Approved on: March 20, 2001
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Vice Chairperson Ward Loyd at 3:30 p.m. On March 5, 2001 in Room 313-S of the Capitol.

All members were present except:
Representative Nile Dillmore - Excused
Representative Geraldine Flaharty - Excused
Representative Andrew Howell - Excused
Representative Mike O'Neal - Excused
Representative Doug Patterson - Excused
Representative Daniel Williams - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Chris Biggs, Geary County Attorney
Donna Heintze, Milford, Kansas
Paul Morrison, Johnson County District Attorney
Ed Collister, Kansas Bar Association
Representative Bill McCreary
Bill Schwertfeger, Caldwell, Kansas
Representative Gary Boston
Don Krebs, Hillsboro, Kansas
Bruce Andrews, Topeka Parks & Recreation
Rick Bowden, Assistant Executive Director, Kansas State High School Activities Association

Hearings on **HB 2138 - one year time limitation on writs of habeas corpus**, were opened.

Chris Biggs, Geary County Attorney, appeared as a proponent of the bill. He stated that it would not interfere with any direct appeal rights but would limit the time following a direct appeal to challenge a conviction by a separate lawsuit. (Attachment 1)

Donna Heintze, Milford, Kansas, commented that the proposed bill would give the victim's family closure. (Attachment 2)

Paul Morrison, Johnson County District Attorney, explained that inmates file 1507's for two reasons; to harass the judicial system and to escape responsibility for their crime. He provided the committee with examples of cases where inmates have filed appeals. (Attachment 3)

Ed Collister, Kansas Bar Association, appeared in opposition to limiting the time an appeal can be filed because of the fear that courts would rush into judgements without serious consideration of the appeal. (Attachment 4)

Judge Steve Leben did not appear before the committee but provided written testimony in opposition to the bill. (Attachment 5)

Hearings on **HB 2138** were closed.

Hearings on **HB 2240 - involuntary manslaughter while handling a firearm under the influence of alcohol or drugs**, were opened.

Representative Bill McCreary appeared before the committee as the sponsor and explained the proposed bill. (Attachment 6)

Bill Schwertfeger, Caldwell, Kansas, provided the committee with a copy of the complaint that he filed in the District Court regarding the shooting death of his son. (Attachment 7)

Hearings on **HB 2240** were closed.

Hearings on **HB 2126 - battery against a sports official**, were opened.

Representative Gary Boston appeared as the sponsor of the bill. The legislation is a pro-active step towards solving a problem before it gets too big. (Attachment 8)

Don Krebs, Hillsboro, Kansas, commented that the legislature needs to send the message that this type of behavior will not be tolerated and that respect for authority figures is important in both work and play.

Bruce Andrews, Topeka Parks & Recreation, stated that there has been a loss of respect between players, fans and sports officials and that the legislature needs to make the right call and move the bill out.

Rick Bowden, Assistant Executive Director, Kansas State High School Activities Association, informed the committee that district attorneys are reluctant to press charges. The bill would give the district attorneys a stronger statute to file under. (Attachment 9)

Mike Boston & Barry Mano did not appear before the committee but requested their testimony in support of the bill be included in the minutes. (Attachments 10 & 11)

HB 2296 - mandatory sentencing & fines for forgery

Representative DiVita made the motion to report **HB 2296** favorably for passage, as amended on 2-20-01. Representative Lloyd seconded the motion. The motion carried.

House Judiciary
Testimony 3/5/2001
In Support of House Bill 2138
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 2138 proposes a reasonable 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 of 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 still require prosecutors to respond with great expenditure 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.

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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 States 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.

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 had 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 complained that his co-defendant was drunk when he made a statement implicating the defendant. This proceeding required hearings, a record, an appeal, briefs, and a written opinion from an appellate court. (Donna Heintze, the mother of the victim, will address you this morning)

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

Respectfully,

Chris Biggs
KCDAA Legislative Chair

House Judiciary
Testimony 3-5-2001
In Support of House Bill 2138
Donna Heintze
Mother of Victim

Good afternoon my name is Donna Heintz from Milford, KS. I am here today in support of House Bill #2138. On September 20, 1991, my 20 year old daughter, Cathy, a full-time student at Kansas State University, was working part-time at a convenience store when two men entered the store in full military battle gear. The robbery had been planned like a battle maneuver. Cathy was shot at close range in the head with a rifle containing a magnum shell. The cash register was never opened.

The two men received life in prison and are still there. But over the last nine years our wounds have not been allowed to heal completely. There is no way to explain the feelings that come over you or the ball in the pit of your stomach when you get the call from the county attorney informing you of a K.S.A. 60-1507 action or appeal. Suddenly the life you have worked hard to put back together takes a turn and all the old wounds are opened again-returning all the feelings of that night.

The appeal affects the whole family as they begin the long wait for the ruling to come back. This happens not once or twice, but many many times. The appeals claim that the robbery was excused by the Desert Storm Syndrome; or that his partner had been drinking when he confessed; or that he had to plead guilty to avoid the military death penalty. He has appealed to our Supreme Court three times.

On Thursday, when Chris Biggs called me asking for my comments, I realized that even after nine years my heart still sinks when I hear his voice out of fear of yet another appeal. I believe it is time to stop the nightmare and let the wounds heal as best as they can for victims. This bill will be a big step in that direction. I pray that none of you will ever have to experience any of this, but if you do, I hope this bill will be in place, so you can have closure, which countless thousands of Kansas victims and their families do not now have.

I would like to take this time to thank you for giving me this opportunity to express my feelings and I hope it will make a difference.

