Approved on: March 30, 2001
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. On March 19, 2001 in Room 313-S of the Capitol.

All members were present except:
Representative Andrew Howell - Excused
Representative Rick Rehorn - Excused
Representative Candy Ruff - 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:
Senator Barbara Allen
Senator David Adkins
Kyle Smith, Kansas Bureau of Investigation
Senator Jim Barnett
Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence
Tom Myers, Mental Health Center of East Central Kansas
Representative Doug Patterson
Larry Rute, Kansas Legal Services
Art Thompson, Office of Judicial Administration
Peg Nichols, Self
Jerry Goodell, Kansas Judicial Council

Hearings on **SB 291 - creating the crime of causing harm to another person by motor vehicle**, were opened.

Senator Barbara Allen appeared as the sponsor of the bill. She state that it would create a new crime of causing harm to another person by motor vehicle. It would apply to leaving a child, 10 years of age or younger, unattended in a motor vehicle in which the child causes the death or bodily harm to another person. (Attachment 1)

Hearings on **SB 291** were closed.

Hearings on **SB 263 - collection of DNA specimens from persons convicted of person felonies**, were opened.

Senator David Adkins appeared as the sponsor of the bill. He explained that the proposed bill would extend the criminal statute of limitations for sexually violent offenses to ten years or one year from the date on which the identity of the suspect is established by DNA. It would also require anyone convicted of a person felony to give a DNA specimens. (Attachment 2)

Kyle Smith, Kansas Bureau of Investigation, appeared before the committee in support of the bill. He commented that federal grants are available through fiscal year 2003 that provides $50 per DNA specimens entered into the system. (Attachment 3)

Senator Greta Goodwin did not appear before the committee but requested her written testimony in support of the bill be included in the minutes. (Attachment 4)

Hearings on **SB 205 - period of no contact with victim as condition of release**, were opened.

Senator Jim Barnett the sponsor of the bill (Attachment 5) introduced Tom Myers, Mental Health Center of East Central Kansas, who explained that the bill would require a 72 hours no contact order to be a condition of a bond. (Attachment 6)

Sandy Barnett, Kansas Coalition Against Sexual & Domestic Violence, she emphasized that the bill is a step towards remedying the problem of perpetrators bonding out from jail and returning home to harass the victim.(Attachment 7)

The Kansas Bureau of Investigation did not appear before the committee but requested that their written testimony in support of the bill be included in the minute. (Attachment 8)

Hearings on **SB 205** were closed.

Hearings on **SB 137 - enacting the Kansas Estate Tax Apportionment Act**, were opened.

Jerry Goodell, Kansas Judicial Council, explained that the proposed bill establishes a default rule for the method of payment of federal & state estate taxes, and an apportionment rule whereby each person interested in the estate's proportionate part of the total tax is determined according to the extent of a person's interest ins included in the total taxable value of all the interests. (Attachment 9)

Hearings on **SB 137** were closed.

Hearings on **SB 14 - mediation; disputes which may be ordered to mediation costs**, were opened.

Representative Doug Patterson explained that the proposed bill would allow judges the discretion to order mediation in any case where the judge finds that it would be a more appropriate means to resolve the issues in the case. (Attachment 10)

Larry Rute, Kansas Legal Services, informed the committee that these mediations would be non-binding and that most judges support this. Mediation is an increasingly accepted method by which the courts and administrative bodies develop flexible methods of resolving disputes and settling cases. (Attachment 11)

Art Thompson, Office of Judicial Administration, commented that current legislation authorizes judges to require mediation in child custody/visitation cases and division of property. The bill would give judges another tool in managing their dockets. (Attachment 12)

Peg Nichols, Self, supported the bill because medication can be a beneficial in a wide range of circumstances. (Attachment 13)

Senator Lana Oleen & Kansas Trial Lawyers Association did not appear before the committee but requested that their written testimony in support of the bill be included in the minutes. (Attachment 14 & 15)

Hearings on **SB 14** were closed.

SB 137 - enacting the Kansas Estate Tax Apportionment Act

Representative DiVita made the motion to report **SB 137** favorably for passage. Representative Newton seconded the motion. The motion carried.

The committee meeting adjourned at 5:15 p.m. The next meeting is scheduled for March 20, 2001.

STATE OF KANSAS

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SENATE CHAMBER

COMMITTEE ASSIGNMENTS
CHAIR: ELECTIONS AND LOCAL GOVERNMENT
MEMBER: ASSESSMENT AND TAXATION
EARLY CHILDHOOD DEVELOPMENT SERVICES
FINANCIAL INSTITUTIONS AND INSURANCE
REAPPORTIONMENT

March 19, 2001

Mr. Chairman, Members of the Committee:

I'm here to testify in favor of **S.B. 291**, which would make it a crime to cause the death or bodily harm to another person by motor vehicle, if the harm is caused by an unattended child age ten (as amended by the Senate Judiciary Committee) or younger.

It is my understanding that if a person leaves a child unattended in a motor vehicle, and that child is injured or dies, the parent or guardian's negligent action is covered by our current criminal laws. That person can be prosecuted under Kansas "endangering a child" statutes.

However, it is also my understanding there is a gap in Kansas law if a person leaves a child unattended in a motor vehicle, and that child causes the death or bodily harm to another person by causing an accident involving another motor vehicle or pedestrian. Thus, the reason for introducing **S.B. 291.**

This idea was brought to me by Michele Struttmann, whose 2-year-old son was killed when a motor vehicle occupied by two toddlers hit she and her son from behind while they were sitting on a park bench. The toddlers were left unattended in the vehicle. One of the consequences of her experience is that she has begun a campaign to bring awareness to this gap in many states' laws.

I have attached a copy of the Missouri law that was passed last year. In drafting this bill, we set the penalties so that causing harm to another person by motor vehicle when such child causes the death of another person

is a Class A person misdemeanor. This level of penalty was chosen for two reasons: first, it would not impact Sentencing Guidelines in terms of bed space, and second, it is equivalent to the punishment for vehicular homicide.

Last year, this Legislature passed a law called "Jake's Law", named for Jake Robel, a 6-year-old who was left unattended in a motor vehicle, and who was dragged to death during a carjacking. The man charged with first-degree murder in the case had just been released from jail, and had an outstanding warrant for his arrest. The State of Kansas now has a statutory duty to research the criminal history of persons in custody before releasing them in our communities.

I believe **S.B. 291** addresses just as serious and significant an issue that is not covered under Kansas law today. That is, when a parent or guardian leaves a child unattended in a motor vehicle, and that child causes the death or bodily harm to another person by causing an accident involving another motor vehicle or pedestrian, it should be a prosecutable crime.

Thank you for your consideration of **S.B. 291**. It passed out of the Senate on a vote of 29-11. I ask that you vote it favorably out of committee.

KIDS 'N CARS™

A car is NOT a toy

- 28-01 att 2

Barbara Allen

Michele Struttmann
918 Glenn Avenue
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To: Senator Allen/Nancy Kirkwood

Date: 2/28/01

Fax Number: 785-368-6365

Comments: Please call me if you have any questions. Again, I am sorry for any inconvenience this causes.

Hello my name is Michele Struttmann and this is a picture of our two-year-old son Harrison. Harrison was born February 20, 1996, our third wedding anniversary. What better present than a healthy, beautiful, baby boy? Everyone was in love with Harrison. He was the center of our universe. He loved playing with Hot Wheels, Barney, Arthur, basketball and anything to do with boats. Since Harrison loved anything involved with boats we took almost daily walks to a park that overlooked the Missouri River. That park would be the place where Harrison would lose his life.

I brought Harrison and our three nieces to Harrison's favorite park to watch boats on the Missouri River in Washington, Missouri. We thought May 30, 1998 would be no different from the literally hundred of times before, when we went to watch the boats. We were sitting on a park bench and heard a loud crash behind us. I turned, screamed for my nieces to run and lunged for Harrison. There wasn't enough time. The van grazed two of my nieces but hit Harrison and myself head on. As my arms stretched out to grab Harrison, I saw only the grill of the van.

I lost consciousness as the van drug me down a rock embankment. The van stopped when it struck a fire department boat preventing the van from plunging into the swift Missouri River. Moments later, surrounded by blood, I regained consciousness and saw my leg tangled in the tire. At that moment my life changed forever.

People frantically ran to help me. I prayed that somehow Harrison and my nieces escaped injury. I asked about Harrison but was only told he was being taken care of. I

knew I had to remain calm. I told the firemen how to contact my husband, sister and brother-in-law. From beneath the van, I counted the number of ambulances and listened for a helicopter. When I heard the helicopter, I knew the situation was critical. I was very cold from the loss of blood and had difficulty breathing.

The firemen hurriedly thought of ways to free my leg and decided to use airbags to raise the van. It was a horrifying experience but the worst pain was in not knowing the fate of our son. I repeatedly asked about Harrison but received only vague answers. After 45 minutes they freed my leg and transported me by helicopter to a hospital in St. Louis. I was told Harrison was transported to the hospital in Washington. I still had hope.

Upon arriving at the hospital I continued to ask about Harrison. A chaplain finally told me he was flown to Cardinal Glennon Children's Hospital, in St. Louis and my husband was on his way to be with him. I finally let go and cried. I knew in my heart that if Harrison was flown to Cardinal Glennon his life was in danger.

I lost a lot of blood from the multiple cuts. Severe burns seared my crushed leg. My arm was broken in several places. My doctor later told me I looked like Humpty Dumpty and he didn't know where to start to put me back together again.

After surgery I asked my husband about Harrison. He cried and couldn't tell me what happened. He kept shaking his head no. My mother had to tell me Harrison died. No

one told me earlier for fear I wouldn't fight through surgery. I kept fading in and out, reliving the nightmarish horror.

Two days later, I begged the doctors to let me go to Harrison's funeral but it was impossible. I wanted to tell him how much I loved him, how much joy he gave me and hold him one last time. I wanted to tell him how sorry I was for not protecting him from that van. As a mother I always tried to protect our son from dangerous situations. Being hit by a van in the middle of the park never entered my mind.

Slowly the shocking details unfolded. Two children (ages 2 and 3) were left unattended inside a van with the motor running while their parents stood behind the van talking to relatives. One of the children playing behind the wheel shifted the van into gear. The idle on the van, set higher than normal, caused the van to jump a curb stop and race through the park.

Weeks before Harrison's death a local storeowner had warned that mother not to leave her toddlers unattended inside a van that was running. She disregarded the advice and now we suffer the consequences.

I was initially in the hospital for three weeks. I have since undergone twelve surgeries; more surgery will be necessary. My physical loss is irreparable, but fails in comparison to the loss of Harrison. No one can understand the day-to-day emptiness of losing a child, unless it has happened to you.

The parents of the toddlers responsible for Harrison's death did not receive one citation, not even child endangerment charges for their own children. Their children would have perished in the run-away van as it headed toward the Missouri River, had it not been for a boat, bringing it to a screeching halt.

(Long pause) It is unbelievable that a person can throw a piece of trash out the car window and get a $1000 fine and/or up to a year in jail. Someone killed our son and they didn't receive one citation.

At the time of our tragedy, Missouri did not have a law that specifically prohibited leaving children unattended in vehicles. I testified in Missouri on a bill that that would make it illegal to leave children unattended in vehicles. This bill became effective on August 28, 2000.

Currently, ten states have laws that restrict leaving children unattended in vehicles. Our mission is that each state has a law specific to the problem of leaving children unattended in vehicles.

Since our tragedy I have found hundreds of incidents where children shifted a vehicle into motion. Most of the time the car hits a lifeless object. Those people are lucky and sustain only monetary damages. We wish we were that fortunate. The ultimate nightmare has happened to us.

Punishments must be implemented. This is not about writing tickets, but about saving lives. Stop and think about the consequences.

This type of irresponsible behavior should not be tolerated. Even if a car engine is off, or the child is properly restrained it is still unsafe to leave children unattended in or around vehicles. Children are not only in danger of engaging the vehicle, but subject to abduction, carjacking, or heat exhaustion. In 2000, at least 45 children died because they were left unattended in vehicles.

Most people would not think twice to call the highway patrol if they suspected an intoxicated driver. With increased awareness and education people will understand that leaving children in or around a vehicle is just as dangerous as a drunk driver on the road. When adults leave children unattended in vehicles they are not only endangering that children but innocent people as well. Unfortunately, Harrison is a perfect example of an innocent child being killed because of another parents' negligence.

