted of drug related charges in 1987. His conviction was affirmed in his direct appeal. In 1997, when Randall Murphy was on parole[1] for his offenses, the district court a hearing on the issue of whether his trial counsel's assistance was ineffective. The case was captioned Murphy v. State, Johnson County District Court Case No. 96 C 5726.The problem in these cases is that witnesses, and their memories, fade with the passage of time.

Police property rooms are full of evidence from old homicide cases that have gone to jury trial years ago because of the possibility that a K.S.A. 60-1507 action may be filed years later.

Currently, a direct appeal of a conviction takes about two years from the time that a notice of appeal is filed until the time that the appellate courts render a decision and the mandate from the appellate clerk's office returns to the district court. SB 180 bars the lawsuit "within one year from the date on which the judgment of conviction becomes final ..." The appellate courts have the discretion to remand a case that is on appeal back to the district court for a determination of the effective assistance of counsel. See State v. Van Cleave, 239 Kan. 117, 716 P.2d 580 (1986). Therefore, as a practical matter under SB 180, a convicted felon has at least three years in which to file a claim of ineffective assistance of trial counsel. In most instances, a criminal defendant is aware that he may want to pursue a claim against his trial counsel as soon as the adverse verdict is handed down.

The purpose of statutes of limitation is to "secure the peace of society and to protect the individual from being prosecuted upon stale claims." Rochester American Ins. Co. v. Cassell Truck Lines, 195 Kan. 51, 54, 402 P.2d 782 (1965). Such a proposal would encourage litigation of ineffective assistance of counsel claims while trial counsel still remembers the case, is still available to testify and while witnesses are still available to prove the underlying criminal case. The federal government has a similar statute of limitation.

The federal government has a similar limitation in its Anti-Terrorism and Effective Death Penalty Act. This act has passed constitutional muster.

Thank you for time and attention. I encourage you to recommend passage of SB 180.

Sincerely,

Steven J. Obermeier
Assistant District Attorney

[1] "A prisoner who institutes a K.S.A. 60-1507 proceeding, and is released on parole from the state penitentiary while his appeal from a denial of his motion by the district court is pending, remains in 'custody' within the meaning of the statute, and the questions presented are not thereby rendered moot." Faulkner v. State, 22 Kan. App.2d 80, 83 (1996).

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TESTIMONY OF
ASSISTANT ATTORNEY GENERAL JARED S. MAAG
BEFORE THE SENATE JUDICIARY SUBCOMMITTEE
RE: SENATE BILL 180
FEBRUARY 15, 1999

Mr. Chairman and Members of the Subcommittee:

I want to thank you for this opportunity in appearing today on behalf of Attorney General Carla Stovall, and ask that you support Senate Bill 180 which would impose a time limitation on the presentation of collateral appeals under K.S.A. 60-1507. This legislation is designed to promote the State's legitimate interest in the finality of convictions and in general address the problem of unduly delayed petitions filed by state prisoners seeking redress years after their convictions have been affirmed. Additionally, this legislation promotes a simplified approach to state collateral review by discouraging piecemeal litigation.

The imposition of a one year limitation on the filing of a state collateral appeal does not place an undue burden upon a prisoner who seeks review of a constitutional claim. Some might argue that such a provision violates a prisoner's due process rights. Others may contend that this legislation prescribes an impermissible suspension of the writ. These assertions, however, are misplaced, as neither § 8 of the Bill of Rights of the Kansas Constitution would be transgressed, nor would a prisoner's due process rights under the Fourteenth Amendment be infringed upon through the enactment of this legislation.

Just as Congress may impose limits on a writ of habeas corpus within the federal system, the legislature may pass judgment on the proper scope of K.S.A. 60-1507 as it pertains to time limitations. SB 180 is not jurisdictional, it does not divest the court of its authority to hear claims under the statute, it merely requires a prisoner to diligently pursue his or her claim(s), thus easing the burden placed upon the system in trying to address an issue that was viable some 10 or 15 years earlier.

In 1996, Congress passed similar legislation contained in 28 U.S.C. § 2244(d)(1) enacted under the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Under that law, Congress fashioned a number of start dates for a prisoner who seeks review of an alleged constitutional violation. The primary start date will occur on the day that direct review of a petitioner's case is concluded. Three other dates begin the time period apart from this date, if

applicable. These are cases where (1) the state has unconstitutionally prevented a petitioner from presenting a claim within the one year limitation, (2) the United States Supreme Court has announced a new rule of law that applies retroactively to a petitioner; or (3) where the factual basis of a claim could not have been discovered through due diligence on the part of a petitioner. Should any of these provisions be met, the time period for the beginning of the one year limitation is delayed.

