Approved: April 30, 2003
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on March 13, 2003 in Room 313-S of the Capitol.

All members were present except:
Representative Ward Loyd - Excused

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

Conferees appearing before the committee:
Kathy Olsen, Kansas Bankers Association
Joe Eaton, Intrust Bank of Wichita
Senator Derek Schmidt
Chris Biggs, Geary County Attorney
Steve Obermeier, Johnson County District Attorneys Office
Eric Rucker, Office of Attorney General

The hearing on **HB 2404 - mortgagee allowed to bid in sale of real estate for delinquent taxes**, was opened.

Kathy Olsen, Kansas Bankers Association, explained that the proposed bill would allow a mortgagee to be a bidder at a foreclosure sale. Current law prohibits this practice. In 1995 language was struck that prohibited the mortgagees from bidding, however, at a later time it was discovered that another provision existed. She proposed an amendment which would clarify that the exception apply to a mortgagee or assignee, as a successor to the security interest, and clarify that the mortgagees who are allowed to bid at the tax sale be those who filed their security interest of record and who are on record at the time of the county's sale. She also requested an amendment which would remove mortgagees from the provisions in Section (c) so that if the mortgagees buy the property, they are not liable for the owner's taxes for up to ten years plus interest. (Attachment 1)

Joe Eaton, Intrust Bank of Wichita, wasn't sure why the current statute was ever enacted because the mortgagee is never the owner of the property, rather a holder of a lien. (Attachment 2)

The hearing on **HB 2404** was closed.

The hearing on **SB 15 - warning to tenants relating to termination notices with new conditions not contained in rental agreements**, was opened.

Senator Derek Schmidt requested the bill be introduced to address situations where a notice of intent to vacate could cause the tenant to be financially responsible for items not included in the original contract. (Attachment 3)

The hearing on **SB 15** was closed.

The hearing on **SB 206 - one year time limitation on writs of habeas corpus**, was opened.

Chris Biggs, Geary County Attorney, reminded the committee that the proposed bill passed the House in 2000 by a vote of 108-10. The time limits proposed in the bill would start to run after the direct appeal is over. Several other states have time limits. Under current law inmates can appeal through our state appellate courts and then to the United States Supreme Court, after which they can start the action over again by filing it under K.S.A. 60-1507. (Attachment 4)

Steve Obermeier, Johnson County District Attorneys Office, appeared as a proponent to the bill because it would give closure to the victim and/or victim's family for the criminal case to finally come to an end. (Attachment 5)

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on March 13, 2003 in Room 313-S of the Capitol.

Eric Rucker, Office of Attorney General, suggested that the proposed bill would allow the courts to deal with the more serious questions of law rather than tying up their time with frivolous lawsuits. (Attachment 6)

Written testimony in support of the bill was provided by Michelle Brown (Attachment 7), Donna Heintze (Attachment 8), Senator Lana Oleen (Attachment 9).

The hearing on **SB 206** was closed.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

March 13, 2003

To: House Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: HB 2404: Bidding at Tax Foreclosure Sale

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today in support of HB 2494, amending K.S.A 79-2804g. This is the section of the tax code that provides a list of people and entities that are prohibited from bidding at tax foreclosure sales by the county.

The amendment that we are proposing would allow a mortgagee (lender holding a mortgage on the property) to be a bidder at such foreclosure sales. Current law (Section (a)(1)) prohibits a mortgagee from participating in these sales as a person having a statutory right to redeem.

History.

This statute has had an interesting history. We have attempted, since 1995, to successfully amend the statute to allow mortgagees to participate in the county's tax foreclosure sale. In 1995, the legislature struck language that specifically prohibited mortgagees from bidding in at the sale. The intent at this time was to allow mortgage holders to bid at the sale. Later we discovered that the language of Section (a)(1), referring to persons having a statutory right to redeem pursuant to KSA 79-2803, included mortgagees. We thought the problem was solved in 1998, but there was a lot of confusion as there were two statutes that were nearly identical (see former KSA 79-2804j), and in the end, the language remained.

