Approved March 16, 2000
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:16 a.m. on March 15, 2000 in Room 123-S of the Capitol.

All members were present.

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

Conferees appearing before the committee:
Representative Mary Compton
Paul Morrison, Johnson County District Attorney
Jerry Maag, Prosecutor for Attorney General Stoval
Ron Wurtz, Kansas Bar Association

Others attending: see attached list

HB 2075–concerning the Kansas tort claims act; relating to definition of an employee

Conferee Compton testified on behalf of District Judge Fred Lorentz discussing the issue of probationers working in the community and liability concerns. (attachment 1) Following lengthy discussion regarding whether of not the bill provides for insurance coverage for these workers, the Chair stated he would contact the judge for clarification.

HB 2684–concerning civil procedure; relating to habeas corpus

Conferee Morrison testified in support of **HB 2684.** He provided a brief overview of K.S.A. 60-1507, a bill whereby an inmate may raise the issue of ineffective assistance of counsel "at any time" with no statute of limitations. He discussed the abuse of this law by inmates who are "bored" and so use this law for any purpose and "squander law enforcement and judicial time and resources." He cited several examples of this abuse by inmates in Johnson County. He stated that the federal government has a similar limitation in its Anti-Terrorism and Effective Death Penalty Act and stated this act has passed constitutional muster. (attachment 2) Discussion followed.

Conferee Maag testified in place of Chris Biggs, Geary County Attorney, who could not be present today. (written testimony submitted by Mr. Biggs - see attachment 3) In response to Committee's questions during previous discussion he expanded on federal law regarding the issue of time limits for appeals and validated the previous conferee's claim that **HB 2684** does not violate an inmate's constitutional rights. (no attachment)

Conferee Wurtz testified on behalf of the KBA in opposition to **HB 2684.** He presented an historical overview of the common law writ of habeas corpus. He discussed the issues of incorrect sentencing and conviction errors citing several cases he was aware of and argued that the statute of limitation works an injustice. Since his comments were similar to Ed Collister's written testimony, the KBA utilized his letter as the conferee's written testimony. (attachment 4) Discussion followed regarding a compromise on the statute of limitations being one year as proposed by the bill. The conferee stated if there must be a compromise he would recommend 5-10 years. Following further discussion, Senator Goodwin moved to amend the bill with a 5 year limit and report it out favorably for passage, Senator Vratil seconded. Discussion. Senator Harrington moved to amend the bill with a 3 year limit, Senator Vratil seconded. Discussion. Senator Harrington withdrew her motion and a vote was taken on Senator Goodwin's motion and Senator Vratil's second to amend the bill to 5 year limit and pass it out favorably. Motion failed 6-5.

The meeting adjourned at 10:57 a.m. The next scheduled meeting is March 16, 2000.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 15, 2000

NAME	REPRESENTING
Rep. Mary Compton	C. Fred Lorentz (Judge)
Jena Walper	Kansas University
David Debenham	Attorney General
Jared Maag	Attorney General
Paul Morrison	JoCo. D.A.
Steve Kearney	KCDAA
Susan Bechard	KCDAA
Kathy Porter	OJA
Whitney Damron	KS Bar Assn.
Ronald E. Wurtz	Ks Bar Assn.
Loane A. Phillips	KDHE
~~Sharon Huffman~~	~~KCDC/KDHR~~
~~Sandy Braden~~	

THE THIRTY-FIRST JUDICIAL DISTRICT OF KANSAS

Second Division

Hon. C. FRED LORENTZ
District Judge
P.O. BOX 246
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YATES CENTER OFFICE	625-8610	FAX 625-8674

Date: March 9, 2000

Re: Testimony on House Bill 2075

I thank you for the opportunity to present written testimony as my schedule prevents me from appearing in person.

The idea for the bill resulted from discussions among several judges and court services and community corrections staff concerning problems with community service.

There is no doubt that assigning community service hours to probationers is of great value as a sanction for the courts; a method of allowing communities to see law breakers return some good to the community; and an opportunity for probationers to have an appreciation for what it takes to make a community.