We believe that Senate Bill 180 should incorporate similar provisions. They provide an equitable remedy for those cases where a legitimate claim can be established beyond the one year limitation period. We have thus presented an amendment to Senate Bill 180 which encompasses these alternate start dates.

To be sure, this issue raises both state and federal concerns with regard to the ability of a prisoner to test the legality of his or her detention. This legislation does not, however, foreclose all avenues of redress for state prisoners, as some might claim. This bill is constitutionally sound and necessary to bring a sense of finality and order to our system of criminal justice.

Indeed, it is well established that a state may impose time limitations to the assertion of a constitutional right. *Brown v. Allen*, 344 U.S. 443, 486 (1953); *Michel v. State of La.*, 350 U.S. 91, 97-98 (1955). The question of whether the one year limitation would violate the suspension clause rests on whether the limitation period renders the habeas remedy "inadequate or ineffective" to test the legality of the detention. *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998) (citing *Swain v. Pressley*, 430 U.S. 372, 381 (1977)). Again, this legislation does not materially impair a prisoners right to file an appeal pursuant to K.S.A. 60-1507, it simply establishes a reasonable time limit for a prisoner to exercise this right of action.

Equally important is the fact that Kansas is not the first state to implement time limitations for post-conviction relief. For example, both Iowa and Mississippi have established laws which impose time limitations for collateral appeals. See I.C.A. § 822.3 and Code 1972, § 99-39-5, Uniform Post-Conviction Collateral Relief Act (UPCCRA) respectively. Both laws have been challenged for constitutional validity and each state Supreme Court found that the time limitations did not work an unconstitutional suspension of habeas corpus. See *Davis v. State*, 443 N.W.2d 707, 709-710 (Iowa 1989); *Cole v. State*, 608 So.2d 1313, 1319 (Miss. 1992).

In closing, I respectfully present to the committee a quote from the late Justice Powell regarding numerous appeals brought by prisoners who abuse the system with continuous and frivolous pleadings:

> "At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell J., concurring)

Accordingly, on behalf of Attorney General Carla Stovall, I would respectfully ask for your support of Senate Bill 180.

Proposed Amendment to Senate Bill 180

Section 1. K.S.A. 60-514 is hereby amended to read as follows: 60-514. The following actions shall be brought within one year:

(e) An action brought pursuant to K.S.A. 60-1507 and amendments thereto. A 1-year period of limitation shall apply to a motion attacking sentence by a prisoner in custody under sentence of a court of general jurisdiction. The limitation shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review by the United States Supreme Court or expiration of the time for seeking such review;

(B) the date on which the impediment to filing a motion attacking sentence created by State action in violation of the Constitution or laws of the United States, or the constitution or laws of the state of Kansas is removed, if the prisoner was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court of the United States or the Supreme Court of the State of Kansas, if the right has been newly recognized by the Supreme Court of the United States or the Supreme Court of the State of Kansas and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Sec. 2. K.S.A. 60-1507 is hereby amended to read as follows:

60-1507. (a) *Motion attacking sentence.* A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may ~~at any time~~, *pursuant to the limitations within K.S.A. 60-514(e),* move the court which imposed the sentence to vacate, set aside or correct the sentence.

Legislative Testimony

KANSAS BAR ASSOCIATION

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TO: Members, Senate Judiciary Committee

FROM: Martha Coffman, representing the Kansas Bar Association

SUBJ: SB 180

DATE: February 15, 1999

My work phone is 296-2639 if you have any questions.

Because of long standing commitments I have made to be in Lawrence today, I regret that I am not able to appear in person to present my remarks. However, I will try to briefly summarize for you my concerns about an attempt to limit the availability of a collateral remedy for those convicted of offenses in the State of Kansas.

SB 180 seeks to create a 1 year statute of limitations for filing a K.S.A. 60-1507 motion. A person convicted of a crime uses this procedure to challenge the conviction after the direct criminal appeal is completed. I oppose this bill for the reasons stated below.