The Missouri Highway Patrol reports from 1994-1998 there were 103 injuries and 3 deaths of children under the age of six injured or killed by a driverless vehicle or driver under the age of six. Harrison is NOT included in those three deaths, because the incident took place in a park not on a roadway. The National Pediatric Trauma Registry which consists of 85 pediatric trauma hospitals across the country reports 76 incidents over the

past 10 years of children being injured because a child was left unattended in a vehicle. This report does not include deaths and should be considered a lower boundary of the actual number of incidents.

The **University of California at Irvine** monitored 10 hospital emergency rooms in one county in California for 24months. They reported 9 incidents of children being injured or killed because they were left unattended in vehicles. One tragic incident is very similar to ours- A little boy age 2 was playing with his family around a campfire at a state park. Another two-year-old was in his car seat but left unattended in vehicle that was running. This little boy climbed out of his car seat and shifted the vehicle into drive. The little boy who was playing with his family around the campfire died and two adults were also injured. Two conclusions from the study were to never leave a child alone in a vehicle, under any circumstances and for product redesign.

The automotive industry also needs to take some of blame for these senseless deaths. Car manufactures need to implement safety campaigns advising consumers that they should never leave children unattended in vehicles. They advise people not place small children in the front seat if the vehicle has an airbag, but they do not warn parents about leaving children unsupervised in vehicles. Until auto manufactures modify design features that lead to injury and deaths we must warn everyone that children must NEVER be left unsupervised in vehicles.

I have uncovered over 1000 children being injured, abducted or killed because they were left unattended in vehicles. What does it take for people to wake up and understand that leaving children alone in or around a vehicle is a tragedy waiting to happen?

People leave their children unattended for various reasons…to save time, to run quick errands but **always** for their convenience. After all they will be only gone for a minute. How deadly a minute can be. Automobiles can be as lethal as a loaded weapon in the hands of a child. While most parents are cautious not to leave valuables, such as handbags or cell phones, in a vehicle, they often leave a behind something that is priceless…their child.

One death or injury because children are left unattended in or around vehicles is too many. Unfortunately, nothing can bring Harrison back, but we can make a difference for other children. **Harrison's death wasn't fate, but a preventable tragedy**. Every child has a right to be protected against being left unattended in a vehicle. How many more tragedies must occur before we protect these children?

STATE OF KANSAS

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SENATOR DAVID ADKINS

Testimony before the House Committee on the Judiciary
Senate Bill 263
Monday, March 19, 2001

Chairman O'Neal and Committee Members:

I appreciate this opportunity to appear before you in support of Senate Bill 263 which I believe, if enacted, would significantly enhance public safety in Kansas. The bill expands the offenses for which those convicted would be required to submit a DNA sample. The technological advances in crime investigation and the ability to positively identify a suspect as a result of DNA evidence provide us with a significant new tool for law enforcement. Kansas should take full advantage of this valuable asset in fighting crime.

With the passage of SB 263 Kansas would join many other states that have chosen to expand their DNA databases to include samples from those convicted of felony crimes. The bill would require individuals convicted of a felony or a crime for which they would be required to register in the offender registry to submit a saliva or blood sample to a DNA database. The expense of building this database will be offset largely as a result of federal funding that is now available.

I believe enacting SB 263 will cost effectively help prevent more crimes, solve more crimes and in some instances help to exonerate more innocent people than current law. These are all important public policy outcomes that we should embrace with the support and enactment of SB 263.

Attached to my testimony I am providing you with a number of items that have appeared in the press which I hope will provide you with more information on how expanding DNA databases has been shown to enhance public safety.

I appreciate your willingness to conduct a public hearing on this bill and I urge your favorable consideration of SB 263.

Respectfully submitted,

David Adkins

Senator David Adkins

House Judiciary
3-19-01
Attachment 2

Benefits of Expanding Criminal DNA Databases

Most states have enacted legislation requiring the collection of DNA samples from violent criminals. Once a sample has been collected, it is profiled and entered into secure state and federal databases. These databases are an irreplaceable investigation tool for law enforcement. When law enforcement obtains DNA from a crime scene, the DNA is compared against the state and federal databases. If the crime scene DNA matches a profile in the DNA database, then law enforcement has a suspect.

Recently, state legislators throughout the country have questioned why the DNA databases of violent offenders are not being expanded to include all convicted offenders. This comes as some U.S. states and foreign countries have discovered that expanding DNA databases beyond violent criminals could double the chances of matching a suspect against the state and federal databases.

Expanding the state databases to include all convicted offenders would have several benefits: First, more crimes would be solved; second, more crimes would be prevented; third, more innocent people would be exonerated; and lastly, society would realize greater cost-efficiencies:

1. **Solve crimes** – DNA collection from all convicted felons, rather than just sex offenders and serious violent crimes, would result in a monumental amount of violent crimes being solved. Statistics show that as many of half of the criminals that commit violent crimes have non- violent criminal histories (see Virginia and Great Britain study). Therefore, offenders who are required to submit DNA when convicted of non-violent felonies will be identified as they leave DNA behind at a rape and murder scenes. *If a state takes DNA from violent offenders only, the likelihood of solving a particular rape or murder are reduced by 50%.*

2. **Prevent crimes** - Solving a crime -- and solving it quickly -- has a direct effect on preventing additional crimes by the same perpetrator. An offender who is not apprehended in a timely manner remains free to commit more crimes. For example, according to a study completed by the National Institute of Justice (US Department of Justice) the average rapist commits 8-12 sexual assaults. If law enforcement could immediately apprehend the rapist after the first sexual offense, *then a minimum of 7 rapes would be prevented per offender.* When considering that *as many as half* of all violent criminals have a prior conviction for a non-violent crime, it becomes evident that expanding DNA database requirements to all convicted felons would significantly impact the number and frequency of rapes and other repeat violent crimes in this country.

3. **Exonerate the innocent** - Increasing the DNA database to those convicted of non-violent offenses would reduce the occurrence of innocent people who are wrongly suspected, arrested and convicted of crimes they did not commit. Two common scenarios exemplify how a larger DNA database protects such innocent people:

    - *The guilty party is in the database* – Imagine that strong circumstantial evidence leads law enforcement to suspect an innocent person of a crime. An analysis of DNA evidence from the crime scene identifies someone else as the true perpetrator when it is matched against profiles in the state's database. The innocent person is dismissed as a suspect and the true perpetrator is arrested.

    - *The innocent party is in the database* – Imagine a situation where law enforcement has DNA from a crime scene that they know belongs to the true perpetrator. Now imagine that law enforcement has identified a probable suspect, but does not have enough cause to obtain a warrant for a DNA sample from the suspect. If this suspect's profile was already in the database due to a previous non-violent conviction, law enforcement could automatically check the database and subsequently eliminate the person as a suspect. This would reduce an immeasurable amount of needless embarrassment and stress brought upon innocent persons wrongly suspected of committing horrible crimes.

4. **Cost Efficiencies** – According to a study completed by the National Institute of Justice (U.S. Department of Justice) rape is the costliest crime in America with victim costs totaling $127 billion. The study estimated that when all factors are considered (including medical and mental health care, lost productivity and decreases in the quality of life) the estimated cost of rape *per victim* is $87,000. If the average rapist commits 8 rapes, but a DNA databank stops the offender half way through his spree, then 4 rapes are prevented at a savings of $348,000. We know that the federal DNA database system has matched crime scene evidence to a database profile on at least 100 sexual assault cases. If we assume that just 25% of these offenders would have committed only one more rape each, a minimum of $2.17 million in savings would be realized.

Virginia produces 20 "cold hits" from its DNA database in the first two months of 2000.

The Plain Dealer, February 29, 2000.

HEADLINE: "Criminals can't hide from DNA." New York City police believe DNA database will help them catch scores of violent criminals, who have a recidivism rate of 40% to 50%.

Daily News (New York, February 17, 2000.

Florida gets cold hit on an unsolved murder from offender in the DNA database for a lewd behavior conviction.

Sun-Sentinel (Ft. Lauderdale), March 5, 2000

Two separate rapists are trapped by DNA when old evidence is compared against the state's DNA database.

Sun-Sentinel (Ft. Lauderdale), March 5, 2000

HEADLINE: "DNA Bust Gives Hope to Officials." Inmate at Sing Sing is nabbed for a 1979 murder through a "cold hit" in the DNA database.

Daily News (New York), March 14, 2000.

Unsolved rape from 1993 is put to rest when Georgia's DNA database matches crime scene evidence to an offender in jail for five other rapes.

The Atlanta Journal and Constitution, March 17, 2000.

Arkansas gets "cold hit" from a hair sample recovered from the scene of a burglary. DNA extracted from the hair matched a sample from an offender registered in the state's DNA database.

The Arkansas Democrat-Gazette, April 8, 2000.

The FBI's CODIS makes a "cold hit" linking a Florida resident to a 1995 murder in Iowa.

The Associated Press State & Local Wire, April 25, 2000.

California's DNA database leads to arrests when three "cold hits" are made on previously unidentified rapists and murderers.

The Los Angeles Times

MILWAUKEE
JOURNAL SENTINEL
FINAL EDITION SOUTH ★ WEDNESDAY, DECEMBER 6, 2000 ★ WWW.ONWISCONSIN.COM

PAGE B1

2-4

DNA helps find suspect in '93 rape — in Texas jail

As database grows, officials expect to solve more cases

By DAVID DOEGE
of the Journal Sentinel staff

A 30-year-old man imprisoned in Texas has been linked to the unsolved 1993 abduction and rape of a college student in Milwaukee through a national DNA indexing system, a prosecutor said Tuesday.

Although the so-called "cold hit" is still undergoing verification, it is believed to be the first time the national system has snared someone outside Wisconsin for an unsolved crime committed in the state.

While authorities had feared they would never be able to prosecute anyone for the crime after the statute of limitations apparently expired last year, they have since discovered they have time left on the crime's prosecution clock because the suspect spent time outside Wisconsin.

The statute of limitations can be extended by the amount of time the person spent outside the state. Authorities have determined that the suspect spent enough time behind bars outside Wisconsin to prove that there is time left to prosecute him for the 1993 attack.

"We have located our victim outside the state, and she is very pleased with the news," said Assistant District Attorney Norman A. Gahn.

Samples required

Gahn said the case was a "perfect example" of the need for Wisconsin to fully implement its 11-month-old law requiring that DNA samples be obtained from all newly convicted felons. It was learned in October that eight months passed before sample kits were distributed throughout the state for the collection of genetic samples from several thousand felons who were placed on probation earlier this year.

Moreover, state and Milwaukee County officials are still at odds over who is responsible for the collection of DNA samples from an estimated 200 felons placed on probation monthly.

When the law took effect in January, it was believed it would help solve previously unsolved crimes, including rape and murder, because of felons' propensity for recidivism.

"This shows how potentially valuable the process is," Gahn said.

The victim in the 1993 attack could not identify her assailant, but the attacker did leave behind genetic material that had the potential for a DNA prosecution.

In 1998, that material, along with materials from other unsolved assaults, was used to determine the assailant's genetic profile and placed in a databank at the State Crime Laboratory.

Since 1993, authorities have been collecting oral cell swabs from more than 10,000 convicted sex offenders for placement in another laboratory's database. The databanks, which are steadily receiving new samples, are routinely compared and have led to the clearance of more than a dozen unsolved attacks.

After the statute of limitations seemingly expired for the 1993 attack of the student in March 1999, Gahn and Milwaukee police began issuing criminal charges for unsolved cases identifying the defendant solely by the genetic code determined by crime laboratory DNA analyses.

They do so whenever a statute of limitations looms for an unsolved attack in which the assailant left behind material for DNA analysis.

"It was extremely frustrating to see time expire when we had this very specific evidence," Gahn said.

John Doe warrants issued

On Monday, Circuit Judge John J. DiMotto signed the 12th such John Doe genetic warrant for Gahn, this time for the Dec. 7, 1994, gunpoint rape and abduction of a then 15-year-old girl on the northwest side.

Gahn said the warrant represented the last unsolved 1994 case for which there has been a DNA determination but no identified suspect and a statute of limitations issue.

All such 1995 cases slated to run out of time in 2001 have been identified and will undergo the same John Doe DNA warrant process in the months ahead, Gahn said.

Gahn said the first word of a possible cold hit for the 1993 student rape came from Texas in August.