I have worked extensively with community organizations and governmental agencies in our area in an effort to identify projects for which we can assign community service hours as well as to seek volunteer monitors. In general both groups are very willing to participate. However we keep encountering the liability problem.

In our judicial district we have been fortunate to have several successful community service programs. Even so, we find ourselves in need of many more projects and people to supervise those projects. Our school district could use probationers for clean up, washing school buses, etc. but are afraid due to liability concerns. Although we have been able to talk the fair association into using community service workers, they were very reluctant due to concerns about liability. On the other side, our efforts to use community volunteers as passive monitors whose purpose is to observe and fill out forms for our court services and community corrections staff has run into problems again due to fears about personal liability.

What I had hoped could be drafted was a bill to simply grant immunity to project providers and volunteer monitors. I know the approach addressed in HB 2075 is by ensuring work comp coverage for injury to the probationer. That helps for those entities that carry work comp, but wouldn't for those who don't. Additionally, it doesn't address the plight of volunteer monitors.

If any of you have suggestions regarding amendments to the bill, they will be greatly appreciated. The possibilities for expansion of the use of community service are unlimited if we can get around the liability concerns.

Thank you again for your time and consideration.

Sen Jud.
3-15-00
att 1

Comments in Support of House Bill 2684

to the Senate Judiciary Committee

Wednesday - March 15, 2000

Paul J. Morrison, District Attorney - Tenth Judicial District

I feel very strongly about my support of this piece of legislation. During my almost 20 years as a prosecutor, I have seen K.S.A. 60-1507 continually abused by inmates within the Department of Corrections to attempt to escape responsibility for their crimes and or used simply as a tool to harass the judicial system put them in prison.

Unfortunately, currently under K.S.A. 60-1507, an inmate may raise the issue of ineffective assistance of counsel "at any time." This current law gives inmates more rights than law enforcement and the public, who must operate under a statute of limitations before any criminal actions can be filed against those who have perpetrated crimes against them. Over the years I have witnessed many, many inmates in Johnson County, Kansas who have squandered law enforcement and judicial time and resources in responding to their claims of ineffective assistance of counsel. Here are a few examples:

- 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. One of the arguments Peck raised on appeal was that he was denied due process because the Clerk of the District Court could not find the transcript of the closing arguments. Had the Court of Appeals ruled in his favor, Peck could have receive a new trial for the crimes he committed in 1983.

- Derrick Davis was convicted in 1982 of homicide of a 16 year old high school student during an armed robbery. Davis received two jury trials after he was granted a new trial after his first claim of ineffective assistance of counsel. In the ensuing years, Davis again

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used K.S.A. 60-1507 in an attempt to escape responsibility for his crime. Our office has expended substantial resources in fighting these claims, the latest having only been ruled upon approximately eight weeks ago.

- 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 had 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 number 96C5726. The problem in these cases is that witnesses, and their memories, fade with the passage of time.

I would also note that police property rooms throughout the State are full of evidence from old homicide cases that have gone to jury trial years ago because of the remote possibility that a K.S.A. 60-1507 action may be successfully 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. Therefore, as a practical matter under this bill, 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 federal government has a similar limitation in its Anti-Terrorism and Effective Death Penalty Act. This act has passed constitutional muster.

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"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).

Senate Judiciary
Testimony 3/15/2000
In Support of House Bill 2684
Kansas County And District Attorneys Association
Chris Biggs
Legislative Chair KCDAA / Geary County Attorney
(785) 232-5822

I would like to thank the Committee for this opportunity on behalf of the KCDAA to support this necessary legislation. HB 2684 proposes a reasonable one year time limit following direct appeal upon an inmate's opportunity to challenge a conviction by a separate lawsuit under K.S.A. 60-1507. This does not interfere with any direct appeal rights.