Sincerely,

Donna Heintze

House Judiciary
3-5-01
Attachment 2

Comments in Support of House Bill 2138

Monday - March 5, 2001
Paul J. Morrison, District Attorney

I'm here today to testify in support of House Bill 2138. 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 that 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 marshal 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 rule din his favor, Peck could have received a new trial for 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 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 a year 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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[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).

TESTIMONY BEFORE
HOUSE JUDICIARY COMMITTEE
RE: House Bill 2138
March 5, 2001

Mr. Chairman, Ladies & Gentlemen:

Thanks for giving me an opportunity to express the views of the Kansas Bar Association on House Bill 2138, which basically establishes a one-year time limit to file a proceeding to challenge the validity of a conviction or sentence currently set out in K.S.A. 60-1507.

The Kansas Bar Association has in the past adopted a position opposing any such time limitation, renewed that opposition last year, and continued by renewing that opposition for the current legislative session.

Unfortunately, we were not aware of it until it was too late for a representative to make arrangements to appear and testify before this committee last year. For that we apologize. We did testify before the Senate Judiciary Committee and ultimately the proposal last year was defeated.

I have enclosed for your interest the testimony of those KBA representatives who presented testimony to the Senate Judiciary Committee last year. They continue to advocate as they did last year, as in the testimony attached. That testimony is from myself, Martha Coffman (now an attorney with the Kansas Corporation Commission, but for many years in charge of central research for the Court of Appeals), and John Tillotson (who for many years was a federal magistrate and therefore came in contact with Kansas post-conviction

relief cases in that capacity since there has been a requirement for years that a state prisoner exhaust state remedies before moving to the federal court).

I urge you in addition to consider the following:

1. Habeas corpus protection for individual citizens is of ancient derivation, having existed in English common law years before it was first enacted by the Habeas Corpus Act in England in 1679. It is the method by which any citizen can challenge the validity of any restraint, which includes imprisonment by a government.

It is so significant that those who wrote the Kansas Constitution thought it important enough to be contained in the Bill of Rights of our Constitution. It is found at Section 8 of the Bill of Rights:

> "Habeas corpus. The right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or of rebellion."

The current bill proposes to suspend the right after a year. It does not seem that it is required by the public safety because of invasion or rebellion, and therefore at its best is constitutionally suspect.

2. In 1776, our forefathers, prior to establishing our constitution, published their thoughts on individual rights. They stated in part:

> "We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

The Kansas constitutional expression of the writ of habeas corpus protects liberty. While it is true that unfortunately some forfeit the right to liberty by their conduct, our justification for declaring that forfeiture is that the rule of law was followed in a criminal case. Surely if the rule of law was not followed, the forfeiture was not justly obtained. Our system for enforcing the law is not perfect. Maybe it can never be perfect. The ability to determine whether a conviction is valid or not should not depend on a one-year time limitation. Such a limitation would only say that if one's liberty is unjustly taken, one can get relief only by meeting a one-year limitation to do so. That just minimizes into potential non-existence the great writ. Philosophically, the time limitation concept is a bad concept. It is inconsistent with centuries of tradition concerning this particular rule of law.

3. A motion pursuant to K.S.A. 60-1507 was a procedural device added to make use of a habeas corpus writ ordained by the Kansas Constitution practical and more efficient. Prior to 1963 when the motion procedure currently in legislative form was adopted all challenges to conviction or sentence validity were made in the county where the petitioner was confined. Such was required by existing rules of substantive jurisdiction and venue. The 60-1507 motion procedure was adopted to spread the cases out to the District Courts where the sentence and confinement were imposed, and relieve the two-fold burden on Leavenworth and Reno counties to obtain records from other counties and consider all of the challenges filed at that time. The theory in adopting a 1507

motion procedure was that the District Court which had imposed the sentence following a conviction would have records concerning the conviction handy and would be the more practical and efficient place to consider the merits of the argument. The process has worked well with that modernization. But, that change did not limit the constitutional right in any way. If K.S.A. 60-1507 were abolished today, the result would revert to the pre-1963 procedure. If 60-1507 proceedings were time barred, arguably a habeas corpus remedy would still be available.

4. I have tried to read all the complaints about 1507s that one can find. There does not appear to be any pressing problem created by the existence of the statute in its current form. Statistics indicate that 350 to 400 1507 motions per year are filed in the District Courts and a slightly higher number of habeas corpus cases. There is no indication why there has been no demonstrated problem created by the existence of those 1507 motions. And, as a matter of fact, many of the motions are generated by the fact that the legislature over the years has changed the substantative and procedural law resulting in challenges to the validity of existing convictions and sentences.

5. The process from arrest to incarceration is much more complicated today than it used to be. As I am sure the committee members are aware, in recent history representatives of the court system and representatives of the Bar Association have repeatedly pled for more money resources for the court system to handle its ever expanding work load. That money was for more judges, more

nonjudicial personnel, more facilities, more technical tools to get the work done in a more expeditious fashion. The pleas were made because the ability to get the results done and done correctly, was succumbing to the absolute press of business.