"You never know when and where these assailants could turn up now," Gahn said. "They are in about the same position in Texas as Wisconsin is in preparing their databank."

More than two dozen states, including Wisconsin, are uploading genetic samples into the national indexing system that makes comparisons of samples throughout the country possible. Searches for matches among the databanks are conducted monthly through the indexing system.

Earlier this year, two men imprisoned in Wisconsin were linked to two unsolved assaults in Illinois and Minnesota.

"We are now in the process of re-analyzing all of our evidence and waiting for his prosecution to be completed in Texas," Gahn said of the suspect for the 1993 assault.

Gahn said the suspect faces a variety of sexual assault counts in Texas that could result in him receiving a life prison term there, thereby negating the need to transport him to Wisconsin for prosecution. The Texas prosecution of the suspect is expected to be completed in February.

"It could be a situation where the case here could be read into the case record there during their penalty phase," Gahn said. "We will have to see what develops there and talk with our victim."

AT A GLANCE

- Since 1993, authorities have been **collecting oral cell swabs** from more than 10,000 convicted sex offenders for placement in a laboratory database.
- **The databanks**, which are steadily receiving new samples, are routinely compared and **have led to the clearance of more than a dozen unsolved attacks**.

THE ROANOKE TIMES

TUESDAY

NOVEMBER 14, 2000

Christiansburg burglary is 1 of 250 cases solved by use of state's DNA database

Bank of DNA samples yields big results for Va. police

Virginia is one of seven states that take DNA samples from all felons, not just sex offenders.

By SHAY WESSOL
THE ROANOKE TIMES

CHRISTIANSBURG — When town police were called to investigate a burglary last year in a building at Sunset Cemetery, they had little evidence except for a few smears of blood on a broken window.

A decade ago, the case might have wound up in the unsolved pile. But a statewide database of DNA taken from all felons convicted since 1990 is beginning to change that.

In the last two years, the database has sparked a growing number of "cold hits" — matches that police turn up during blind checks of DNA-type evidence against the database.

As of this week, 250 cases, including the Christiansburg burglary, have been solved because someone convicted of a felony had been ordered by a court to give up a DNA sample that was entered into the databank, said Paul Ferrara, director of the Virginia Division of Forensic Science, which maintains the database.

"We're getting one almost every working day, and that's really exciting," Ferrara said.

Christiansburg investigators sent a sample of that blood to the state forensics lab, blindly hoping that a DNA match might turn up. For the first time for Montgomery County authorities, it did.

"That made the case. We had no fingerprints, no nothing," said Capt. Tom Lawson of the Christiansburg Police Department. "The guy denied knowing anything about it, but yet his blood was there."

Once investigators received word of a match from the lab, they obtained another blood sample from the suspect, 42-year-old David Bryan Smith. When that blood was analyzed, it proved conclusively that Smith had cut himself on the building's window, Lawson said.

That was enough to put Smith at the scene — without any witnesses — and gave police the probable cause to get the arrest warrant, he said.

On Nov. 3, Smith pleaded guilty in Montgomery County Circuit Court to the Oct. 10, 1999, break-in and grand larceny from Sunset Cemetery on South Franklin Street. He was sentenced to eight years in prison, with all but two years suspended, and ordered to pay $1,800 in restitution. Information as to why Smith's DNA was already in the database was unavailable Monday.

DNA testing has been used for years to help pinpoint suspects in sexual assault and homicide cases. Now, in part through the state's database, the genetic material is turning up as evidence in a wider variety of cases, most notably in property crimes.

Soon, authorities say, it could be used as regularly and with as much accuracy as fingerprints.

"DNA evidence is treated just like a fingerprint," said Capt. Tony Webb of the Pulaski County Sheriff's Office. "If you've got a suspect who says he wasn't there and you find DNA evidence, then they've got to sit down and explain what it's doing there."

In most instances, DNA analysis is used to prove that an existing suspect was or wasn't at the scene of the crime.

Pulaski County authorities, for example, plan to use DNA evidence in the capital murder trial of Jeffrey Allen Thomas, who's charged with the Jan. 25 shooting death and attempted rape of 16-year-old Tara Rose Munsey. By comparing DNA in Thomas' blood with a semen stain found on Munsey's thigh, prosecutors want to prove that Thomas was with Munsey the night she died.

All states require DNA, found in human cells and carrying a unique genetic code, to be drawn from convicted sex offenders. Virginia is one of seven states that take DNA samples from all felons.

The database contains more than 120,000 samples, Ferrara said.

"We're processing crime scene evidence in about 1,300 cases a year right now, which is probably one of the largest operations in the country," he said. "We realized 10 years ago what it could do, and now we're actually seeing it happen."

The database has found suspects in decades-old murder cases as well as crimes that don't make headlines. Even the little victories mean a lot to those investigating them.

Radford police recently got their first cold hit through the databank and are close to making an arrest in a breaking-and-entering case. Investigators will request a search warrant to take a blood sample from the suspect for testing, said Capt. Gary Harmon.

It takes 60 to 75 days to get evidence processed through the state labs and checked against the database, Ferrara said. He said the state's goal is to reduce that time to less than 30 days.

The state picks up all the costs — about $50 to enter a new felon into the database and at least $5,000 to process evidence submitted to the lab, he said.

"It ain't cheap on the surface in terms of dollars and cents," Ferrara said. "But if you look at it from the standpoint of, first, how much investigator time did it save and, more importantly, how many victims did not become victims because of the databank or how many innocent people were not convicted of a crime they didn't commit, then those costs seem minimal."

Shay Wessol can be reached at 381-1665 or shayw@roanoke.com

Save women: Take all felons' DNA

The National Organization for Women is pushing hard for a multibillion-dollar windfall to continue funding the 1994 Violence Against Women Act, a laundry list of feminist projects. Politicians, eager to woo the female vote and loath to draw feminist fire, may accede.

Commentary
By Amy Holmes

Despite the more than $1.6 billion spent on the 1994 law and the additional billions proposed, the act includes nothing for a crucial weapon in the war against violence inflicted upon women: DNA matching. Doing so would conflict with another powerful liberal lobby, the American Civil Liberties Union.

Deirdre Raver of Queens, N.Y., a rape survivor and long-time advocate of the national DNA database, told me she hardly is surprised: "As usual, the National Organization for Women is silent on initiatives that will directly help female crime victims seek justice. They are protecting their radical allies in the ACLU, who put the rights of rapists and murderers before the rights of victims. ... Common sense no longer applies."

The ACLU urges limiting DNA data to criminals convicted of serious felonies. But many serious cases are solved by matching DNA collected in an investigation of an unrelated, lesser offense. A study of Virginia's DNA database released this month found that 40% of men arrested for rape previously committed property crimes; a 1998 British study said that more than three-quarters of U.K. rapists first were burglars.

Former Virginia governor George Allen, a Republican Senate candidate, recently proposed doubling federal funding for the database. He wants to help states eliminate backlogs of unanalyzed DNA evidence and encourage them to collect DNA samples from all convicted felons and share that information with the FBI.

His plan would go far toward modernizing our criminal justice system. Although all states require DNA collection from convicted sex offenders, only seven states collect and file the DNA of all felons.

The ACLU and its feminist-elite allies are misguided in their opposition to a comprehensive DNA database. Law enforcement officials already routinely collect hair samples and fingerprints in cases far less serious than rape and murder. The ACLU also argues that cataloging all felons' DNA leads us down a slippery slope toward a national DNA database of innocent citizens. What the civil libertarians refuse to acknowledge is that burglary and theft often are the first steps a criminal takes on *his* slippery slope toward rape and murder.

Amy Holmes is a Washington-based writer.

USA TODAY

July 10, 20000

Study: Many rapists were thieves first

Results may lead to taking DNA for lesser crimes

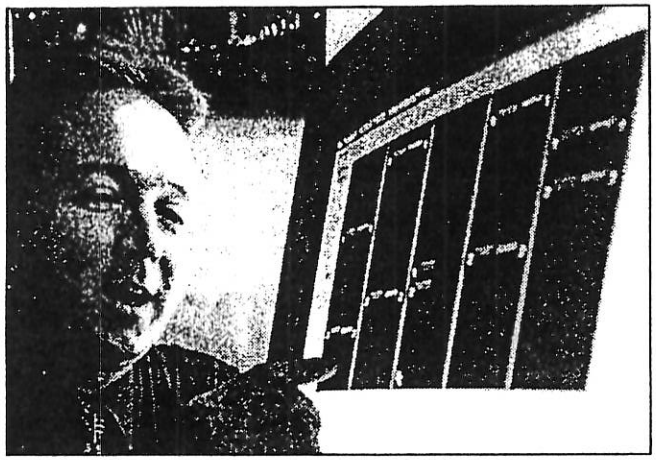
By Richard Willing
USA TODAY

WASHINGTON — At least 40% of men who ultimately are arrested for rape begin their criminal careers with property crimes such as burglary and petty theft, says a study of Virginia's convict DNA database scheduled to be released today.

The Virginia study of 40 rape suspects is the first U.S. analysis of the link between property crime and subsequent sex offenses. It likely will prompt more calls to expand the list of crimes for which DNA is drawn from convicts.

Most of those state databases focus on collecting DNA from violent criminals as a way to quickly identify repeat offenders. But law enforcement agencies and other supporters of expanded databases also want to include non-violent offenders such as burglars. That way, proponents say, more potential rapists would be entered in state DNA databases and matched more quickly to serious crimes.

"To catch those who commit the most serious crimes, you're going to want to collect DNA from those whose crimes at first don't seem so bad," says Paul Ferrara, director of Virginia's DNA database and a study co-author. "In many cases, ultimately they're going to prove to be the same people."



By Mark Foley, AP

Statistics show: David Coffman, Florida's DNA database director, says many rapes are "crimes of opportunity."

Critics of database expansion say the Virginia study's conclusions are based on too small a group of convicts.

"If you're going to expand databases, you're going to have to be smart about it," says Harlan Levy, a lawyer in New York and author of *And the Blood Cried Out*, a book about using DNA in the courtroom.

"You can't make really broad judgments based on narrow data," he says.

Virginia's findings echo the results of a British government study from 1998 that found that more than three-quarters of rapists in the United Kingdom were burglars first. In Florida, an ongoing study of that state's sex offenders has found that more than half were previously burglars or petty thieves.

The Virginia study is scheduled to be discussed here today at a meeting of the National Commission on the Future of DNA Evidence.

All states require DNA, the body chemical that carries an individual's unique genetic code, to be drawn from some convicted offenders. That information is stored on a computer database. Authorities then can check whether DNA taken from crime scenes matches any DNA profile in the database.

All states take DNA, typically in the form of blood or saliva, from convicted sex offenders, and most collect it from murderers. But only seven states do DNA profiles of all felons, including burglars and other nonviolent offenders. And lately, state legislatures have resisted efforts to expand DNA databases. This year, 17 state legislatures considered proposals to expand the list of crimes for which DNA is drawn. Eight passed such measures.

Virginia, which began the first state DNA database in 1989, is among the seven states that take samples from all convicted felons.

The study tracked 40 men in Virginia who were matched by DNA evidence to unsolved rape, sodomy or indecent exposure cases from 1993 through 1999.

About 60% were matched because their DNA had been filed after they were convicted of a previous sex offense. But the other 40% were caught because their DNA was on the database for lesser felonies, mainly burglary and larceny.

"If you just (take DNA for) a rape conviction, you're giving someone, in effect, a free rape before they can be put on the database and matched," Virginia's Ferrara says. "But if you include the so-called 'gateway' or 'predictor' crimes, you're much more effective."

David Coffman, Florida's DNA database director, says the data suggest that rapes are often "crimes of opportunity" committed by burglars who find women home alone.

"Anecdotally, police have known this for a long time," says Coffman, who is studying the criminal history of convicts in Florida. "Now we can quantify it and, better yet, do something about it."

Prodded by Coffman's statistics, the Florida Legislature recently added burglary to the crimes for which DNA can be collected.

Jerry Lyell, a defense lawyer in Arlington, Va., criticized the expanded databases as part of a "general trend" among prosecutors to try to convince the public that DNA evidence is "always the be-all and end-all."

"Do we really want every minor offender's genetic code in the government's hands, just because some prosecutor argues that it might help him make a case somewhere down the road?" Lyell asks. "That's asking a lot."