To add to the confusion, many counties have been allowing mortgagees to bid in at tax foreclosure sales. Their belief, as is ours, is that the 1995 legislature changed to law to specifically allow mortgagees to participate in these sales. Other counties point to Section (a)(1), to indicate that they cannot allow the mortgagee to bid.

We believe that the legislature did intend for a mortgagee to bid at the county's tax foreclosure sales, believing that the mortgagee should be allowed to protect their security interest at this sale.

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610 SW Corporate View 66615 • P.O. Box 4407, Topeka, KS 66604 • (785) 2
email kbaoffice@ink.org

Rationale for exception.

A mortgagee is in a much different position than the property owner. The mortgagee's goal is not to become the owner of the property upon paying off the taxes. The mortgagee's goal is to protect the interest it has in the property, recognizing that the lien for unpaid taxes is a priority lien and will need to be paid first out of the proceeds of the sale. This is all taken into consideration when the mortgagee determines the bid amount. Allowing a mortgagee to participate in the sale will help assure that the delinquent taxes will be paid, while at the same time, keeping the costs at a minimum for all parties involved.

If the mortgagee is not allowed to bid in at the county's sale, a separate, subsequent foreclosure action would have to be initiated and another sale would be scheduled. This is an additional cost not only to the mortgagee, but also to the property owner.

Possible Amendments.

We have attached some suggested amendments to the original bill draft. The suggested amendments to Section (a)(1) are clarifying in nature. We are asking that the exception apply to a mortgagee or assignee, as a successor to the security interest. We are also asking to clarify that the mortgagees who would be allowed to bid in at the tax sale, be mortgagees who have filed their security interest of record and who are on record at the time of the county's sale.

The amendment we are suggesting to Section (c), would remove mortgagees from the provision that if after the fact (after the sale), the mortgagee buys the property and it is within 10 years of the date of the public auction, the mortgagee would be liable for the original judgment lien and interest thereon from the date of the public auction. Again, it is our belief that this provision was meant to apply to the property owner who also has a right to redeem under KSA 79-2803, to keep that property owner from escaping tax liability. We do not believe that it was intended to discourage mortgagees from protecting their security interests by holding them liable for the property owner's tax liability for up to ten years, plus interest.

Thank you for your time and we respectfully urge the Committee to favorably consider the attached amendments and then to act favorably upon **HB 2404** as amended.

Session of 2003

HOUSE BILL No. 2404

By Committee on Federal and State Affairs

2-18

AN ACT concerning sale of real estate for delinquent taxes; amending K.S.A. 2002 Supp. 79-2804g and repealing the existing section.

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

Section 1. K.S.A. 2002 Supp. 79-2804g is hereby amended to read as follows: 79-2804g. (a) Whenever any tract, lot or piece of real estate is offered for sale at public auction pursuant to K.S.A. 79-2804, and amendments thereto, such tract, lot or piece of real estate shall not be sold, either directly or indirectly, to:

(1) Any person having a statutory right to redeem such real estate prior to such sale, pursuant to the provisions of K.S.A. 79-2803, and amendments thereto, *except that this paragraph (1) shall not prohibit sale to any person who held an interest in such real estate as mortgagee at the time ~~the tax constituting part of the judgment became due~~*;

(2) any parent, grandparent, child, grandchild, spouse, sibling, trustee or trust beneficiary who held an interest in a tract as owner or holder of the record title or who held an interest at any time when any tax constituting part of the county's judgment became due; or

(3) with respect to a title holding corporation, any current or former stockholder, current officer or director, or any person having a relationship enumerated in paragraph (2) to such stockholder, officer or director.

(b) If any such real estate is acquired by a county pursuant to K.S.A. 79-2804, and amendments thereto, and, at the end of six months from and after confirmation of such sale to the county, such real estate is advertised for sale at public auction, as provided in K.S.A. 79-2804f, and amendments thereto, such real estate shall not be sold, either prior to or at such auction, to any person having a statutory right to redeem such real estate, under the provisions of K.S.A. 79-2803, and amendments thereto, for an amount less than the original judgment lien and interest thereon, plus the costs, charges and expenses of the proceedings and sale, as set forth in the execution and order of sale issued pursuant to K.S.A. 79-2804, and amendments thereto.