I can give you examples of sentences recorded in journal entries after pleas which were incorrectly recited in the journal entry because there was not a transcript of the sentencing proceeding at the time the journal entry was crafted, and it was crafted by a prosecutor who did not accurately reflect the court's order, overlooked in the press of time by the overburdened defense system, and signed-off on by the judge who had 100 cases or more pass through his or her docket before the journal entry was presented. But, the results to clients were that they were sentenced to consecutive crimes instead of concurrent crimes according to the journal entry, but had not been so sentenced in fact. It took an appeal and/or post-conviction relief attempt to correct the situation. Or, there are examples where the Department of Corrections have inaccurately computed sentences that supposedly were set by the legislature and the court justifying the release of an inmate who served a sentence. Or, consider the fact that a significant number of persons sentenced to prison, either because of the emotional impact of the incarceration, or their intellectual ability, simply are not capable of protecting themselves without the assistance of help, perhaps from an attorney. In my experience, it is extremely difficult even for attorneys to communicate with their clients in prison. Sometimes it is years after the fact that

discrepancies appear or new witnesses appear or old witnesses recant or transcripts finally reveal that a convicted defendant's liberty was unconstitutionally taken. Rectifying those problems where they exist by the current system does not seem to have posed a great problem resulting in an uproar demanding a change in the law. There is simply no reason to change the law.

6. Last, the proposed changes give a court at least one, and perhaps two additional tasks to resolve a 1507 motion's issues. And, if the issue considered must be considered in the light of a manifest injustice requirement, the motion must be reviewed on its merits in any event. The proposal before you adds work for the judge.

Respectfully submitted,

Ed Collister

Edward G. Collister, Jr.
3311 Clinton Parkway Court
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WRITTEN TESTIMONY OF STEVE LEBEN
ON HOUSE BILL 2138

March 5, 2001

I am sorry that I am unable to appear in person today before your committee, but I would like to add my voice to those in opposition to House Bill 2138, which would place a time limit on the filing of habeas corpus petitions in Kansas. I have been a district judge since 1993; the views expressed here are submitted solely on my own behalf.

To me, the issues here really are simple ones: Should there be a time limit on justice when a person is in custody? If the State *has* wrongly imprisoned someone, doesn't the State *always* have an obligation to restore that person's freedom?

All of us must recognize that mistakes *do* happen in our justice system—and that will *always* be the case. The reason for that, too, is a simple one: No human institution can achieve perfection.

Let me take a moment to provide some explanation about why we must always realize that there will be an error rate in our justice system, no matter how well intentioned we may be. To achieve the right result, we must determine who, among conflicting witnesses, is telling the truth. That is a very difficult job. A pretty good study by a group of psychologists a few years ago tested several groups to see whether they were able to do any better than chance in telling which of two witnesses was telling the truth. (In the experiment, one was telling the truth; the other was not.) They conducted the experiment with a group of judges, psychologists, social workers, police officers, and Secret Service agents. Among all of those groups, the *only* ones who did better than chance at spotting the liars were Secret Service agents who were at that time doing anti-counterfeiting work. The researchers theorized that the specific training those agents received, plus the daily work, gave them an advantage in this task. Significantly, after those agents had been off of the anti-counterfeiting detail for six months, even they no longer scored better than chance.

So, it has been proven that judges do no better than chance in telling truth-tellers from liars. We certainly hope that juries of 12 may do better. And they may. But they also may not.

Last year's publication of *Actual Innocence*, a book detailing 62 cases in which serious convictions, including ones for murder and rape, were overturned based on DNA evidence certainly stands as compelling evidence for the wisdom of those who founded our country, and of those who wrote the Kansas Constitution, in providing for habeas relief. Virtually all of those 62 innocent, yet imprisoned, men would have been brought their habeas claims more than a year after sentencing. The top three reasons for mistakes in those cases, according to the authors, were mistaken eyewitness testimony, mistaken lab data, and police or prosecutorial misconduct. All of those are problems that can never be eliminated from our very human justice system.

I recognize that HB2138 does have an escape valve of sorts. It would allow an untimely claim to proceed, but "only to prevent a manifest injustice." Obviously, this will result in substantial litigation before any of us knows what that will be held by the Kansas Supreme Court to mean. One could certainly argue that any time an innocent person is imprisoned is a situation of manifest injustice. To have a time limit and an escape valve, however, indicates that some claims are intended to be time-barred. So we should recognize that this "escape valve" still is intended to result in closing the doors to the courthouse in at least some cases, even if the person imprisoned may be innocent.

The primary justification, as I understand it, for this bill is a claim that taxpayers are paying too much for these habeas cases to be resolved, and that they are taking up too much time of the courts. I note that the fiscal note provided by the Governor's office indicates that the Office of Judicial Administration has not documented any expected savings and the Board of Indigents' Defense Services actually has estimated that the bill could cause additional expense. I hope you'll require that the claim of cost savings to be very carefully documented before taking the proposed step of closing the doors of the courthouse to these claims.

I do apologize that I could not come to speak with you today in person. I hope, though, that you'll agree that the writ of habeas corpus, which was so significant both when our nation was founded and when our own state constitution was written, is worth preserving in a strong and vital way.

Actual Innocence:

The Justice System Confronts Wrongful Convictions

Steve Leben

Jim Dwyer, Peter Neufeld & Barry Scheck, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED. Doubleday, 2000. 304 pp. $24.95.

In some abstract, impersonal way, all of us are aware that mistakes are made in our justice system. It is, after all, a human institution, and human beings make mistakes.

Even as we read occasional stories about the release of an innocent person, the issues raised by that apparent mistake may remain abstract, without a sense of urgency attached to them. After all, this may have been an isolated error. Or the person may actually have been guilty, but not provably so.

If you read this book, the mistakes made in our criminal justice system will no longer be abstract ones.