DNA Testing Aids the Search for Truth

BY RUDOLPH W. GIULIANI

ON ITS MOST BASIC level, our criminal justice system is about a search for the truth. The responsible use of DNA testing promises to take much of the guesswork out of that search for the truth in court. DNA will prove to be the most effective tool our civilization has devised to protect the innocent, convict the guilty, and even prevent many crimes from occurring.

Just as fingerprinting was considered controversial when it was first introduced, the increased use of DNA testing has also proved controversial. Nonetheless, every relevant court decision has upheld the constitutionality of DNA data banking. And in England, where both traditional fingerprinting and DNA fingerprinting were first developed, a DNA database containing samples from almost 700,000 criminals has led to 70,000 cases being cleared over the past five years.

America currently lags far behind in embracing this technology. The City of New York is aiming to close this gap by establishing a $126 million, state-of-the-art DNA testing facility and database — by far the largest and most advanced in the nation.

Many Potential Benefits

We have already seen glimpses of the potential benefits of DNA evidence in our city. One of the best examples is the criminal investigation and prosecution of Arohn Kee, who is currently awaiting trial in New York County Supreme Court. With the help of DNA evidence, Mr. Kee was indicted for seven rapes and murders that took place between 1991 and 1998.

Just as important, the same DNA evidence led to six individuals being cleared of charges, including one person who had already been indicted for a rape later connected to Mr. Kee. Interestingly, that person's arrest stemmed from an eyewitness identification, which was later proved wrong. He was freed, and justice was served, because of DNA.

In this example, and many others, DNA has already established its value as a powerful tool for the defense. Yeshiva University's Cardozo School of Law has an initiative known as the Innocence Project, which examines DNA evidence in cases where people convicted of crimes continue to maintain their innocence. Led by lawyers Barry Scheck and Peter Neufeld, the Innocence Project has secured the release of 38 innocent individuals serving time in jail. In total, DNA evidence has led to the exoneration of almost 70 people in our nation's prisons — eight of whom were on death row.

Another example of DNA evidence at work shows that greater use of a DNA databank will be a powerful tool for preventing crime.

Between 1993 and 1999, a man named Issac Jones, who was out on parole, committed 51 rapes and sexual assaults in our city. At the very first rape, he left DNA evidence. But because a substantial DNA databank did not yet exist, we were not able to link him to the crime. When Mr. Jones was finally arrested, police took a sample of his DNA, which proved a match to 17 separate rape cases in which DNA had been recovered. Police were then able to link Isaac Jones to additional rapes and sexual assaults, 51 in all. If we had been maintaining a DNA database, and taking DNA from people who are arrested or convicted of crimes, we could have identified Isaac Jones after the first rape he committed. And 50 women might have been spared the horror of sexual assault.

Although DNA promises to have its greatest applicability in solving crimes of rape and sexual assault, they are by

Mayor Giuliani

no means the only crimes that can be solved using this technology. For example, more than half of the 70,000 cases in which DNA evidence has been used in England were burglaries and car thefts. And, of course, DNA can help in establishing paternity, and making "deadbeat dads" accountable for supporting their children.

There are those who continue to resist the use of this scientifically proven technology. The ACLU has launched a series of court challenges to the establishment of DNA databanks in several states on the ground that such databanks contain personal information and therefore constitute an invasion of privacy.

The Supreme Court has yet to offer an opinion on the constitutionality of DNA databanks. However, we should keep in mind that police across the nation have for many years maintained a database of identifying information on file, in the form of traditional fingerprints.

New York has recently amended its law to authorize the taking of DNA samples with a simple cotton swab inside the mouth, as the English do, so that the process will be even less invasive.

The New York State Legislature should authorize police to take DNA samples from every person who is arrested for a printable offense. DNA testing should be as commonplace as fingerprinting is today. And just as we treat fingerprints, if a person is acquitted or not prosecuted, the DNA profile should be expunged from the databank, and the sample destroyed.

Congress and state legislatures should provide sufficient funding to analyze the backlog of untested DNA samples that sit frozen in vaults. Because this effort is so important, I have set aside $4.5 million in funding during the city's next fiscal year to provide for analysis of approximately 12,000 rape kits. This will not only dramatically increase the number of old cases that will be solved, but will prevent further victimization.

To be truly effective, legislatures should also enact laws to eliminate the statute of limitations in cases of rape and sexual assault. Because of this new technology, we are no longer limited by time in analyzing evidence, and should not be so limited in prosecuting sexual predators and other criminals.

Congress should authorize funding to address both casework and convicted offender samples, so that the existing federal data banking system can be used to its full potential. Most criminals commit crimes without regard to state lines. New York's police should have access to data on criminals from New Jersey and Connecticut, and vice versa.

Finally, the United States should have a laboratory system that is able to address the capacity and the demand for DNA analysis. England's Forensic Science Service could serve as a model. A professional laboratory system ensures a neutral process dedicated to only one outcome — the truth.

We need to meet the challenges of the future by embracing the technologies of the future. DNA testing will prove to be the most effective means of establishing guilt or innocence — and thus furthering justice — in the 21st century.

Rudolph W. Giuliani *is the Mayor of New York City.*

St. Petersburg Times
Florida's Best Newspaper

WEATHER: High 72, low 48;
0% chance of rain. More, 8B

MONDAY, March 13, 2000

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2-9

Bill would add burglars to DNA list

■ Despite ethical concerns, a link between burglars and rapists helps spark legislation that would expand the state's DNA database.

By GRAHAM BRINK
Times Staff Writer

TAMPA — A common thread runs through the histories of some of the men who commit Florida's worst sex crimes: Before they were rapists, they were burglars.

Fifty-two percent of offenders linked to sexual assaults or homicides through the state's DNA database had pulled off an earlier burglary, according to the Florida Department of Law Enforcement. And two-thirds of rapists reoffend, on an average of eight to 10 times.

Those numbers inspired proposed legislation requiring a sample of every convicted burglar's DNA to be added to the state's growing DNA database, which already includes samples from murderers and other violent criminals.

Theories abound about the burglar-rapist link. Some experts say that when the thrill of simply breaking into homes wears off, they use their burglary skills to escalate to more serious crimes. Others think it's a natural progression for a would-be rapist to move from intruding into homes to perhaps the ultimate intrusion of rape.

Whatever the reason, law enforcement found the link too pervasive to ignore.

"We are really excited about this," said Hillsborough County sheriff's Maj. Gary Terry. "It has the potential to help solve a lot of tough-to-solve crimes."

Not everyone is so keen about the idea. Unlike fingerprints or mug shots, DNA provides an almost endless array of personal information that critics worry could be exploited.

Please see DNA 6B

DNA from 1B

The first DNA testing started in the mid-1980s in the United Kingdom. Florida set up its database in 1990, collecting samples from those convicted of sexual assaults and lewd and indecent acts. The list has since grown to include homicide and attempted homicide, carjacking, home invasion-robberies and aggravated battery. The DNA database now has 63,500 samples, with about 8,000 added each year.

Tiny amounts of genetic material from hair, semen, blood or other body fluids and tissues found at a crime scene can be tested for a possible match in the database. Prosecutors use the DNA to identity suspects with staggering certainty, often 1 in billions.

The Florida database has yielded 215 such matches and aided 340 investigations, the most of any state, said David Coffman, Florida's database supervisor. Three years ago, Florida became one of three states that eliminated the statute of limitations in sexual assault cases as long as the crime is reported within 72 hours. That change will allow authorities to use DNA evidence decades after the crime.

"Florida has led the way when it comes to DNA databases," Coffman said. Adding burglars to the database, he said, "is an opportunity for things to get even better."

The legislation would add about 40,000 DNA samples and the corresponding names to the database in the first year. Those include convicted burglars now in custody or on probation. After the initial surge, an estimated 16,000 samples — the average number of defendants convicted of burglary for the first time each year — would be added annually as a result of the bill.

Each new sample costs the state about $75, which includes testing, archiving, maintenance and other annual operating expenses like employee salaries.

Adding burglars' DNA to the database could be a deterrent, law enforcement says. Once burglars know their DNA is on record, they might be less likely to commit a more serious crime. It also could help rule out suspects, saving investigators time and effort.

Billie Shumway, FDLE crime lab supervisor in Tampa, said the added samples could cut down on unsolved sex crimes, too. In Hillsborough County alone, some 20 sex crimes go unsolved each month, she said. She predicted the initial surge alone would help solve at least a few dozen cases statewide.

"It's impossible to make a good estimate," she said. "But it makes sense that the bigger the database, the more hits we'll get, especially when we target groups known to commit sex crimes."

Every state has passed legislation to create a database, though only 22 have active programs, Coffman said. The Florida system also can be linked to a national database that includes about 250,000 samples and could expand dramatically if the hundreds of thousands of samples awaiting testing are added. Last year, DNA samples were able to link three rapes in Jacksonville to eight more in the Washington, D.C., area, Coffman said. The link led detectives to identify a suspect in all 11 cases.

Coffman advocates a controlled approach to expanding the database, but envisions a day when all convicted felons in Florida will have DNA on file, similar to the system used in a few other states, like Virginia.

One of the sponsors of the bill, state Rep. Lars Hafner, D-St. Petersburg, does not expect much opposition in the Legislature, calling it a good "centrist" issue. Gov. Bush already has included money for it in his proposed budget. The costs will be analyzed carefully, but Florida legislators have always supported DNA testing, Hafner said.

"It's a matter of public safety," he said. "One that is confirmed by the statistics."

Still, the proposal has revived some of the legal and ethical concerns raised when the database was in its infancy. Civil libertarians ask where the collecting will stop and how it will be used.

Louisiana, for instance, requires a sample from everyone who gets arrested, regardless of the outcome of the case. New York City Mayor Rudy Giuliani said he would support expanding the databases by taking a sample from every newborn baby.

Advocates say people who give up DNA samples do not have anything to worry about unless they break the law.

But critics say that sounds like a breach of an individual's constitutional rights.

DNA, or deoxyribonucleic acid, is a building block that makes up the genetic material determining each person's heredity and identity. Each person's DNA is unique, except for identical twins and patients who undergo bone marrow transplants.

Unlike fingerprints, DNA can provide a vast amount of information about a person, from eye color to about 4,000 diseases and genetic conditions. Some researchers claim that DNA includes genetic markers for criminal tendencies, sexual orientation and substance abuse.

"(That) information belongs to each individual, not the government," Larry Helm Spalding, ACLU legislative counsel in Florida, recently wrote. "The possibilities, and thus the dangers, are endless."

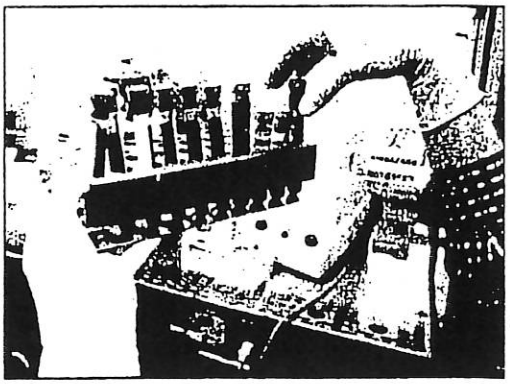
Opponents also argue that the government has a dubious track record of using information as it was originally intended. The Census, devised under the Constitution to set an accurate count of Americans for tax and representation purposes, was used during World War II to round up Japanese-Americans. Closer to home, Spalding pointed out that Florida legislators authorized the commercial sale of driver's license photos until a public outcry ended the practice.

"Of course, those were only aberrations, weren't they?" Spalding asked sarcastically.

— Times researcher John Martin contributed to this report.

The Atlanta Journal-Constitution March 17, 2000

More data on DNA may be OK



Photos by NICK ARROYO/ Staff

Processing blood samples from sex offenders, Lynn Fyffe, a forensic biologist at the GBI Crime Lab, adds to the state's DNA database. Under a pending bill, DNA samples would be taken from all felons.

If the Legislature approves, state will move to forefront of identifying criminals through science.

By Peter Mantius
pmantius@ajc.com

In April 1993, a 30-year-old Roswell woman was awakened by a knife-wielding intruder who blindfolded and raped her before fleeing her apartment.

Police had no leads until last year, when the GBI's Crime Lab began comparing biological evidence collected from the scenes of unsolved rapes with samples of DNA taken from convicted sex offenders.