TIME LIMITS

Time limits are preferred in the law. They give parties and opportunity to present their case and try contested matters in a timely fashion while evidence is fresh, and witnesses available. For example, the State must file most cases within two years of the act (K.S.A. 21-3106) and must bring a jailed defendant to trial within 90days arraignment or the defendant will be set free ---regardless of the crime (K.S.A. 22-3402). A defendant must make application for a new trial based on newly discovered evidence within two years of the conviction (K.S.A. 22-3501). Kansas has a 30 day limit on habeas actions (K.S.A. 60-1501). Yet, there is no time limit, at all, on K.S.A. 60-1507 actions.

The time limit proposed in the present bill will start to run after a direct appeal is over, which may last several years in itself. The intent of this bill is to eliminate appeals of the silly and mundane which require prosecutors to respond at a great expense of money and effort. The bill also allows the time to be extended in the interest of justice to allow for the truly exceptional cases.

NOTION NOT NOVEL

The notion of such a time limit is not novel. Missouri has a 90 day limit (Rule 29.5) and the United States Government has a one year limit (28 USCA § 2255). Both Iowa and Mississippi have time limitations for filing a collateral attack upon a conviction. I.C.A. § 822.3 and Code 1972, § 99-39-5, Uniform Post-Conviction Collateral Relief Act (UPCCRA). Both statutes have withstood a constitutional challenge to the time limitations. The United States Supreme Court has long recognized that a state may impose time limitations upon assertion of a right. *Brown v. Allen*, 344 U.S. 443, 486 (1953).

PRESENT LAW

Under present law an inmate has the right to a direct appeal through our state appellate courts, and also by application to the United Sates Supreme Court. After exhausting these remedies, which may take years, and inmate may then file an action under K.S.A. 60-1507, at any time, to challenge the conviction. Common issues raised include ineffectiveness of counsel, challenges to a plea hearing, and technical challenges to the selection of the jury or the charging document.

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There is simply no finality to a criminal case in Kansas. No matter how clear the evidence of guilt, a victim's family can never hear that the case is over. Even upon losing a motion under K.S.A. 60-1507, an inmate may then start the appeal process all over again as to the denial of the 60-1507, or file additional such motions.

*In Saline County a defendant successively maintained a 60-1507 and had his guilty plea thrown out ten years after his conviction — not because he claimed he was innocent, but because the judge failed to ask the magic words "how do you plead." The defendant had otherwise been advised of his rights, signed a written agreement, and the intent of the plea was clear from the record. He shot a police officer.

*In Wyandotte County, a defendant has filed 13 actions under K.S.A. 60-1507 to challenge his 1992 conviction.

* Daniel Remeta pled to 3 counts of murder and filed a 60-1507 action 12 years later to withdraw his plea in an attempt to stay his execution in Florida.

* Sedgwick County is now dealing with a 60-1507 which, if successful, will require re-trial of a 1978 murder.

* Geary County presently has a case where a defendant is appealing a denial of a K.S.A. 60-1507 following a 1992 plea of guilty to murder. He has previously had his sentencing appeal and a prior 60-1507 appeal denied . He complains that his co-defendant was drunk when he made a statement implicating the defendant.

The Kansas County and District Attorneys Association strongly encourages passage of this bill.

Respectfully,

Chris Biggs
KCDAA Legislative Chair

KANSAS BAR ASSOCIATION

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MEMORANDUM

3/14/00

TO: Chairman Tim Emert and Members of the Senate Judiciary Committee

FROM: Paul Davis, Legislative Counsel

RE: House Bill 2684

Chairman Emert and Members of the Committee:

Attached is a letter from Ed Collister, who is an attorney in Lawrence and is a member of the KBA Criminal Law Section. His written testimony summarizes the reasons that the KBA is opposed to the enactment of HB 2642. Ron Wurtz, who is also a member of the KBA Criminal Law Section, will be presenting oral testimony to the committee on behalf of the KBA. Because his comments are similar to Ed Collister's written testimony, we are going to utilize Ed's letter as Ron's written testimony. Sorry for the confusion!