Barry Scheck and Peter Neufeld are lawyers who started their careers in a legal aid office in the Bronx. Although they have long ago left legal aid for other, arguably greater pursuits—Scheck is a law professor and Neufeld is in private practice; they have teamed up to represent big-name clients like O.J. Simpson and to develop national reputations for their understanding of DNA evidence—they retain the zeal of idealistic young lawyers who have just started legal aid work and, as beginners, been given only a single client to represent.

The book tracks the work done by Scheck and Neufeld through the Innocence Project, a clinic they co-founded at the Cardozo Law School that uses volunteer law students and attorneys to review cases in which DNA testing might prove a convicted person's innocence. Their co-author, Jim Dwyer, is a reporter at *Newsday* who championed—prior to their release—the cases of some of those who had been wrongfully convicted.

The majority of the book consists of separate chapters detailing specific cases that illustrate typical ways in which the justice system may go awry and the innocent may be found guilty. The authors present overall data on 62 cases through August 1999 in which convictions were overturned based on DNA evidence. In 52 of 62 cases, there were mistaken eyewitnesses; in one case, there were five eyewitnesses, all of whom were wrong. The authors show how common techniques for police interrogations and lineups can suggestively lead witnesses to identify an innocent person. The also show how other factors—including false confessions, scientific fraud, junk science, poor defense counsel, and unethical prosecutors—have led to conviction of the innocent in specific cases in which DNA evidence has, after-the-fact, conclusively proved the defendant's innocence.

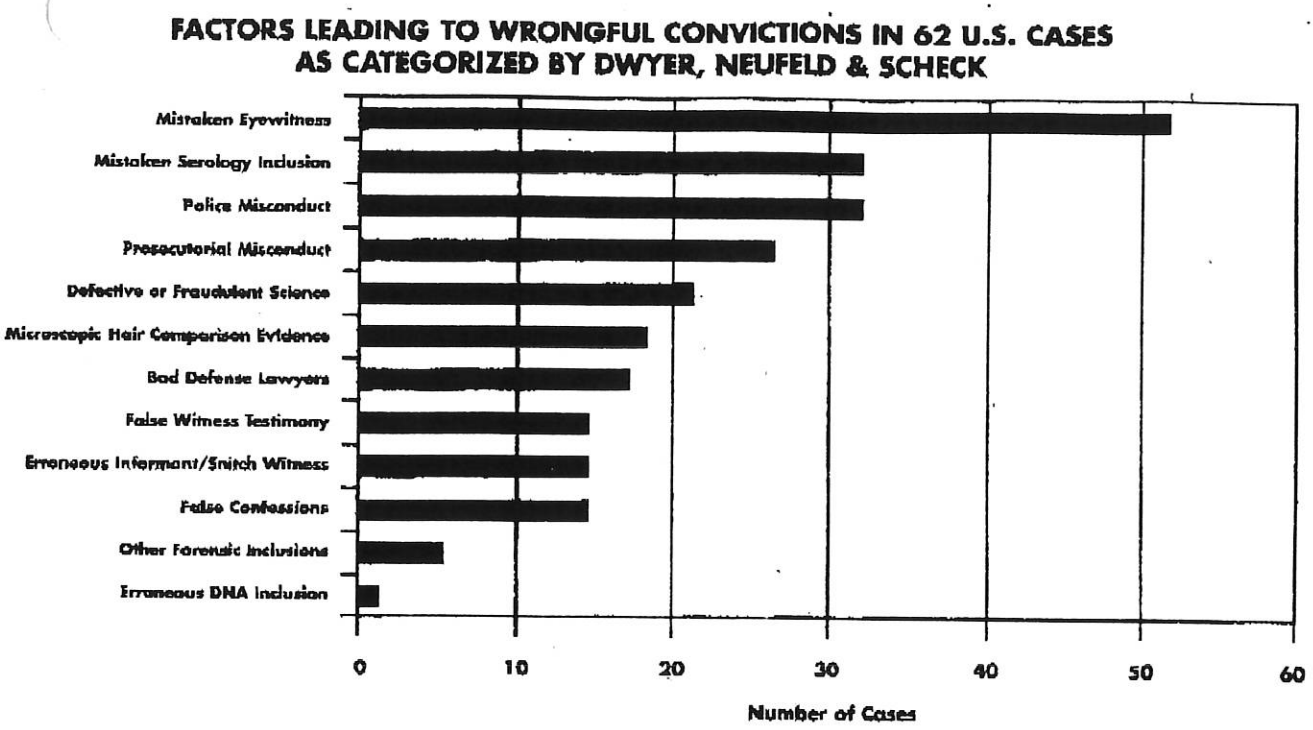
Two aspects of the book give a sense of urgency about reading it. First, it takes you vividly behind the scenes of real-life cases in which innocent men were convicted. We get to share not only the horror of the innocent who is sent to prison; we also get to see, in context, how such a terrible mistake could have occurred. Second, it provides a number of suggestions for improving the system to avoid these results, including a helpful, six-page appendix detailing the authors' suggested reforms.

Perhaps the most intriguing proposal is the establishment of governmental Innocence Commissions at the federal and state levels. The authors appropriately note that government agencies investigate the causes of air crashes for the purpose of figuring out what went wrong so that future accidents can be prevented. Surely the specter of placing innocent people in prison for long terms—or even capital punishment—is worthy of a similar effort.