They matched the Roswell crime evidence with the DNA of John Scieszka, a former welder serving a life term for raping five University of Georgia women in 1995 and 1996. Last June, Scieszka pleaded guilty to the Roswell attack.

Now the state is poised to expand its 8-year-old DNA program from collecting about 1,000 samples a year from sex offenders to nearly 40,000 from all felons. If legislation backed by Lt. Gov. Mark Taylor passes as expected, Georgia will move to the forefront of the national movement to expand state DNA databases and link them together.

Taylor predicts Georgia's new system will "provide the proof to solve literally hundreds of unsolved crimes," deter future crimes and exonerate innocent prisoners who were wrongly convicted.

Atlanta defense attorney Jack Martin said he believes it's "just a matter of time" before DNA evidence frees a Georgia death row inmate.

"This is one of the great revolutions in solving crimes, for both sides," said Martin, legislative advisor for the Georgia Association of Criminal Defense Lawyers. "It helps find criminals, but it's an opportunity to exonerate people who in the past would have been convicted on what we thought was reliable evidence."

This week, state lawmakers were trying to agree on how much to compensate a Clayton County man convicted of rape after DNA evi-

➤ *Please see* **DNA, D4**

2-11

DNA: Proposed bill may close unsolved crimes

➤ Continued from D1

dence showed he didn't commit the crime. Calvin Johnson was freed in June after 16 years in prison.

Georgia's DNA database has produced relatively few spectacular prosecutions or exonerations. Usually, its benefits are far less dramatic.

"Mostly we link one unsolved crime to another," said George Herrin, director of the GBI's Crime Lab. "We get one or two of those a month.

"But Florida, where they've been doing a lot more samples than us for three or four years, has a rate of association 10 to 12 times ours," Herrin said. "I think [Taylor's bill] will help solve a lot of crimes."

Georgia is the latest state to look at increased collection of DNA as a law enforcement — and criminal defense — tool. Several states also have increased the numbers of crimes eligible for testing.

DNA samples can be obtained from blood, saliva, hair, skin or semen. The GBI currently collects blood samples from sex criminals and keeps them in refrigerated storage at its headquarters east of Atlanta. Evidence experts catalog the DNA characteristics of each sample and store the information on computer files.

Taylor's bill would expand that program so anyone convicted of a felony after July 1, 2000, would be tested. And felons already in prison would be tested upon release, if not sooner. The state expects to pay about $35 per sample, excluding personnel costs. The total tab would be about about $2.2 million a year.

Critics believe such testing threatens constitutional privacy protections.

DNA DATA BANKS

All states in the southeast take DNA samples from criminals, but the qualifying offenses vary from state to state.

State	Samples required from sex criminals	Samples required from many other serious criminals	Samples taken from juveniles	Linked to national database*
Alabama	✔	✔		
Florida	✔	✔	✔	✔
Mississippi	✔			
North Carolina	✔	✔		✔
South Carolina	✔		✔	✔
Tennessee	✔	✔		
Virginia	✔	✔	✔	✔
Georgia	✔			✔
Proposed Georgia plan	✔	✔		✔

*National DNA Index System run by FBI

Source: National Conference of State Legislators

CHUCK BLEVINS / Staff

Debbie Seagraves, executive director of the American Civil Liberties Union of Georgia, argued that the DNA database will be too large, and too vulnerable to outsiders, such as insurance companies snooping for genetic health tendencies.

"Any time you compile large databases, that information can never be entirely secure, either due to carelessness or greed," Seagraves said. "You don't even need DNA in non-violent crimes, or in most violent crimes."

Herrin said rape is the crime most likely to yield useful DNA evidence. But even in rapes, he said, semen of the attacker is not present about 30 percent of the time.

Many other violent crimes don't provide DNA evidence either. "If you have a drive-by shooting, it's extremely unlikely," Herrin said.

But when DNA evidence is available, it often raises questions about the reliability of other forms of evidence, Martin said.

That's why Martin helped convince legislators to allow defendants, prisoners and their lawyers to have carefully controlled access to the DNA database as a means to try to establish their innocence.

Martin said uncontaminated DNA samples from crime scenes, when properly handled, are extremely reliable evidence. "In fact, it's brought home how unreliable eyewitnesses and confidential informants and circumstantial evidence are," he said.

Herrin said police often arrest suspects and later determine their DNA does not match crime scene evidence. Although such mismatches occur 20-30 percent of the time during the GBI's DNA testing, Herrin said, failure to match doesn't prove conclusively that the suspect is innocent.

But it does strongly suggest innocence, Martin said. "That's scary, because those are cases that probably would have been prosecuted [if not for DNA testing], and the eyewitnesses were flat wrong."

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
KYLE G. SMITH
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF SB 263
March 19, 2001

Mr. Chairman and Members of the Committee:

I am Kyle Smith with the Kansas Bureau of Investigation (KBI), and appear today with Sindey Schueler, Director of our DNA laboratory division, in support of SB 263.

The KBI administers the DNA Databank which is an invaluable tool to law enforcement in investigating murders, rapes and other serious violent offenses. DNA is sometimes referred to as genetic fingerprinting. While there are problems with that comparison, I think it is a useful illustration when considering today's bill. We are all familiar through movies and television of the use of fingerprints, a characteristic unique to each individual. By recovering fingerprints at a crime scene, perpetrators are frequently identified and brought to justice.

DNA found in blood, seminal fluid, hair and even saliva is also found at crimes, frequently violent crime scenes. Just like having the fingerprints on file for comparison, having the DNA on file for comparison of a person previously convicted can quickly identify a perpetrator and lead to their arrest before more murders and rapes may occur. Matches made among profiles can link crime scenes together that otherwise appear to

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be totally independent offenses. It is particularly useful in cases of serial offenders such as rapists and murderers.

SB 263 substantially enhances the DNA Databank by expanding its coverage to include all persons convicted of person felonies and those additional crimes contained in the Offender Registration Act. After one year, collection will be expanded to all felony convictions. Fingerprints are obviously collected on all cases, felony and misdemeanor, and at the arrest stage. The DNA exemplars are only collected after conviction.

Six states have expanded their DNA database laws to include all convicted felonies, which would be even broader than SB 263. Given national statistics showing a 63% recidivist rate for offenders, one can understand why having such a database can be very useful to law enforcement in identifying perpetrators of new offenses. By passage of SB 263, the citizens of Kansas, and especially the victims, will know that there will be a greater chance of the perpetrators being brought to justice.

The provisions of SB 263, by expanding the coverage to all person felonies would increase the collection of samples by approximately 2,500 individuals each year. Besides the good news of increased effectiveness of the databank and the ability of law enforcement to catch criminals, the really good news is that there is federal grant money available to pay for the entire cost of collecting and analyzing these samples. We have been in contact with the National Institute of Justice and feel that we would qualify for the grant if this legislation were passed.

Section 2 amends the statute of limitations to address another problem that is has occurred, where someone, typically a rapist, is identified through the use of the DNA database. However the "hit" made by the DNA match occurs long after the crime has occurred and prosecution is banned by the statute of limitations. The statute of limitations was a creature of common law in the Middle Ages when few people could write and cases needed to be brought while memories were still fresh. Given the scientific reliability of DNA testing, not to mention the use of video tape depositions, etc., it seems unjust that a person having committed a violent rape should go free merely due to the passage of time.

Some states, such as Florida, have responded to this problem by simply repealing the statute of limitations for sex offenses. In California, due to the campaigning of a victim whose offender went free due to this anomaly, they set up a specific statute of limitations for cases where there is DNA evidence. Section 2 is an adaption by the Kansas Revisor's Office of that California statute, which essentially provides that sexually violent offenses may be brought within ten years of the commission of the offense or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later. There are restrictions compelling the timely examination of DNA samples being collected which are based on California backlogs.

If everything goes according to plan through federal grants, we should not have any DNA backlog in Kansas after July of this year. Prosecutors still will have the discretion to not bring cases, due to the death of witnesses or victims, or the lapses of memory or lost evidence. However, passage of this bill would allow prosecutors in the

appropriate case to punish those persons who have clearly committed some of the most violent offenses against another human being.

Director Welch believes that the powerful tool of forensic DNA should be used to seek justice. That includes freeing the innocent as well as convicting the guilty. There has been considerable media coverage on a few cases around the country where persons were wrongfully convicted of offenses before DNA technology was available and the evolution of that technology has resulted in their freedom. Section 3 provides a mechanism for persons convicted for the most serious offenses, i.e. murder and rape, to petition the court for post-conviction analysis to be conducted by the KBI. If the defendant is indigent, the state of Kansas would bear the cost of the analysis. We believe that every safeguard is currently employed to assure the validity of the conviction, that if we have the wrong person in prison, we believe it is incumbent on all of us to take what steps we can to assure that justice is done.

On behalf of Director Larry Welch of the KBI, and indeed, both law enforcement and victims in the state of Kansas, we urge passage of SB 263. Thank you for your consideration. Sindey Schueler and I would be happy to answer any of your questions.

STATE OF KANSAS

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JUDICIAL COUNCIL PROBATE LAW
ADVISORY

HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE
TESTIMONY IN SUPPORT OF SENATE BILL 263
March 19, 2001

Chairman O'Neil and Members of the Committee:

I offer the following in support of the passage of Senate Bill 263, which calls for an expansion of the collections to be taken from all persons convicted of person felonies, as well as the additional crimes set out in the Offender Registration Act. Kansas law currently has limited provisions for the collections of specimens of fingerprints, blood and saliva from certain persons (K.S.A. 21-2511).

To expand the current pool of convicted offenders who must have a blood sample drawn for purposes of DNA identification analysis **is handing a much needed tool to our Criminal Justice and Corrections System**. Creating an expanded DNA data bank bears a rational relationship to the public's interest in enabling law enforcement to better identify convicted violent and sex offenders who are involved in unsolved crimes, who escape to reoffend, and who reoffend after release.

Weekly we are seeing additional states introducing new bills to expand the DNA collection issue to more efficiently provide justice in their courts. As of March 1, 2001, there have been 73 offender DNA database expansion bills introduced in 30 states for the 2001 legislative session. Of those bills, 37 were introduced in 20 states to expand DNA testing to include all felons. This past week Minnesota, Rhode Island and Washington introduced new bills which would expand their state databases which would require DNA samples from all convicted felons. Arkansas, Missouri, Oklahoma and Rhode Island introduced bills to expand their databases by a more limited number of offenders. Wisconsin officials are beginning to collect DNA samples from all incarcerated felons. "Cold" cases in Pennsylvania and Indiana were solved recently through the use of new DNA testing. Men in Alabama and Massachusetts have been exonerated as rape suspects after DNA tests prove they could not have been the perpetrators. A DNA sample has identified a murder suspect in Florida. Florida, Texas, Ohio, Texas and Utah have introduced or passed Post Conviction bills. As this DNA data collection expands nation wide, I believe our state should be included. Perpetrators of crime in our state will more likely be prosecuted and convicted.

The credibility and integrity of criminal justice systems are under scrutiny in many states. I believe the expansion of the DNA database as called for in SB 263 will help crack unsolved crimes, identify serial offenders and convict the guilty, as well as help wrongful convictions from occurring by the adoption of the proposed amendment. I urge the passage of Senate Bill 263, as amended.

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House Judiciary
3-19-01
Attachment 4

STATE OF KANSAS

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SENATE CHAMBER

COUNTIES
CHASE, COFFEY, GEARY,
LYON, MARION, MORRIS,
OSAGE AND WABAUNSEE

COMMITTEE ASSIGNMENTS
VICE CHAIR: PUBLIC HEALTH AND WELFARE
MEMBER: FEDERAL AND STATE AFFAIRS
FINANCIAL INSTITUTIONS AND
INSURANCE

TESTIMONY FOR SB 205

Thank you Representative O'Neal and members of the Judiciary Committee.

I am here in support of Senate Bill 205 which will mandate a 72-hour no contact order for suspects in domestic violence cases. I appreciate the help of all the people and agencies who have lent their advice.

Senate Bill 205 attempts to extend protection to victims of domestic violence who are unable to receive a restraining order because of the inaccessibility to a judge in the middle of the night or over the weekend. Victims are returning home to find an infuriated abuser who continues the violence in his rage over his arrest. The 72-hour no contact order as a condition of bond allows the victim sufficient time to receive a permanent restraining order regardless of the time of day. Finally, if a judge finds that this provision is unnecessary, he can remove the no contact order.