(c) If any tract, lot or piece of real estate purchased at public auction pursuant to K.S.A. 79-2804, and amendments thereto, is transferred, sold, given or otherwise conveyed to any person who had a statutory right to

or that person's assignee

of record

of the sale

redeem such real estate prior to such sale pursuant to K.S.A. 79-2803, and amendments thereto, within 10 years of the date of the public auction, such person shall be liable for an amount equal to the original judgment lien and interest thereon from the date of the public auction.

(d) The provisions of this section shall apply to the sale or conveyance of any real estate by a county land bank established pursuant to K.S.A. 2002 Supp. 19-26,104, *and amendments thereto*.

Sec. 2. K.S.A. 2002 Supp. 79-2804g is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

, except that this paragraph (3)(c) shall not apply to any person or that person's assignee who held an interest in such real estate as mortgagee of record at the time of the sale.

79-2804h. Confirmation of sale of property under 79-2804; affidavit required. No sale of real estate as provided for in article 28 of chapter 79 of the Kansas Statutes Annotated shall be confirmed as provided for in K.S.A. 79-2804, until the purchaser at the sale, shall file with the clerk of the court, an affidavit stating that the purchase of the real estate was not made, either directly or indirectly, for any person having the statutory right to redeem

History: L. 1971, ch. 305, § 2; July 1.

,other than any person or that person's assignee who held an interest in such real estate as mortgagee of record at the time of the sale.

House Judiciary Committee
Tax Foreclosure Sale Bidding Testimony HB 2404
March 13, 2003

Joseph F. Eaton
Vice President of Commercial Real Estate
INTRUST Bank, N.A.
Wichita, Kansas
On behalf of The Kansas Bankers Association

Subject: Allowing a mortgage holder to bid at the public county tax sale of properties being sold for delinquent real estate taxes.

History: Since 1995 the purpose and intent of the legislature to amend K.S.A. 79-2804, Taxation-Judicial Foreclosure and Sale of Real Estate by County, has been to remove the mortgagee (mortgage holder) from the persons barred from bidding at the county tax sale. Attempts in 1995, 1996 and 1998 were made to accomplish the task. The law remains unclear and is influenced by a related statute, 79-2803, referenced at section (a)(1) of this statute.

Proposal: Support passage of HB-2404 amending K.S.A. 79-2904 in order to remove the mortgagee and its assigns from the persons barred from bidding at the county tax sale.

Reasoning:

1. It is the intent of the law to recover the delinquent tax via property sale at public auction. The most successful auctions are those with the most and best bidders. As a practical matter the mortgagee, mortgage holder, will bid to protect its lien interest just as in a civil foreclosure with priority of lien being first to the county for the taxes. The mortgagee is not an owner of the property, rather a holder of the mortgage securing a debt. As such the mortgagee should have the same right to bid on the property to protect that lien position as in it would in a civil foreclosure.
2. The mortgagee can be the State of Kansas, County, City, an individual, the federal government, FNMA/FHLMC, lending institution or any other entity or individual. Governmental entities become mortgagees through grants, affordable housing programs, bonds, etc.
3. In the case of multiple mortgagees (second, third mortgage holders) the bidding would be even more competitive with all bidding to protect their lien position.
4. If the mortgagee cannot bid to protect its lien then it must pay the taxes and begin another foreclosure action and schedule another sheriff's sale costing all parties more time and money.
5. Baring mortgagees from bidding at a tax sale to protect their lien can result in Kansas home owners paying more interest because of pricing differentials charged due to increased risks, perceived or real, in Kansas. For this reason, among others, the issue of reducing the civil foreclosure redemption period was addressed by the Legislature in recent years. Both home lenders and affordable housing sponsors supported the change.

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Senator Derek Schmidt
15th District

Committee Assignments
Agriculture (Chairman)
Judiciary
Reapportionment
Natural Resources
Elections and Local Government
Legislative Post Audit

Message Only (800) 432-3924
During Session

Testimony in support of Senate Bill 15
House Judiciary Committee
by Senator Derek Schmidt

March 13, 2003

Chairman O'Neal and members of the committee, thank you for taking time to consider Senate Bill 15. I regret that a scheduling conflict prevents my being with you in person today, but I did want to submit this testimony to explain the purpose and history of this legislation.