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LAW OFFICES
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EDWARD G. COLLISTER, JR. (785) 842-3126 HALLEY E. KAMPSCHROEDER

March 14, 2000

Senator Ed Pugh

RE: House Bill 2684

Dear Senator:

The significant and objectionable portion of this bill establishes a one year statute of limitations for filing motions pursuant to K.S.A. 60-1507. This limitation dates from the last appellate court action, or the last judgment of conviction, whichever is later, concerning the sentence about which the motion is filed.

The 1507 proceeding is usually publicized as a method by which a person may set aside a conviction, and obtain a new trial. Because that is not the only relief the proceeding provides, because the change may not accomplish much, and because the change may increase Court time considering requests, I offer the following comments.

I believe most of us are aware of the common law writ of habeas corpus. It was one of those ancient proceedings developed out of the century old fights between Englishmen and their King, much like the Magna Carta, to provide for the ability of every citizen to challenge restraint on that citizen's liberty. It is such a significant right that not only is it part of the United States Constitution but it is contained in the Bill of Rights of the Kansas Constitution in the Bill of Rights Section, Section 8. Since its nature is to allow a challenge to restraint on freedom, historically since the inceptions of both constitutions, it has been used to challenge the validity of convictions, the effect of which is to restrain liberty.

Prior to the adoption of the 1507 procedure in 1963 that meant if one were going to challenge a conviction one filed a habeas corpus case in a State Court. However, under jurisdictional and venue provisions the proceeding had to be filed in the District Court where the restraint was occurring. That meant all those habeas corpus cases were filed in the District Courts of Pawnee, Leavenworth, and Reno Counties. One of the basic reasons the 1507 procedure was adopted was 1) to authorize the District Court of the district of conviction to share the work load and 2) to make it easier and more efficient to hear the case by hearing it where the records concerning the case were located. But, the habeas corpus right is still there and will still supply relief even if House Bill 2684 were enacted. I would hope that we wouldn't try to limit the constitutional right.

Of significance the 1507 proceeding may address more than the validity of a conviction. Although we regularly read about 1507 proceedings in which the issues are of constitutional law relating to search and seizure, confessions, etc.,

the proceeding is used for other purposes also, not the least of which is to correct an illegal sentence. For example, I have just been appointed to represent an individual who claims he has already served his sentence under pre-sentencing guideline rules. Under the provision in House Bill 2684 he could not file that proceeding because one year since case activity had passed. Yet he may have a perfectly good argument. He has in effect served all the time that he is required to serve. A statute of limitation works an injustice. In the four years I was a contract appellate lawyer doing business with the Appellate Defender's Office I regularly ran across cases where comparable examples existed. Probably because of the rush of processing cases, mistakes sometimes are made. The complexity of record keeping concerning cases, sentences, and service of time, may result in mistakes.

One of the most memorable cases during my appellate work involved a case in Wichita where the defendant asserted the sentence had been served. After ordering transcription of a sentencing process years after the fact, it was discovered that although the official written document, the judgment, orders that sentences be served consecutively, the sentence pronouncement from the bench was that they would be served concurrently. That made a tremendous difference in the length of time that was required to be served since it is the sentence as pronounced which our Court has repeatedly held governs.

My tenure doing appellate cases also taught me one other thing. Communications with inmates is not good. They do not necessarily get their mail, it is not necessarily sent to the right place because they are regularly transferred from one institution to another, they do not have the assistance of counsel and, many are semi-illiterate.

If we assume that there are some sentences that are not correct, and that there are some convictions that are probably not valid, and I submit we must assume that based on evidence of past practice, why should we inform those entitled to relief that they can only get their relief if they ask for it within a year? If we are worried about the volume of Court business, our Court rules in effect filter out these frivolous cases. If we adopt something like the amendment proposed, all we do is increase the number of legal issues and the Court time required.

The amendment in this bill is a bad idea and, it sends the wrong message.

Yours very truly,

COLLISTER & KAMPSCHROEDER

By: Ed Collister

Edward G Collister, Jr.

EGC/ers