Some concerns have been raised that this bill does not go far enough, that the no contact order will not prevent a determined suspect from returning to the victim. What this law will do is guarantee victims legal recourse and give police immediate access to knowledge of a protective order. This bill has the strong constitutional foundations to stand up under the scrutiny of the court.

I stand for questions.

Senator Jim Barnett

JAB/gkp

House Judiciary
3-19-01
Attachment 5

Re. Senate Bill No. 205

February 14,2001

Domestic violence and its aftermath are, we all agree, a plague on our society. Impassioned debates rage as to its causes. Some accuse movies, others videos and music lyrics, still others drugs and alcohol, lax social discipline and loose standards of ethics and morals.

Whatever its complex causes, most agree that none is more powerful than the intra-generational witnessing of violence within the home. Breaking this cycle of violence is absolutely critical. As children see violence perpetrated on one parent by the other, they become much more likely to be an abuser or abused in their adult relationships.

Whatever we can do today to interupt this cycle will reduce its occurance in the next generation and the next, until perhaps the thought of domestic violence becomes as unthinkable as cannabilism or infanticide.

In recent years, we as a society have begun to recognize and address this plague. On the whole law enforcement and the courts have begun to address this critical issue with a seriousness undreamt of only two or three decades ago. I say "has begun" because we are nowhere near where we need to be on this issue.

Sociatal awareness is a lethargic creature, slow to become aware and frustratingly slow to act. We have begun, only begun, but our direction is positive. Our goal of eleminating domestic violence is, even if distant, at least becoming more defined, more understood, and closer to attainment.

There are a dozen things we could ask you to mandate by force of law this year that would be of tremendous help in this most worthy of crusades, but these things must be done step by step as our society becomes more informed, aware, and outraged.

Today we ask in Senate bill #205 for one small, but very important step. It mandates a presumption of no contact between accused and victim when an accused is released on bond for a domestic violence offence. That restraining order would be for a period of at least 72 hours. It would therefore give the victim a three day period to gather her (or his) resourses, support, possesions and courage. They can then ask the court for a regular PFA (protection from abuse) restraining order on the courts next available business day.

So often these acts occur at night, on weekends, or holidays, when courts are not available to hear a PFA request. A presumptive, no contact condition would offer a small protection for at least a three day period. This is such a basic, simple

and straight-forward proposal, one marvels that it hasn't been done years ago. Simply put, its plain, good common sense.

I would suggest only one slight, but important alteration. On line 19 of page 1, and line 7 of page 3, add "or designee" after "judge" on pg 1 and "magistrate" on page 3. This small addition will allow adjustments for unusual circumstances when, during after hours periods the decisions would be made by someone other than a judge or magistrate.

Respectfully,
Tom Myers

Tom Myers
Licensed Masters Level Psychologist
Mental Health Center of East Central Kansas
Vice-Mayor Ciy of Emporia

KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE

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UNITED AGAINST VIOLENCE

Hearing on Senate Bill 205
Senate Judiciary Committee
February 14, 2001

Dear Chairman Vratil and Members of the Committee:

The Kansas Coalition Against Sexual and Domestic Violence is an association representing victims of domestic and sexual violence and the 27 Kansas programs providing advocacy and other services to them. The attached brochure describes KCSDV and lists the programs in Kansas.

SB 205 is a step toward remedying the problem of perpetrators bonding from jail only to return home or otherwise harass the victim. There is no dispute that in some cases of domestic and sexual violence the perpetrator may return home quickly, sometimes less than an hour after the arrest. It is also true that in some cases perpetrators may be vengeful and dangerous, some even make open threats to "get even" if he goes to jail. SB 205 requires a presumption, unless rebutted, that a 72-hour no-contact order is included as a condition of bond.

SB 205 will not prevent perpetrators who are determined from returning home, but it will give law enforcement a tool to use, hopefully sufficient enough to make an immediate arrest.

Currently in Kansas a judge may enter no-contact or no-violent-contact orders as a condition of bond, but it is not done routinely except in jurisdictions where community response efforts have already addressed criminal justice issues. It is important that SB 205 retain the right of local jurisdictions to set bond restrictions according to their community plan that is part of a broader response. Please ensure that the presumption of the no-contact order can be rebutted in cases where it is necessary or where communities have established protocols.

Hopefully SB 205 will help to send a message to perpetrators of violent person crimes that the courts and community take seriously the safety of its citizens regardless of the relationship of the perpetrator to the victim.

House Judiciary
3-19-01
Attachment 7

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
KYLE G. SMITH, DIRECTOR OF PUBLIC & GOVERNMENTAL AFFAIRS
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF SB 205
March 19, 2001

Mr. Chairman and Members of the Committee:

I am pleased to appear in support of SB 205, which would resolve a difficulty in protecting victims of crimes.

This legislation was drafted to deal with the situation where a perpetrator of domestic violence or some other person offense is released on bond and immediately proceeds to confront the victim. The motive may be intimidation of a witness, revenge or just plain anger. Even if the police get there before a new crime occurs, their options in legally resolving the confrontation and restoring public peace are sometimes limited.

While K.S.A. 21-3843, violation of a protective order, allows police officers to arrest a person who violates a court order a condition of pretrial release, it is sometimes impossible for the officers to verify no contact with the victim was a condition of the bond. These incidents frequently happen late at night when the court is closed and the defendant may not feel like sharing a copy of his bond with the police.

SB 205 would require every bond for a person offense to have as a condition of release, a prohibition against contacting the victim for a period of at least 72 hours.

First, this would provide the officers probable cause. As every bond would have this condition of release, upon checking jail records to determine when a person was released, the officers would have probable cause to make arrests under K.S.A. 21-3843, assuming all facts

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House Judiciary
3-19-01
Attachment 8

were evident. This would allow officers to quickly resolve these situations and move on with the victim protected from someone who has demonstrated a disregard for court orders.

Secondly, the 72 hours would allow victim to seek a protection from abuse order or obtain a copy of the conditions of bond from the court clerk's office, even if the originating incident occurred on a Friday night. This would allow victims to obtain additional protections and the proof thereof. Absent some proof of the conditions of bond, the officers are frequently left to only advising victims that they should contact their attorney to pursue a bond revocation when court reconvenes on Monday morning.

The proposed language also provides for an exception where a court makes a specific finding, modifying the presumption, so in a case where it would create an inappropriate hardship, the condition of release could be modified.

Thank you for your consideration. I would be happy to answer your questions.

JUDICIAL COUNCIL TESTIMONY
ON 2001 SB 137
MARCH 19, 2001

In 2000 the Judicial Council agreed to consider drafting a Kansas Estate Tax Apportionment Act. The Council appointed a committee to conduct the study. Members of the Estate Tax Apportionment Advisory Committee are: Gerald Goodell, Chair, Topeka; Peter A. Cotorceanu, Topeka; Martin B. Dickinson, Lawrence; Theron E. Fry, Wichita; John R. Luttjohann, Topeka; William Q. Martin, Smith Center; Austin Nothern, Topeka; Timothy O'Sullivan, Wichita; and William P. Trenkle, Dodge City.

The Committee drafted the proposed Kansas Estate Tax Apportionment Act which is contained in SB 137.

Current Law

The United States Supreme Court has held that, subject to certain specific exceptions in the Internal Revenue Code, the question of who bears the ultimate burden of the federal estate tax is controlled by state law. *Riggs v. Del Drago*, 317 U.S. 95 (1942). Unlike most states, Kansas does not have a statute apportioning federal estate tax liability. Current Kansas case law provides that (i) in the absence of anything in the will to the contrary, the burden of federal estate tax falls on the residuary estate, (ii) a surviving spouse's share of an estate, to the extent it qualifies for the marital deduction, may not be reduced to bear any portion of estate tax, and (iii) should the residuary estate not be sufficient to pay the tax, the remaining burden is apportioned among the beneficiaries according to the value of the property each beneficiary receives.

This system of apportionment, which is commonly referred to as the "burden on the residue" approach, can lead to unfortunate results. For example, the taxable estate may include joint tenancy property, transfer on death accounts, savings bonds with named beneficiaries, or other property not subject to probate but still subject to federal estate tax. If so, the result under current Kansas law is that the tax generated by such non-probate assets is borne by the residuary beneficiaries of the probate estate, *not* by the persons who actually receive the non-probate property.

Another question under current law is how the tax is to be collected from those ultimately liable for it. The Internal Revenue Code imposes the responsibility for collecting and paying the federal estate tax on the executor, administrator, or other person in possession of the decedent's property (the "personal representative"). However, Kansas law currently contains inadequate procedures to assist personal representative in collecting the tax from the beneficiaries. As a result, attempts by personal representatives to collect estate taxes are often cumbersome, expensive, and ineffective.

House Judiciary
3-19-01
Attachment 9

Proposed Law

Section 322A, Apportionment of Taxes, Revised Civil Statutes of Texas, was used as the starting point and model for preparation of the Kansas Estate Tax Apportionment Act. The act adopts the general principle of "equitable apportionment." Under equitable apportionment, each person who receives property from a taxable estate is liable for his or her pro-rata share of the tax.

The beneficiary's share of the tax is determined by multiplying the total tax by a fraction. The numerator of the fraction is the taxable value of the property the beneficiary receives, and the denominator is the taxable estate of the decedent. For example, assume a person receives joint tenancy property worth $100,000 from a decedent whose taxable estate is $1.5 million. If the total estate tax is $300,000, then the recipient of the joint tenancy property would be liable for 1/15th ($100,000/$1.5 million) of the $300,000 tax, or $20,000.

This act is what is known as a "default" statute and will not apply if the decedent specifically provides for some other method of apportionment. Thus, under this proposal, equitable apportionment can be overridden by a provision in a testamentary or inter vivos instrument that specifically addresses the allocation of estate taxes.

In addition to its general apportionment provisions, the statute also addresses the allocation of taxes attributable to several specific types of property. These include so-called "split interests," "special use" property, and "qualified family-owned business" assets.

The statute also contains specific enforcement mechanisms designed to assist personal representatives in collecting estate taxes from beneficiaries. In addition, it allows personal representatives from other states the right to initiate collection actions in Kansas courts if those states grant a Kansas personal representative a reciprocal right of access to their courts.

Comments to Sections

Subsection 1(a)(6)

Subsection 1(a)(6), defining "representative," applies not only to the executor or administrator of an estate, but any person who is required under the provisions of the Internal Revenue Code to pay estate taxes assessed against the estate.

Subsection 1(b)(1)

Subsection states the general rule of apportionment that each person's proportionate part of the total tax is to be determined according to the percentage of such interest in the total taxable value of the estate. However, if the taxes are otherwise specifically apportioned then those provisions prevail as to that property and those interests are disregarded when calculating the proportional

apportionment. For example, federal law specifically apportions the tax on Qualified Terminable Interest Property (QTIP) on a marginal tax rate basis. That tax would be calculated first and apportioned, and then the balance of the tax would be apportioned among the other assets according to the general rule.

Subsection 1(b)(2)

This subsection confirms that the general statutory scheme of equitable apportionment is purely a "default" rule. In other words, equitable apportionment is always subject to a decedent's right to direct a different method of allocating estate tax liability.

The first sentence permits a decedent to override equitable apportionment in either a testamentary *or* an inter vivos instrument. (*See* subsection (b)(3) below, and comment following, regarding conflicting provisions in different instruments.) This reflects the reality that the cornerstone of many modern day estate plans is not the last will and testament but the revocable living trust.

The subsection also makes clear that no matter which document contains the tax apportionment clause, it must dispose of or create an interest in property. Thus, "stand alone" documents that purport to direct the allocation of estate tax liability, but that are not part of a larger instrument disposing of or creating an interest in property, do not suffice to override equitable apportionment.

This subsection also requires that the direction to use a different manner of apportionment must be specific. It does not, however, purport to define precisely what type of language is required. In addition, subsection (b)(2) permits the decedent not only to direct a different manner of apportionment, but also to grant another person a discretionary power to determine how the tax liability is to be allocated. Finally, under the second sentence of this subsection, a decedent's direction as to the manner of apportionment is limited to the tax on the property passing under the instrument containing the direction, unless the document specifically provides that it is to apply to other property.

Subsection 1(b)(3)

This subsection addresses what happens when there is a conflict between the estate tax apportionment provisions of different documents.