Attached to this testimony, you will find my testimony given last year in the Senate Judiciary Committee when this issue first was considered. That testimony explains in detail the rationale for this bill.

This bill is narrowly aimed at the following conduct:

** A landlord physically provides to a tenant described as a simple notice of intent to vacate the premises.

** Based on the landlord's assurances that this is a "simple" document the tenant must sign to give notice he intends to depart at the end of the lease term, the tenant signs the document -- often without reading it.

** Unfortunately, a very small number of landlords have begun inserting into this document additional substantive terms beyond the scope of the original lease. By signing the "simple" notice of intent to vacate, the tenant is thereby binding himself to the additional terms -- or incurring significant legal expense to avoid the additional obligation.

The approach of Senate Bill 15 to remedy this problem is simple: Require landlords who use this practice of slipping added terms into a notice of intent to vacate to include a clear disclosure statement advising tenants that they have a legal right not to sign the landlord-provided document and instead to provide alternative written notice of the tenant's intent to vacate.

I appreciate the good-faith efforts of the Kansas Landlords Association in working with me on this. While the association opposed the original version of Senate Bill 15, we have reached agreement on the amended version and the association is now neutral on the proposal.

This bill is good for tenants. It also is good for almost every landlord in the state -- myself included -- who benefits from maintaining an upstanding reputation for the residential landlord industry. The only people for whom this legislation imposes a burden are those very few landlords who currently are trying to "put one over" on unwary tenants what the bill is intended to prevent.

Thank you for your consideration. If I may provide further information

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3-13-03
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Message Only (800) 432-3924
During Session

Testimony of Senator Derek Schmidt
In Support of Senate Bill 265
Before the Senate Judiciary Committee
February 1, 2002

Mr. Chairman and members of the committee, thank you for your consideration today of legislation I introduced to restrict the ability of landlords to, in effect, coerce tenants into agreeing to supplemental terms of their lease. Senate Bill 265 is intended to discourage landlords from inserting additional terms beyond the lease agreement into Notices of Termination that are provided by landlords to tenants for the tenant's signature. It seeks to accomplish this by requiring landlords who do insert additional terms into a Notice of Termination to also insert a disclaimer advising the tenant that he need not sign because of the additional terms. Further, it renders any additional terms unenforceable.

The basic public policy idea is simple: The terms of the bargain between a landlord and a tenant should be set by the parties up front, at the time the lease is being negotiated. This is the time when there is a level playing field and neither party is at a disadvantage. If those terms are to later be amended, that amendment should be the result of a subsequent bargained-for exchange, not the result of one party (the landlord) covertly slipping additional terms into an unrelated document (a required Notice of Termination) that is routinely signed by the other party (the tenant).

My interest in this subject arose out of two experiences:

1. Before I was elected to the Senate, my wife and I rented an apartment in Topeka from the AMLI apartment chain. Our lease required that we give at least 30 days notice before the expiration of our lease if we intended to vacate the apartment at the end of our lease. About 60 days before the end of our lease, an agent of our landlord contacted us to inquire if we intended to vacate. I said we did. The agent then said she would provide us with a form we needed to sign and return to her to give notice of our intent to vacate.

   A copy of that form is attached. As you can see, although this form was described to us as a routine matter of giving notice that we intended to vacate, it in fact would have obligated us to several additional terms beyond the scope of our original lease. Among those added terms: We would agree to comply with all terms and conditions of the notice of intent to vacate and of the move out cost

schedule, as well as the terms of our original lease. The "Move out Cost Schedule," to which we would have agreed if we had signed, set forth specific sums we agreed to pay if any damage to the property was noticed.

I refused to sign this form. Instead, I wrote a letter to our landlord and, pursuant to the terms of our lease, provided the required 30-day written notice of our intent to vacate. We left, and I thought little of this matter again until the situation below came across my desk.