The book is not without flaws. The authors have no doubt good-naturedly poked fun at whichever of them—or the editor—who mistakenly referred to "Brett and Scarlett" as the leading characters from *Gone with the Wind*. More relevant is the sense that the authors have a consistent pro-defense slant and do not always give fair consideration to opposing views. It is interesting that they suggest that the immunity enjoyed by prosecutors should be ended so that they could be sued for intentional misconduct. They do not, however, suggest any civil remedies against incompetent defense counsel, even as they note that 27 percent of the wrongfully convicted in their study had "subpar or outright incompetent legal help." When discussing the case of David Shephard, who had spent more than 11 years in prison for a rape he did not commit, the authors note that Shepard was unable to sue the prosecutor, the state, or the victim who had testified that he was the rapist. They ignore any possible claim against the defense counsel, who they have previously told us got so mad at Shephard when he refused to accept the plea bargain she had obtained (under which he would, no doubt, have served many years in prison) that she refused even to prepare him for his testimony in court.

There is also a sense that the authors generally accept whatever the wrongfully convicted man has to say about his dealings with attorneys, police and prosecutors as being accurate. Though they carefully attribute statements to the defendant, the stories are certainly told with an air of presumed truth to their statements. Yet there is certainly a chance that some of the police or prosecutorial misconduct was not as bad as reported if some of these recollections by the now-released defendants are exaggerated or wrong. Given the problems dutifully noted with eyewitness recollections, it would perhaps be appropriate to note more clearly that some of these recollections, potentially enhanced by years of wrongful imprisonment, may themselves lack accuracy as well.

Despite any limitations the book may have, it powerfully details problems in the system that anyone seriously concerned about justice must, at least, carefully consider. By



"Mistaken serology inclusion" refers to ABO and protein blood typing of semen, saliva, and blood stains. "Other forensic inclusions" refers to comparisons of fingerprints, fibers, and other physical evidence. Source: ACTUAL INNOCENCE, p. 263.

reviewing in detail cases in which it is beyond doubt that the wrong person was convicted, the book itself likely is better than any work product that could ever be produced by one of the authors' suggested Innocence Commissions: the written work of a committee rarely approaches the scope, clarity, or depth of research reflected in this book. The proposal for an Innocence Commission—in each state and at the federal level—is still worth pursuing, however, because it is only through getting all of the relevant players to sit down at the same table and to collaborate about the potential solutions that real change in the system can be achieved.

Judges are among those who must give careful thought to whether the existence of these cases—and the apparent causes of these wrongful convictions—demand change from us. In many, if not most, of the cases examined, the appeals process had included an appellate court's finding that whatever errors had occurred were harmless because the evidence of guilt was overwhelming. In the cases examined in this book, the one thing we know for sure is that the errors in those cases were *not* harmless ones. We can't know how many other cases are out there in which innocent men and women have been convicted—DNA evidence is not available to give definitive findings in most cases. The book makes a strong case, however, for careful thought about how a justice system of humans, with procedures already refined over the centuries, can be further improved.

Steve Leben, a general jurisdiction state trial judge in Kansas, is the editor of Court Review.

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MEMBER: AGRICULTURE & NATURAL RESOURCES BUDGET
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FINANCIAL INSTITUTIONS
INSURANCE

Mr. Chairman and members of the committee. I would like to thank you for this Hearing on HB 2240. This is a bill that was worked on by Former Representative Mike Farmer last session and I was asked to continue work on this bill. This bill is in response to a very tragic incident in Caldwell, Kansas. William Chad Schwertfeger was accidently shot to death by a friend who was under the influence of alcohol at the time.

Under the present law in Kansas, the person who shot him did commit the crime of "Involuntary Manslaughter' which is a severity level 5, person felony. However, the charges were dropped by the prosecuting attorney and the responsible person was never punished. I have furnished you with copies of the charges that were filed.

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The bill before you, would create the crime of Involuntary Manslaughter while handling a firearm under the influence of alcohol or drugs a severity level 5, person felony. It also states that aggravated battery with a firearm is the unintentional discharge of a firearm while under the influence of alcohol or drugs which result in:

1. **Bodily harm to a person; or**
2. **Great bodily harm to a person**

would result in a severity level 6 or 7, person felony. Depending on the degree of harm inflicted on the victim.

House Judiciary
3-5-01
Attachment 6

From: Bill Schwertfeger <vette@kanokla.net>
To: "Rep. Bill McCreary" <mccreary@house.state.ks.us>
Date: Thu, Mar 1, 2001 5:30 PM
Subject: Testimony before Judiciary Committee on HB 2240

Dear Rep. McCreary:

Thank you for your call this morning about the time and place for the Judiciary Committee hearing on HB 2240. I will be the only one attending. I am attaching a copy of the Charges that I filed with the District Court should you want to make it available to the committee. It might be wise to Black Out the name and information of the accused since it is no longer applicable.

The judge ruled that there was sufficient evidence to warrant charges being filed and turned it back over to the District Attorney for action. He dismissed the charges and that is why I have pursued this course of action to prevent this gross injustice from happening to some other family.

With the ever increasing use of Drugs and Alcohol in today society and the increase in gun related deaths or injury, it is imperative that we the citizens insure that the State of Kansas has Statues on the books that cover this Felonious Crime.

Sincerely,

Bill Schwertfeger
P.O. Box 8
Caldwell, Ks. 67022
620-845-6726

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House Judiciary
3-5-01
Attachment 7

COMPLAINT OF AFFIDAVIT FOR CRIMINAL CHARGES TO BE FILED AGAINST

IAW K.S.A. 22-2301 and 22-2302, I am filling under oath with the Sumner County District Court on this date, 22 July, 1999, a complaint of **Criminal Charges against**

, for the unintentional shooting death of William Chad Schwertfeger on the night of January 8, 1998 at approximately 11:27 PM

On the above date and time, **did commit the felonious crime of Involuntary Manslaughter as stated in the K.S.A. 21-3404, (a) recklessly and (c) lawful act in an unlawful manner (violation of Uniform Public Offense Code for Kansas Cities, 13th Edition, 1997, page 47 and 48, Article 10.5 and Caldwell City Ordinance No. 1305 which states that it is unlawful to discharge or fire a gun, rifle, pistol, revolver or other firearm within the city.) when he unintentionally fatally shot William Chad Schwertfeger.**

Eye witness present at the residence, 421 S. Chisholm, Caldwell, Kansas on the night of the fatal shooting was Todd W. Lowe, w/m, 21, 8-18-77 and witness at the residence was Ronald B. (Benje) Rowe, w/m, 22, 7-19-77.