Let me begin by reviewing my background. At this time I direct the Office of Central Research for the Kansas Court of Appeals. In this capacity I supervise 12 attorneys who provide research for the Court of Appeals judges. All direct criminal appeals, except those involving a life sentence, and all appeals from K.S.A. 60-1507 proceedings are filed in the Kansas Court of Appeals. Also, I am the immediate past president of the Criminal Law Section of the Kansas Bar Association and have been a member of that organization since graduating from law school 20 years ago. While I believe it is helpful for you to understand my background in weighing the value of my comments, I need to emphasize that in presenting this testimony, I am not representing the Kansas Court of Appeals or the Kansas Bar Association. Although I draw from my past experiences working for the court and as a member of the KBA, my testimony represents my personal thoughts on the subject of post-conviction relief in Kansas.

Further, I want you to be aware I have written two articles in this area of law. The first article dealt generally with *habeas corpus* in Kansas. *Habeas Corpus in Kansas: How is the Great Writ Used Today?* 1995 J. Kan. Bar. Assoc. 26. In the second article, I discussed K.S.A. 60-1507 proceedings specifically. *Habeas Corpus in Kansas: The Great Writ Affords Postconviction Relief at K.S.A. 60-1507,* 1998 J. Kan. Bar Assoc. 16. I would be happy to provide you with a copy of either article.

The Kansas appellate courts have seen an increase in the filing of appeals of 60-1507 motions, but most of this increase is not from traditional 60-1507 proceedings. Our big increase is from legislative changes to sentencing, particularly the Sentencing Guidelines Act. Implementation of partial conversion and subsequent amendments to the guidelines without indicating whether changes will be retroactive or prospective caused a large increase in the use of K.S.A. 60-1507 in recent years. If the legislature wants to slow an increase in 60-1507 proceedings, the best way to do this is not change the Sentencing Guidelines unless necessary to correct an egregious error.

One problem with the effort to create a one year statute of limitations for K.S.A. 60-1507 is newly discovered evidence. I assume the one year of limitation will begin to run after the direct appeal is over. At this

Over, Please

time, a motion for new trial based upon newly discovered evidence must be brought within two years after final judgment. K.S.A. 22-3501. If a claim for new trial based on newly discovered evidence arises after the two-year limitation of 22-3501, then Kansas Supreme Court case law has held a prisoner must use a 60-1507 proceeding to request that a sentence be set aside and a new trial granted. If a one-year limitation is placed on 60-1507, this proceeding will no longer be available for newly discovered evidence found some time after the trial. This means another procedure will need to be created to replace the well known rules now used in K.S.A. 60-1507 proceedings.

What type of evidence can this involve? The area that immediately comes to mind is newly tested DNA evidence. We have all heard reports of new evidence establishing the wrong person was convicted of a crime, even on death row. Kansas is not immune and has had at least one case in which an inmate, Joe Jones, was released after serving a total of seven years for rape. DNA testing established the semen taken from the victim could not have been from Mr. Jones. The availability of such a remedy seems particularly critical now that Kansas has inmates of death row.

Also, let me point out stale ineffective assistance of counsel claims are not successful. The presumption is the attorney gave effective assistance. The petitioner (or inmate) has the burden to establish that assistance provided by counsel was ineffective. Do you really believe an inmate with a valid ineffective assistance of counsel claim will sit in Lansing or El Dorado for 10 years hoping his attorney will die so he can file a 60-1507 proceeding and be sprung? This is highly unlikely. Remember the presumption is the attorney's assistance was effective. The burden is on petitioner to prove otherwise. Each year of delay this is more difficult.

If this bill is aimed at the workload of the appellate defender's office (ADO), the person who drafted it does not understand how the system works. In my experience, ADO attorneys raises all issues in the direct appeal. ADO does not see a 60-1507 proceeding until after it has gone through the trial court. By then ADO is limited to raising the issues preserved in district court--if any. As far as I can tell, this amendment will not impact ADO's workload.

Last, but not least, Section 8 of the Kansas Bill of Rights states that "the right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion." We are not being invaded. Except for resistance from my teenage sons regarding the amount of time they must spend on homework, I have not seen Kansas in a state of rebellion. It is my belief a one-year limitation on use of habeas corpus would violate the Kansas Bill of Rights.

I vehemently oppose a statute of limitation for 60-1507 proceedings. This is the last protection our system provides to correct unconstitutional proceedings for criminals. Its importance will be amplified dramatically when the first death penalty case is affirmed on appeal. K.S.A. 60-1507 has rarely been amended since its enactment in 1963. The rule has worked well for over 35 years and its procedures are well established. Unless the Legislature wants to develop a new statutory proceeding to replace 60-1507, which assures the constitutional protection 60-1507 now provides, the one-year limitation should be rejected.

Ron Smith wanted me to relay to you that the KBA also officially opposes this legislation.

Thank you.

Over please