Where the documents are executed by the same person, the instrument disposing of or creating an interest in the subject property controls. For example, if a will and a revocable trust contain conflicting provisions, the will would control the apportionment of taxes on the probate property, and the trust would control how taxes are to be allocated on the trust's assets.

If instruments executed by the same person conflict with respect to the apportionment of

taxes on property disposed of or created by *neither* instrument, the instrument executed or amended most recently controls. If the instruments were most recently executed or amended contemporaneously, and one of the instruments is a will or codicil, the will or codicil controls. Thus, for example, if both a will and a revocable trust purported to direct the apportionment of taxes on joint tenancy property, the most recently executed or amended document would prevail but, if the documents were executed or amended contemporaneously, the will would control.

If the conflicting provisions appear in documents executed by *different* people, the direction of the person in whose estate the property is included controls. For example, suppose a testator created a QTIP trust for his or her surviving spouse and directed that the estate taxes generated by inclusion of the QTIP trust assets in the surviving spouse's estate were to be paid from the surviving spouse's assets other than the QTIP. Suppose further that the surviving spouse's own will provided that the taxes incurred on the QTIP assets were to be paid from the QTIP assets themselves. Under this subsection, because the QTIP trust is included in the surviving spouse's estate, the direction in the surviving spouse's will controls.

Subsection 1(d)

Subsection 1(d) provides that if a deduction, exemption, or credit is allowed because of the relationship of a person to the decedent (e.g. a marital deduction to a surviving spouse), or because of the purpose of the gift (i.e. a charitable deduction for a gift to a charity), then such property is to receive the full benefit of the exemption, deduction, or credit. However, there is a significant exception to this rule in the case of split interests such as a life estate and remainder or a charitable remainder interest. In those cases where the property is subject to a prior present interest that is not deductible, the tax is apportioned against the entire corpus of the gift, even though the charitable deduction may thereby be reduced.

Subsection 1(h)

Subsection 1(h) provides the estate tax attributable to any split-interest in a property or fund, such as a life estate, term of years, or lifetime annuity interest and the remainder interest is chargeable against the corpus of the property or the funds that are subject to the split-interest.

For example, suppose that assets worth One Hundred Thousand Dollars ($100,000) are left in trust with the income to be paid to beneficiary A for a term of ten (10) years, and the corpus to be distributed to B at the end of the ten (10) year term. Assuming that the appropriate interest rate for the month in which valuation occurs is 7 percent (7%), the value of the ten (10) year term certain is Forty-nine Thousand One Hundred Sixty-eight Dollars ($49,168) and the value of the remainder interest is Fifty Thousand Eight Hundred Thirty-four Dollars ($50,834). Assume further that the estate tax to be apportioned against the trust is Twenty Thousand Dollars ($20,000). The apportioned tax is not divided between the ten (10) year income interest and the remainder interest so as to cause A and B to separately pay a portion of the tax. To do so would work a hardship on both A and B since A would have to pay a significant estate tax before receiving any income, and B would be compelled to pay a tax but would not receive the corpus for ten (10) years. Instead, the

entire tax is to be paid from the underlying corpus or fund. Thus, the Trustee would pay the Twenty Thousand Dollars ($20,000) of apportioned tax from the trust fund itself. The reduction of the corpus by Twenty Thousand Dollars ($20,000) for the payment of the tax means that the remaining trust fund is Eighty Thousand Dollars ($80,000) and there will be a corresponding reduction in income to be earned by the trust. This effectively amortizes the tax allocable to the income interest.

Subsection 1(i)

Subsection 1(i) provides that if an estate qualifies for the Section 2032A Special Use Valuation, the benefit of the reduction in value, and the corresponding reduction in tax, will inure to the benefit of the recipient of the qualifying property. This is accomplished by computing the tax on the estate without any special use valuation. The tax computed without using the special use valuation is then allocated among all of the assets, including the 2032A property at its reduced value, and the tax allocated is then reduced by the amount of the taxes saved.

If the amount of the tax savings is greater than the tax originally allocated to the property, then the excess tax savings is allocated to the other estate beneficiaries. If later there is a disqualifying sale or the qualified use ceases, the recapture tax is equitably apportioned among the persons who have an interest in the portion of the qualified real property to which the additional tax is attributable in proportion to their interests.

Subsection 1(j)

Subsection 1(j) provides certain "qualified family owned business interests" may be entitled under IRC Section 2057 to a deduction from the gross estate up to $625,000. In order to assure that the qualifying property and its owners receive the benefit of this deduction, a computation is used which is identical to that applied to 2032A special use valuation property as explained in the comment to subsection (i) above.

Subsection 1(k)

Subsection 1(k) provides that in certain cases a qualifying estate can elect to pay estate tax attributable to the decedent's interest in a closely held business in up to ten annual installments with the first installment not due until five years after the estate tax return is filed. Interest is charged on the unpaid balance of the tax due until all installments are paid. Subsection 1(k) directs the taxes, interest, and any penalties to the recipient of the property that is the subject of the extension for payment.

Subsection 1(m)

Subsection 1(m) requires the representative to seek recovery from a person interested in the estate, the estate tax apportioned to the person with respect to property not in the possession of the

representative and in which such person has an interest. Such obligation does not commence until the expiration of ninety (90) days from the date the underlying estate tax liability is finally determined. Thus, such ninety (90) day period would not commence until any administrative or judicial appeal of such estate tax liability have been exhausted.

Such obligation is subject to three specific exceptions. First, such obligation may be waived by other parties who would benefit from such recovery. Secondly, it may be waived by the instrument under which the representative derives powers. Finally, the Committee was concerned that this subsection not impose on the representative either an unjustifiably onerous or unreasonable obligation or an undue exposure to personal liability. Consequently, the representative, prior to initiating an action otherwise obligated under this subsection, should weigh the costs of such action against the amount and likelihood of a potential recovery. In the event, in the reasonable judgment of the representative, such recovery action is not cost effective, the representative should not pursue such recovery. It is intended that the judgment of the representative in this regard be sustained absent an abuse of the representative's discretion.

Subsection 1(n)

Subsection 1(n) provides that if any amount of estate tax apportioned against a person interested in the estate is not collected, such unrecovered amount shall be apportioned against the other persons interested in the estate in the manner provided in subsection (b)(1), i.e., in the same manner the estate tax liability was initially apportioned, save that such person interested in the estate with respect to which such tax liability is not collected shall be excluded in such reapportionment. Any person who is charged with or pays such reapportioned amount has a right of reimbursement from the person who was charged with the estate tax which was reapportioned. Such right of reimbursement may be enforced by the representative. It is also enforceable by the person charged with the estate tax which was reapportioned, provided the representative has either assigned such right to the person charged with the tax or six months have expired since such person charged with the tax has paid such tax and there are no then pending judicial proceedings in which the representative is pursuing the same right of reimbursement.

Sections to be repealed

79-15,120. Same; reimbursement of tax from estate, when. If the tax or any part of the tax is paid by, or collected out ~~of~~, that part of the estate passing to or in the possession of any person other than the personal representative in their capacity as personal representative, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate. It is the purpose and intent of this act that so far as practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate prior to the distribution of the estate.

History: L. 1999, ch. 79, § 7; July 1.

79-15,121. Same; recovery of tax from insurance proceeds, when. Unless the decedent otherwise directs by will or trust, if any part of the gross estate on which tax has been paid consists of the proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the personal representative, the personal representative shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the taxable estate. If there is more than one such beneficiary, the personal representative shall be entitled to recover from such beneficiaries in the same ratio. In the case of such proceeds receivable by the surviving spouse of the decedent for which a deduction is allowed on federal form 706 under section 2056 of the internal revenue code, relating to marital deduction, this section shall not apply to such proceeds except as to the amount of such proceeds in excess of the aggregate amount of the marital deductions allowed under such section.

History: L. 1999, ch. 79, § 8; July 1.

79-15,122. Same; recovery of tax from certain marital deduction and other property recipients. Unless the decedent otherwise directs by will or trust, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041 of the internal revenue code, the personal representative shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise or release of a power of appointment such portion of the total tax paid as the value of such property bears to the taxable estate. If there is more than one such person, the personal representative shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 of the internal revenue code, relating to marital deductions, this section shall not apply to such property except as to the value of such property reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 of the internal revenue code over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section.

History: L. 1999, ch. 79, § 9; July 1.

79-15,123. Same; recovery of tax from certain marital deduction property recipients. (a) (1) If any part of the federal gross estate consists of property the value of which is includable in the federal gross estate by reason of section 2044 of the internal revenue code, relating to certain property for which marital deduction was previously allowed, the personal representative shall be entitled to recover from the person receiving the property the amount by which the total tax imposed by K.S.A. 79-15,102, and amendments thereto, exceeds the tax which would have been imposed by K.S.A. 79-15,102, and amendments thereto, if the value of such property had not been included in the gross estate.

(2) Subsection (a)(1) shall not apply with respect to any property to the extent that the decedent specifically indicates by will or trust an intent to waive any right of recovery with respect to such property.

(b) For purposes of this section, if there is more than one person receiving the property, the right of recovery shall be against each such person.

(c) In the case of penalties and interest attributable to additional taxes described in subsections (a) and (b), rules similar to subsections (a), (b) and (c) shall apply.

History: L. 1999, ch. 79, § 10; L. 2000, ch. 24, § 3; July 1.

79-15,124. Same; recovery of tax from certain life estate property recipients. (a) (1) If any part of the gross estate on which tax has been paid consists of the value of property included in the gross estate by reason of section 2036 of the internal revenue code, relating to transfers with retained life estate, the decedent's estate shall be entitled to recover from the person receiving the property the amount which bears the same ratio to the tax imposed by K.S.A. 79-15,102, and amendments thereto, as the value of such property bears to the taxable estate.

(2) Subsection (a)(1) shall not apply with respect to any property to the extent that the decedent by will or revocable trust specifically indicates an intent to waive any right of recovery under this provision with respect to such property.

(b) For purposes of this section, if there is more than one person receiving the property, the right of recovery shall be against each such person.

(c) In the case of penalties and interest attributable to the additional taxes described in subsection (a), rules similar to the rules of subsections (a) and (b) shall apply.

(d) No person shall be entitled to recover any amount by reason of this section from a trust to which section 664 of the internal revenue code applies, determined without regard to this section.

History: L. 1999, ch. 79, § 11; L. 2000, ch. 24, § 4; July 1.

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STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: BUSINESS, COMMERCE & LABOR
HEALTH & HUMAN SERVICES
JUDICIARY

Testimony in Support of SB 14

Representative Michael O'Neal
House Judiciary Committee

Dear Mr. Chairman and Members:

It is my pleasure to appear before you today in support of SB14.

In my private law practice, I handle a variety of real estate issues and conflicts. Until recently, disputes involving a variety of matters could only be resolved by lawsuits involving judges and juries. Recently, however, the tools of Alternate Dispute Resolution ("ADR") have become available as a less expensive, more expedient and substantive means of resolving conflicts among parties.

Alternate Dispute Resolution involves the application of Arbitration, Mediation and Conciliation to resolve conflict. These tools are less expensive than litigation and usually results in fairer settlements than the "win all – loose all" results of litigation.

With the plethora of litigation, some federal and state courts have been given authorization to require litigants to participate in ADR as part of the court process. Mandatory ADR does not require disputes to be resolved without a day in court, but it does require parties to try to settle cases by away of mediation, conciliation, mini trials, summary jury trials and other proceedings in order for the parties to analyze their cases, the strong points, the weak areas and the realities of juror considerations to avoid the expenses and delays of a jury trial. The Missouri federal and state courts have been granted these ADR tools. As a result:

1. 53% more cases settle as a result of mandated ADR.
2. 58% of ADR referred cases settled within two months of the ADR involvement.
3. 1,155 attorneys reported a net cost savings of $17,487,273.00 over a 51/2 year period. This represented an average savings of $34,956 per case (assuming two sides per case).

House Judiciary
3-19-01
Attachment 10

4. ADR mandated cases terminated 29% faster.
5. Of 1,970 attorneys responding to a survey, 71% reported that ADR was very helpful or somewhat helpful in reducing the cost to resolve their case and 95% supported continuation of the program.

ADR can be involved in the resolution of civil, juvenile and domestic cases.

As a result of current trends in mediation alone, I can report that of the cases I have submitted to ADR within the last three years, only one failed to settle within one month thereafter. The one case that did not settle will be in better shape to try as a result of the mediation.