Eye witness statements taken by the KBI, SA Colin Wood, on January 15, 1998 and supported by sworn testimony before a Coroner's Inquest. under the direction of the Attorney General, on December 18, 1998, show **how did with reckless disregard for human life in a matter of approximately 20-30 seconds pick up his own 9mm Ruger pistol (possessed since December 17, 1991) and while pointing this deadly weapon directly at William Chad Schwertfeger, at a distance of 2-5 feet (supported by KBI lab results and eye witness statements), cycled the slide action in an attempt to safe the weapon with a magazine clip loaded with 5 rounds. When the slide did not lock into the safe position, it chambered a live round.**

then pulled the trigger (KBI lab results support the Ruger 9mm functioned as designed) thus firing the deadly weapon. The 9mm steel shot bullet struck William Chad Schwertfeger in the left arm passing completely through the chest cavity and exiting the body just behind the right arm. He mostly likely died in the arms of the eyewitness, Todd W. Lowe. According to , under the influence of 10-14 6.0 beers (supported by statements from Todd W. Lowe, Benji Rowe, SA Colin Wood's investigation and own statements and sworn testimony), thought the weapon was empty and therefore did **NOT** follow any know gun safety techniques, ie. remove the magazine clip, point the deadly weapon away from any human, have safety on/decock or even **DO NOT PULL THE TRIGGER** . However, the other witness at the residence, Benje Rowe, had fired the weapon with on December 31, 1997, just 8 days before this. During this firing session, was the only person that loaded the magazine clip with 5 rounds. On January 5th or 6th 1998, Benje Rowe stops by the residence of and observes him

cleaning or oiling this 9mm Ruger. A statement by Michael E. Downum, w/m, 39, 7-1-60, on January 31, 1998, to SA Wood states that usually kept a loaded magazine in the weapon. When would pick up the 9mm Ruger, he would remove the magazine first, then cycle the slide to make certain there were no live rounds in the chamber and only then hand the weapon over to Downum. Michael E. Downum, a long time friend and employee of the , has seen handle this Ruger 9mm on numerous occasions.

The assumption that the action of on the night of January 8, 1998 at approximately 11:27 PM was accidental in nature rather than recklessly felonious is unconscionable. In my letter to William Mott, Sumner County Attorney, dated June 30, 1998, I highlight the flaws of the Caldwell Police Department and the summary report by KBI SA Colin Wood, dated June 12, 1998. During the Coroner's Inquest on December 18, 1998, did while under sworn testimony perjury himself on several occasions. Whether this perjured testimony affected the non-binding accidental cause of death of William Chad Schwertfeger can only be determined under a full due process of justice in District Court.

I therefore humbly submit under oath this complaint of Affidavit of Criminal Charges against charging him with Involuntary Manslaughter, IAW K.S.A. 21-3404 in the unintentional death of William Chad Schwertfeger on January 8, 1998.

WILLIAM R. SCHWERTFEGER
505 N. WEBB
CALDWELL, KANSAS 67022
(316) 845-6726

10 Attachments:

1. Ltr. to William Mott, Sumner County Attorney, dtd. June 30, 1998
2. Case file to William Mott, Sumner County Attorney, dtd. June 12, 1998
3. Ltr. to William Mott, Sumner County Attorney, dtd. August 20, 1998
4. Transcript of Coroner's Inquest held on December 18, 1998
5. Jurors cause of death of William Chad Schwertfeger, dtd. December 18,1998
6. Ltr. to Attorney General Carla J. Stovall, dtd. December 19, 1998
7. Ltr. to William Mott, Sumner County Attorney, dtd. December 21, 1998
8. Ltr. to William Mott, Sumner County Attorney, dtd. January 3, 1999
9. Ltr. to William R. Schwertfeger, dtd. January 5, 1999
10. Ltr. to William R. Schwertfeger, dtd. January 11, 1999

STATE OF KANSAS

GARRY G. BOSTON
REPRESENTATIVE, SEVENTY-SECOND DISTRICT
14 CIRCLE DRIVE
NEWTON, KANSAS 67114-1328

TOPEKA

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H.B. 2126 Battery against a "Sports Official"

Chairman O'Neal and members of the committee. Thank you for allowing me to appear before you this afternoon regarding an issue that is growing at an alarming rate throughout the country.

Physical attacks on persons having control of sporting events has reached epidemic proportions. Numerous reports of fan unruliness appear daily. Some of these attacks are fueled by alcohol served at some of the events. Officials have come under physical attack in just about every manner conceivable, from being spat upon, verbally abused to being slugged, tackled, kicked and attacked with chairs and baseball bats. Many have been chased from the field of play and some were not so fortunate as to escape. Every football and basketball official in Kansas knows the need to "get out of town fast...and safely" after a close game where emotions got out of hand. Everyone who has ever officiated can tell you some frightening stories. We need to make people aware of SPORTSMANSHIP AND THE PROPER BEHAVIOR at public athletic events. We have waited too long already!