2. Some months later, a client walked into my law office in Independence. The situation was this: Client's son was a student at the University of Kansas. Son and several friends had jointly rented an apartment from a large apartment chain in Lawrence. Their lease required 30-day written notice of intent to vacate before the lease term expired. When the notice period arrived, the landlord provided the son and his friends with a pre-printed Notice of Termination form. Unlike my wife and me, the boys signed the form without reading it because they believed that they had no choice and that their signature did nothing but indicate their intent to depart at the end of the lease term.

   The boys moved out and, all parties agreed, they had caused damage to the apartment. But there was a substantial dispute about the cost of repairing that damage. The boys thought the cost was about $1,000 (or $250 per boy). The landlord thought the cost was about $4,000 (or $1,000 per boy). The boys obtained an independent estimate from an outside source of what it would cost to repair the damage. The estimate was closer to $1,000 than to $4,000.

   However, the Notice of Termination form signed by the boys had expressly (in small print on the back) set forth a schedule of costs for repairing certain types of damage. As calculated by that schedule, the boys did indeed owe $4,000. They had little recourse other than to pay the bill since they had expressly agreed, in writing, to the cost schedule. To bring litigation in an attempt to defend their interests in this case would have been more costly and troublesome than to pay the bill.

Mr. Chairman, these two cases illustrate what appears to be a systematic problem. Large apartment chains are employing pre-printed Notices of Termination forms to dupe unsuspecting tenants into agreeing, in writing, to additional terms beyond their original lease.

This sort of business practice is sneaky, unfair, and should be prohibited. That is what Senate Bill 265 is intended to do, and I would encourage the committee to support it.

ate Received 9-26-00

Apt. # 11

NOTICE OF INTENT TO VACATE

Type _____

PLEASE BE ADVISED THAT THE UNDERSIGNED RESIDENT(S) INTEND TO TERMINATE RESIDENCY OF THE PREMISES LISTED BELOW.

DATE NOTICE GIVEN 9-26-00 DATE OF INTENDED MOVE OUT 11-30-00

Names of all residents on lease Derek & Jennifer Sommidt

Apt. No. 1116 Address 2745 Via West Dr Carpet Color _____

60 ~~30~~ Day Written Notice	(Yes)	No
Will apartment be vacant?	Yes	No
Current lease expiring	11-30-00	
Lease Term Fulfilled	Yes	No
Rent will be paid to		
Well Wishes Card Received	Yes	No

Specific reason for moving _____

Scheduled Move Out Inspection Date _____ Time _____

DATE OF INTENDED MOVE OUT

ASSIGNMENT OF DEPOSIT

In roommate situations, Community Director, at its sole option, may consent to a vacating resident obtaining a replacement roommate. All terms and conditions of the lease contract remain in full force and effect, including those relating to your deposit and the refunding of said deposit. By your signature below, you hereby transfer and assign all right, title and interest, if any, of your deposit to the replacement roommate and acknowledge Community Director does not waive any rights it may have as set forth herein above or in the lease.

I hereby transfer and assign my deposit to _____.

CHANGES IN MOVE OUT DATE

No retraction or change of the intended move out date may be made without approval in writing by Community Director. Resident may not hold over beyond the move out date. **If the apartment is pre-leased after Owner's Representative receives this notice, it will not be possible to approve any request for a move out date extension.** Community Director and any new resident must rely on this move out notice for preleasing purposes.

CLEANING

As provided in the lease contract the apartment must be left in a thoroughly clean condition. This includes the stove, refrigerator/freezer, counters, cabinets, floors, tubs, shower walls, toilets, windows, etc. All carpeted areas must be vacuumed. You will be charged for those areas not cleaned. The cleaning charges are listed on the back of this notice of intent to vacate.

DEFAULT NOTICE

Your lease is a binding contract and the Community Director expects you to honor your obligations. If you will be vacating the apartment before the lease term expires or if you are not giving 30 days' written notice of intent to vacate, Community Director will enforce its rights including but not limited to the following:

1) ADMINISTRATIVE CHARGES to re-let the apartment
2) BREACH OF LEASE FEE
3) CLEANING CHARGES guidelines set forth on the move out cost schedule on the back
4) LOSS TO VACANCY (i.e. rent on the apartment until the lease expires or until the apartment is re-let)
5) PHYSICAL DAMAGE CHARGES
6) UNPAID MISCELLANEOUS CHARGES, (i.e. late charges, NSF charges, etc.)
7) OTHER CHARGES

ENTERED INTO COMPUTER

MOVE OUT INSPECTION

You should meet with our representative for a move out inspection. Our representative has no authority to bind or limit us regarding deductions for repairs, damages, or charges. Any statements or estimates by our representative are subject to our correction, modification, or disapproval before final refunding.