I urge your support of SB14.

Respectfully,

Doug Patterson

TESTIMONY OF LARRY R. RUTE
KANSAS LEGAL SERVICES, INC.
(785) 233-2068

HOUSE JUDICIARY COMMITTEE
On Senate Bill No. 14

Rep. Michael O'Neal, Chair

Monday, March 19, 2001
Room 313-S

I would like to thank the Chair and members of the Committee for the opportunity to appear before you today. My name is Larry Rute. I am the General Counsel for Kansas Legal Services, Inc. (KLS) and Coordinator for Midland Mediation and Settlement Services. As you may be aware, KLS is a private, non-profit corporation dedicated to providing free or low-cost legal services to low- and moderate-income Kansans. Last year our attorneys and support staff, located in twelve legal services field offices, provided legal advice/representation to more than 31,000 Kansans in all 105 counties.

In 1995 KLS established Midland Mediation and Settlement Services (Midland), providing mediation, arbitration and other alternative dispute resolution services to Kansans at all economic levels. Midland serves as the sole private contractor providing voluntary mediation services in behalf of the Kansas Human Rights Commission. We provide significant court referred family law mediation services in behalf of the Kansas Supreme Court's "Access to Justice" mediation program.

Midland has served as the Program Administrator for the Equal Employment Opportunity Commission's voluntary mediation program in both Kansas and Western Missouri. Our mediators serve as members of the Early Assessment panel of the Western District of Missouri federal court, U.S. Postal Service "Redress" mediators and mediators and hearing officers for the Kansas Department of Education. We have three full-time mediators and twelve part-time mediators providing mediation services throughout the state of Kansas and in portions of Western Missouri. We are proud of our approval by the Office of Judicial Administration as a statewide mediation center.

Kansas Legal Services believes that Senate Bill No. 14 and its proposed amendments are vitally important to enhance the availability of mediation to Kansas citizens. Alternative dispute resolution, particularly mediation, is emerging as an increasingly accepted method by which courts and administrative bodies develop flexible methods of resolving disputes and settling cases. Mediation techniques can be tailored to facilitate problem solving in a wide variety of settings.

Conferees appearing before the Senate Judiciary Committee made it clear that mediation is emerging as an important vehicle that is increasingly utilized by courts and administrative agencies as a just method for resolving disputes and settling cases. The Supreme Court's Advisory Council on Dispute Resolution has conducted a survey of all judges and a random sample of attorneys on their attitudes concerning dispute resolution. The results showed overwhelming support towards mediation and other non-binding forms of dispute resolution.

House Judiciary
3-19-01
Attachment 11

The Amendments to Senate Bill No. 14 have several important goals:

1. Clarify and expand the ability of the District Courts to order a variety of matters into mediation;

2. Requires that mediation conducted within state government meets standards established under the Dispute Resolution Act;

3. More clearly defining penalties if mediation is conducted in bad faith; and

4. Elimination of outdated Department of Human Resources mediator fee restrictions.

One of the more important aspects of this legislation is the specific authorization for District Courts to send all types of cases to mediation. Rather than setting out a "laundry list" of eight case types that may be referred by the court, the laundry list has been eliminated. Upon a finding by the court that alternatives to litigation are appropriate, and further considering the mediation costs and the parties' ability to pay, a judge may order the parties to participate in a judicial settlement conference or non-binding dispute resolution.

Anther important requirement is that mediation conducted within state government meet currently established standards under the Dispute Resolution Act. The Office of Judicial Administration has developed excellent requirements for mediator training and mediation professional responsibility standards by Supreme Court rule. State government should be leading the movement toward resolving disputes through mediation and other alternative dispute resolution methods, by following established professional standards.

In conclusion, we believe that alternative dispute resolution systems, particularly mediation, provide a unique opportunity to empower individual citizens to participate in the resolution of very difficult family, public policy and employment issues. We support fully the amendments to Senate Bill No. 14 and urge its passage. We hope to continue to participate in the improvement of alternative dispute resolution systems in the months and years to come.

Respectfully,

Larry R. Rute
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HOUSE JUDICIARY COMMITTEE
Testimony on behalf of Senate Bill 14
Art Thompson
Dispute Resolution Coordinator
March 19, 2001

K.S.A. 5-501 et. seq. established the Dispute Resolution Act in 1994. The objective of the Act is to encourage the use of dispute resolution mechanisms, such as mediation, by approved programs and courts.

I am here to provide any technical information you might need in considering this bill and to specifically support the portion of the bill which clarifies that district court judges can order dispute resolution when appropriate. I have followed this bill since it was first discussed by the Federal and State Affairs Interim Committee this fall.

The intent of revised Section 2 is to allow judges the discretion in determining when it would be appropriate to refer a particular case to dispute resolution. It would apply when a judge finds:

> "...that alternatives to litigation may provide a more appropriate means to resolve the issues in a case and that the costs of the dispute resolution process are commensurate with the amount at controversy in the case and the parties ability to pay such costs...."

It is important to note that the bill indicates that the form of dispute resolution is **non-binding**. A party can always elect to go to court.

In 1986, the Legislature authorized judges in Kansas to be able to require mediation in child custody/visitation disputes. Last year the Legislature expanded the ability of judges to order mediation in the property side of divorces as well.

Senate Bill 14 clarifies for judges that they have one more tool to use in managing their dockets and providing the most appropriate form of dispute resolution. Not all cases are appropriate for dispute resolution but this bill gives judges the ability to refer those that are.

Section 1. (b) of the bill adds "state government or as otherwise provided by statute" to the Dispute Resolution Act. This means that if state government or the legislature orders dispute resolution, the providers of those services will meet minimum the same qualifications which are currently required for courts and approved programs.

Mediation is . . . a delicate balance

Remarks by: Margaret 'Peg' Nichols
Coordinator, Kansas Tenth Judicial District Small Claims Mediation Program
Newsletter Editor, Heartland Mediators Association
Supreme Court approved mediator/trainer in core/civil/domestic

I've rubbed elbows with, and learned from, mediators who work in North Ireland, Guatemala, Colombia, South Africa and Russia, but I volunteer and work as the coordinator of the Kansas Tenth Judicial District Small Claims Mediation Program.

The keystone of true mediation is the self-determination of the parties, and the mediation session allows parties to examine anxieties and concerns that are often far more important than monetary or property issues.

One of the most wrenching cases in our small claims was the divorced parents suing over the possession of the visitor book which was signed at the funeral of their adult, drug-plagued son who had died not even owning the clothes on his back.

One that I enjoyed tremendously was a case of two bar buddies, one of whom had sold the other an old truck for $250. After hearing the defendant's story, the plaintiff decided the loss of a drinking buddy wasn't worth $250 and the charges were dropped. They went off down the hall together, arms around each other's shoulders.

Often a plaintiff, with some regard for the human side of the defendant, will be willing to accept a lesser amount because he or she realizes that although the judge might well make a judgment in his or her favor, the efforts required to collect might well cost more time, energy, money and aggravation than they are willing to invest. The compliance rate, although not 100%, is very high. People who have a hand in crafting their own agreements are much more likely to keep them.

Mediation can be beneficial in a wide range of circumstances. The writing of the North American Free Trade Agreement marked the first time that mediation clauses have been an integral part of an international trade agreement. Mediation can be effective in civil cases; construction conflicts, racial, sexual or employment discrimination claims; special education needs evaluations; divorce/domestic issues, and victim/offender conciliation – an admittedly different type of mediation, where only the bravest of mediators tread.

Because of the tragic consequences of workplace hostility, the United States Postal Service developed the REDRESS program. Mediators outside the USPS are brought to the worksite to mediate agreements between disputing employees.

Peer mediation programs have been established to defuse schoolyard disputes. Trainers who provide training courses for adults are now seeing the first wave of people

who were first introduced to mediation in the schoolroom and who are looking for ways to carry those concepts in the adult world.

People who enroll in the mediation courses bring an incredible range of experiences with them. We've had mediators in the program who have been, and some still are, attorneys, accountants, doctors, therapists, human resources administrators, tax specialists, business owners, teachers, prison system executives, car dealers, counselors, labor negotiators, people who bring impressive credentials.

People who become mediators are people who are willing to search hard to help people resolve their conflicts. There is a lot of volunteer mediation, and most of that will probably continue, but to really encourage peaceful resolutions, there needs to be adequate compensation to allow practitioners to earn a living.

I believe that when people become more aware of the option of mediation, more of them will choose that route toward resolution. Judges can support that growth by choosing to send more cases to mediation.

I would personally like to see this proposed legislation amended by some language that would more clearly define mediation as a process in which the parties, not the mediators, have complete control of the outcome.

This could easily be done by adding phrases similar to what already appears in some of the Supreme Court rules regarding mediation, for example:

Supreme Court Rules

Rule 901
An agreement reached by the parties is to be based on the decisions of the parties and not the decisions of the mediator.

Rule 902
The agreement reached by the parties shall be based on the decisions of the parties and not on the decisions of the mediator

Rule 903
A mediator shall recognize mediation is based on the principle of self-determination by the parties. Self-determination is the fundamental principle of mediation. It requires the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

Further, as you consider this legislation, I urge you to seek input from mediators in your district.

Absolutely the best source is right here in Topeka, through the person of Art Thompson, who heads up the state Alternative Dispute Resolution office, and reachable through the website at http://www.kscourts.org/adr/ or 785.291.3748.

The professional organization formed by the mediators themselves is Heartland Mediators Association. The executive director is Sandra Sabanske, whose e-mail is sabanskes@aol.com , telephone 913.381.4458. The official HMA website at http://www.idir.net/~mediation will soon carry a list of mediators.

My hodge-podge of websites includes a lot of information about regional mediation, and can be accessed at http://home.att.net/~rmnichols/balance.html , which also has my e-mail. If you will contact me – phone is 913.782.0189 – I will personally put you in touch with some mediators who can provide additional input as you consider this legislation.

State of Kansas

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COMMITTEE ASSIGNMENTS
CHAIR: CONFIRMATION OVERSIGHT
VICE CHAIR: ORGANIZATION, CALENDAR & RULES
MEMBER: STANDING & JOINT COMMITTEES

Majority Leader
Kansas Senate

SENATE CHAMBER, STATE CAPITOL
TOPEKA, KANSAS 66612-1504

TESTIMONY
HOUSE JUDICIARY
MONDAY, MARCH 19, 2001
SB 14

Chairman O'Neal and Members of the Committee:

I appreciate the opportunity to offer testimony in support of Senate Bill 14. The measure has had significant study and consideration, as it was a subject assigned to an interim study committee, a Senate Judiciary subcommittee and the full Senate Judiciary Committee. It was passed by the Senate on March 8, 2001, with a vote of 39-1.

Mediation is a flexible and varied process which can be tailored to facilitate problem solving in a wide variety of settings. Conferees appearing before our committee made it clear that mediation is emerging as an important vehicle which increases utilization by courts and administrative agencies as a just method to resolve disputes. Those parties involved in reaching an agreement through mediation have shown to be more compliant and satisfied with their decisions.

The Office of Judicial Administration has developed excellent requirements for mediator training and mediation standards by Supreme Court rule. If we in state government are to demonstrate support for the non-binding dispute resolution process, it would be wise for state governmental agencies to meet or exceed established mediation requirements. State government should be leading the movement toward resolving disputes through mediation and this bill moves us forward.

I urge your favorable consideration of Senate Bill 14. It can make a positive difference in settling disputes.

Respectfully submitted,

Lana Oleen
Senate Majority Leader

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House Judiciary
3-19-01
Attachment 14

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee

FROM: Terry Humphrey
Executive Director
Kansas Trial Lawyers Association

RE: 2001 SB 14

DATE: March 19, 2001

Mr. Chairman and members of the House Judiciary Committee, thank you for the opportunity to offer our comments in support of SB 14.

SB 14 includes proposed amendments to K.S.A. 5-501 and 5-509 related to disputes which may be ordered to mediation. The Kansas Trial Lawyers Association supports empowering the court to order mediation under certain conditions. This provision also provides the means by which an order can be entered by involving persons in the mediation process who have the authority to help settle the claim. Judicial ordering powers provide a decision-maker who is remote and removed from the process.

Thank you for the opportunity to comment on SB 14. We encourage your support of this bill as amended. I would be happy to answer any questions or provide any further information that the committee may have.

Terry Humphrey, Executive Director

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