The definition of a "Sports Official" in the bill is not limited to the referee or umpire, but includes those within a school system who have responsibility for crowd decorum and maintaining order at an event. We have included coaches as well as those persons who have the responsibility of providing security at athletic events ranging from professional to organized little league. School age students who officiate would be protected at summer recreation games the same as an official working any organized athletic contest.

The penalty for an adult convicted of "battery against a sports official" would be a minimum $500 fine and a maximum of $2,000 for adults. Juvenile violations would be handled under the juvenile offender code.

Thank you for your consideration. Athletics are a great American Experience. We must keep it safe, fun, competitive and rewarding for everyone, and that means we must determine and enforce the RULES OF BEHAVIOR so that we all may enjoy the joy of sports.

Garry Boston
Representative

House Judiciary
3-5-01
Attachment 8

TO: House Judiciary Committee

FROM: Rick Bowden, Assistant Executive Director, KSHSAA

RE: House bill 2126

I offer this written testimony in support of HB 2126. Those of us who have served in the capacity as an official or school administrator at interscholastic events/contests are aware of the potential that exists when fanatics attend interscholastic games. It is an unfortunate situation when those in attendance at interscholastic events sometimes take out their frustrations (which are sometimes carried over from the day's work or business world) at the interscholastic venues. As with many things in life, events outside and beyond the control of officials and administrators at interscholastic events sometimes affects and brings out inappropriate behavior by those attending the events.

Several years ago, the KSHSAA Board of Directors, added rule 52 *(Citizenship/Sportsmanship Rule)* to the rules governing interscholastic activities among the member schools of the KSHSAA. This rule was supported and promulgated by the schools who make up the KSHSAA. The school administrators of our member schools believed then as they do now that spectators, coaches and participants in interscholastic events should model proper sportsmanship which promotes good citizenship. Through the efforts of school administrators and sports officials, the schools of Kansas have promoted and made proper behavior at interscholastic events a primary objective. It is important to note that the number of times that violence occurs between spectators and game officials/administrators is very rare in interscholastic events in Kansas. This is due in large measure to the diligence that the school administrators provide at these events and the efforts of sports/game officials to avoid or defuse potentially confrontational situations involving spectators.

However, even with the efforts extended on the part of administrators and officials, potentially violent situations do arise – fanatics in the stands/bleachers loose control and behave inappropriately and will, on occasion, resort to physical as well as verbal abuse of those charged with administering the contests. The major reason that officials give me for leaving the officiating avocation is the abusive behavior extended to them by a few spectators at games.

Again it is important to emphasize that the overwhelming majority of the people that attend KSHSAA interscholastic games behave in appropriate and sportsmanlike ways – it is the very few that loose emotional control at games that prompts the concern that leads to legislation of this type. But those few can do much harm to officials and school administrators and ultimately to the learning environment that is interscholastic activities. For those instances, this legislation will provide assistance to officials and administrators in dealing with the inappropriate and potentially dangerous behavior.

Chairman O'Neal and Committee Members:

Thank you for allowing my written testimony on HB 2126.

My name is Mike Boston. I am a professional softball umpire. I am on the staff of the Big XII, Missouri Valley and Rocky Mountain Athletic conferences. I know what it is like to be escorted to and from dressing facilities by campus security / athletic department personnel--and I appreciate their commitment to safety. I also work high school and youth softball, too. Unfortunately, at those levels, most umpires change clothing and equipment at their cars---in the same parking lot that the fans park in and there is no security escort.

We live in a world that has become a violent society. An all-star second baseman spit in a Major League umpire's face. An NBA all-star pushed a ref into the scorer's table. A high school wrestler head-butted the referee leaving the official unconscious. A coach at a little league baseball game was ejected and returned to the field with a loaded .38 revolver and fired six shots at a volunteer 16 year old umpire... People see violence in sports daily as shown repeatedly on programs such as ESPN Sports Center. Abuse is seen at professional, collegiate, high school and recreational levels. A "monkey see, monkey do" mentality has evolved.

My major concern is for those involved in officiating youth leagues where the officials are less experienced and there are no supervisors on site. Under these circumstances, the potential for abuse from overly emotional fans is greater than if supervisors were present. The youth official is in a very vulnerable position.

Over the years, I have seen and heard quite a bit. Verbal abuse directed at officials has been condoned and officials have been taught to do their best to ignore the fans. Now, more and more fans are getting bolder and crossing the line of civility when they go beyond the verbal abuse and get physical, either by throwing objects or getting "hands-on." Our society cannot continue to allow this to happen.

As a 12 year old kid needing spending money, I began umpiring youth softball & baseball for $2.50 a game in 1971. Back then, parents and relatives watched the games and enjoyed watching their youngsters have fun, get some exercise and enjoy the experience of learning teamwork and good sportsmanship. Once in a great while, a loud mouthed fan would come along and yell at the umpire. This type of behavior was not accepted by the fans as they would remind the heckler that it was only a kid's game.

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3-5-01
Attachment 10

Fast-forward to 2001, the fun & exercise of sports have long been forgotten. The ballplayers are involved in a "business." College athletic scholarships are on the line, performance is a must, statistics rule--- so any bad call or perceived bad call could cost a parent money in the hectic world of seeking an expense-paid education. Even kids with no aspirations of college, play hard and "just do it."

The mentality of the sports fans today is quite different than in the past. Now, the lone heckler from 30 years ago is joined by many other hecklers, and the comments they make are often profane, vulgar and incite others to join their tirade. Since their poor language has been condoned, a few are getting brave enough to get physical... where do we draw the line?