VACATING APARTMENT

I understand Community Director will NOT refund my deposit, if any, until I return all keys and provide my forwarding address after release of the apartment and inspection by Owner's representative. I also understand that my lease contract provides that my apartment might be shown with prior notice to prospective residents before I vacate.

By signing this notice of intent to vacate I give permission to Community Director to release my rental history to prospective Managers or Landlords. Also, I understand and agree to comply with the terms and conditions of the lease contract, notice of intent to vacate and move out cost schedule. This notice of intent to vacate is not valid until all residents moving out have signed and Community Director has approved. I UNDERSTAND I AM RESPONSIBLE FOR RENT UNTIL ALL THE KEYS TO MY APARTMENT ARE RETURNED AND MY FORWARDING ADDRESS IS PROVIDED.

Resident(s) Signature	Date	Forwarding Address				
		Street Address	Apt#	City	State	Zip
		Street Address	Apt#	City	State	Zip
		Street Address	Apt#	City	State	Zip

Receipt of this notice is acknowledged and approved by: Patricia Olson 9-26-00

Community Director Date Taken By

3-4

MOVE-OUT COST SCHEDULE

Cleaning and Repair Charges:

If prior to moving out, you do not clean the items listed below and leave them in satisfactory working order, the following charges will be deducted from your deposit or owed if deposit is not sufficient to cover the charges. You will be charged for each instance in which an item must be cleaned or repaired. The prices listed below are average prices only.

If Manager incurs a higher cost for cleaning or repairing an item, you will be responsible for paying the increased amount. Please note that this is not an all inclusive schedule; you could also be charged for cleaning or repairing items that are not included on the following list.

Kitchen Cleaning		Bathroom Cleaning		Miscellaneous	
Cabinets & Countertops	$30.00	Shower Door	$15.00	Carpet Cleaning	$100.00
Dishwasher	$10.00	Sink/Countertops/ Cabinets	$35.00	Carpet Repairs	$100.00
Drip Pan	$ 2.00			Holes in Wall	$ 75.00
Oven	$30.00	Toilet	$10.00	Painting	$200.00
Refrigerator/Freezer	$40.00	Tub/Shower	$20.00	Trash Removal	$ 60.00
Stove/Vent-a-Hood	$10.00			Vinyl Floors	$ 25.00
				Wallpaper Removal	$150.00
				Window Coverings (miniblinds & verticals)	$ 50.00

Replacement Charges:

If any items are missing or damaged to the point that they must be replaced upon move out, you will be charged for the current cost of the item, plus labor and service charges. A representative list of replacement charges is provided below. These are average prices.

If Manager incurs a higher cost for replacement, you will be responsible for paying the increased amount. Please note that this is not an all-inclusive schedule; you could also be charged for the replacement of items that are not included on the following list.

Carpet Replacement	$900.00	Light Bulb	$ 1.00
Countertops	$300.00	Light Fixture	$ 50.00
Crisper Cover	$ 15.00	Mailbox Key (lost or unreturned)	$ 25.00
Disposal	$ 65.00		
Door	$100.00	Mirror (Bath)	$ 60.00
Door Key (lost or unreturned)	$ 35.00	Patio Glass Doors	$ 150.00
		Patio Screen	$ 100.00
Fire Extinguisher (1 1/2 lb. size)	$ 35.00	Window Coverings	$ 200.00
		Window Glass	$ 150.00
Ice Trays	$ 5.00	Window Screen	$ 35.00

House Judiciary
Testimony 3/13/2003
In Support of Senate Bill 206
Kansas County and District Attorneys Association
Chris Biggs
Legislative Chair KCDAA / Geary County Attorney (785) 232-5822

I would like to thank the Committee for this opportunity on behalf of the KCDAA to support this necessary legislation. Senate Bill 206 (which previously passed the House as HB 2684 by a vote of 108-10 in 2000) proposes a reasonable time limit following direct appeal upon an inmate's opportunity to challenge a conviction by a separate lawsuit under K.S.A. 60-1507. This does not interfere with any direct appeal rights. The bill originated in the Senate Judiciary Committee this year.