An official being assaulted during or after a contest was unheard of thirty years ago. Today, most every state in our country has had reports of situations where rabid fans have attacked umps, refs, coaches, opponents, athletic directors and even score keepers. Kansas has been fortunate to have not had many serious reports. Most instances have gone unreported to civil authorities. However, Kansas is not immune.

Passing a law to make it a crime to attack any sports official can help our society regain it's civility. It is a shame to think a law needs to be passed to stop the nonsense, but thirty years ago, who would have thought that fans would really become so fanatical that they would even think about using profane and vulgar language at a ball game, let alone take matters into their own hands.

Sports officials are in a position of authority and deserve an opportunity to work in a safe environment. I hope that you will give serious consideration to protecting those involved in promoting sports for the people of Kansas by penalizing those who seek to harm them.

Thank you,

Mike Boston
boston_umpire@hotmail.com
2001 Clover Lane
Newton, Kansas 67114-1218

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February 6, 2001

The Honorable Gary Boston
Kansas House of Representatives
Room 156-E
State Capitol
Topeka, KS 66612

Dear Representative Boston:

I regret that I am unable to appear before you in person, but I hope you will read into the record, this testimony offered in support of legislation protecting sports officials under consideration in the state of Kansas.

Sadly, there has been a disturbing increase in the number of reported assaults and lawsuits against the men and women who officiate our games today. Many of these people either volunteer their time or officiate for minimal pay. In most cases, attacks occur from overzealous fans, players or coaches who have lost perspective of what the games are about and have emotionally decided to "take matters into their own hands." Often times, no security exists and the official is placed in a dangerous situation because they must maintain a calm and demeanor that protects the integrity of the sport, the organization that utilizes their services and the profession itself.

Vulnerable may be an understatement.

Since 1976 and 1980 respectively, *Referee* magazine and the National Association of Sports Officials has worked to improve officiating. We have published numerous educational training materials and a monthly magazine. As a news gathering publication for the industry, many reports have come to us about various attacks on officials. But at no time in our history have we received so many as in the past three years. The trend is growing. Bad behavior at sporting events is on the increase and the sports officials have become a primary target.

Let me share with you some examples of the kind of behavior we are talking about...

In Oklahoma, a 34-years old adult attacked and choked a teenage base umpire at a tee-ball game, because the adult didn't agree with a call at first base. Imagine the shock on the 5-and 6-year old participant's faces, the life-long lasting impression left when these children watched in horror this stupidity?

In Omaha last year an adult broke the nose of a 16-year old flag football referee at the halftime of a game in full view of the eight and nine-year old players.

Two years ago in Alabama, following a closely fought high school playoff game, the game announcer over the stadium address system said, "These officials should go back to school." This comment led to a mob of more than 100 students and adults from the losing school charging onto the field chasing the officials who were leaving. One official was physically assaulted.

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Attachment 11

In the state of Washington, a high school wrestling official was head-butted by a contestant after the official gave a point deduction to the participant for unsportsmanlike conduct. The official was unconscious for more than three minutes.

And last but not least, in Albuquerque last summer, an adult softball league umpire had his face crushed when a player, angry for having been ejected from the game for using profanity, blindsided the umpire and hit him full-force with an aluminum bat in the face.

While watching local and national news events, you may have seen in recent year's the attacks on professional officials by the NBA's Dennis Rodman or Major League Baseball's Roberto Alomar. Those are incidents that receive high exposure because they are events captured on video and involve highly paid athletes. What you don't see are the abuses occurring at the youth leagues around the country on an all to frequent basis. Those events rarely make the news.

Youth sports and many high school events provide no security measures at all. It is at these types of events where officials are most vulnerable. It is at these events where emotions can become so intense that physical attacks include bats, chairs, tire irons and even guns.

Many officials now wonder if it is worth it. We believe the answer is still "yes" because sports need the impartiality of the official. Our community youth programs and high schools need officials to ensure that events are conducted safely and fair. However, if such behavior is allowed to continue without consequences, the pool of officials will disappear.

NASO recently commissioned a survey of all 50 of the United States high school associations and nearly all reported a decline in officials registering in their state. Why? The lack of sportsmanship and fear of retribution by uncontrolled fans were cited as the number one reason.

If the behavior of those who cross the line goes unpunished, then the number of officials working such events will continue to decline.

Sports officials are conditioned to take the verbal abuse. Most officials will "tune out" the aggressively verbal fan. In all cases, such behavior by players and coaches can be handled through the rules of the game. However, physical abuse crosses the line. When someone charges an official with intent to cause bodily harm, then prosecution must be a recourse. Otherwise, you are declaring open season on all sports officials.

There are no party lines to cross when addressing a common sense issue such as this. There is no fiscal impact with this law, but there is moral impact. This legislation supports the most basic moral code we try to instill in our children and society — respect authority.

I urge you to join the 14 other states that have already enacted similar legislation. Leaders in Arkansas, California, Delaware, Georgia, Kentucky, Louisiana, Minnesota, Montana, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania and West Virginia have demonstrated courage, good judgment and vision to make the right call.

Before the end of this year, we anticipate several more states enacting legislation. Among those that we understand plan or have submitted bills for consideration this year: Alabama, Arizona, Connecticut, Florida, Illinois, Indiana, Iowa, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New York, South Carolina, Texas, Vermont, Virginia and Washington.

Thank you for your consideration. I ask that you make the right call now and support this legislation today.

Sincerely,

Barry Mano
President

BM/rds