TIME LIMITS

Time limits are preferred in the law. They give parties an opportunity to present their case and try contested matters in a timely fashion while evidence is fresh, and witnesses available. For example, the State must file most cases within two years of the act (K.S.A. 21-3106) and must bring a jailed defendant to trial within 90 days of arraignment or the defendant will be set free ---regardless of the crime (K.S.A. 22-3402). A defendant must make application for a new trial based on newly discovered evidence within two years of the conviction (K.S.A. 22-3501). Kansas has a 30 day limit on habeas actions (K.S.A. 60-1501). Yet, there is no time limit, at all, on K.S.A. 60-1507 actions. Procedural time limits on habeas actions are constitutional. See, ***Battrick v. State,*** 267 Kan. 389, 985 P.2d 707 (1999)

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

NOTION NOT NOVEL

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

PRESENT LAW

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

H. JUDICIARY
3-13-03
Attachment: 4

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

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

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

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

* Sedgwick County has dealt with a 60-1507 which, if successful, would have required re-trial of a 1978 murder.

* Geary County presently had a case where a defendant appealed a denial of a K.S.A. 60-1507 following a 1992 plea of guilty to murder. He has previously had his sentencing appeal and a prior 60-1507 appeal denied . He complained that his co-defendant was drunk when he made a statement implicating the defendant. This proceeding required hearings, a record, an appeal, briefs, and a written opinion from an appellate court. (Donna Heintze, the mother of the victim, has provided written testimony) The co-defendant recently filed a several hundred page 60-1507 which raises many issues already determined in a prior hearing. Counsel was been appointed, at State expense, to sort through the rambling pleadings. His main argument on appeal is that his plea was not lawful because he plead to second degree murder when he really was guilty of first degree murder. (I'm not kidding!) We recently filed our reply brief to the Kansas Court of Appeals.

The Kansas County and District Attorneys Association strongly encourages passage of this bill. It promotes victim interests, finality in criminal proceedings, and is fiscally responsible. It also provides for the inmate with a truly meritorious claim while at the same time it provides a procedure to succinctly eliminate those petitions which are technical, mundane, and ridiculous.

Respectfully,

Chris Biggs
KCDAA Legislative Chair

#12 County Attorney's Corner

("I'll appeal this to the Supreme Court if I have to!")

The appeal process in a criminal case gets a great deal of comment. Much of it negative. One reason for this is that they seem to go on forever. That is because sometimes they do.

Say a defendant was convicted by a jury of a burglary in Geary County. He asks the trial court for a new trial. Denied.

He appeals to a three judge panel of the Kansas Court of Appeals. Denied.

He then petitions the Kansas Supreme Court for review, which may be granted, but as for the appeal ---. Denied.

Is he done? No.

He then asks the United States Supreme Court to review the case (if a federal constitutional question is raised)--- Denied.

Now that highest court in the land has refused the appeal he is finally done. Wrong.

He then files a new proceeding (which would be called a 60-1507 or habeas corpus action) in the Geary County District Court, and raises some new constitutional issue. He claims that the defense lawyer was ineffective for not raising it before. The appeal is denied.

He then appeals this to the Kansas Court of Appeals and, you guessed it, he loses and then appeals to the Kansas Supreme Court. He then petitions the United States Supreme Court for review again. If he loses this, he is surely done . Not so fast!

Now that he has exhausted his state remedies, he files a federal habeas corpus action in the local federal district court. At this level, one federal judge hearing the case can overturn what a jury, two State district judges, and many appellate judges have ruled upon.

If the defendant cannot convince the federal judge to overturn the case, he must then appeal the decision to the 10th Circuit Court of Appeals in Denver. The decision of that court can then be appealed to the United States Supreme Court, under certain circumstances.

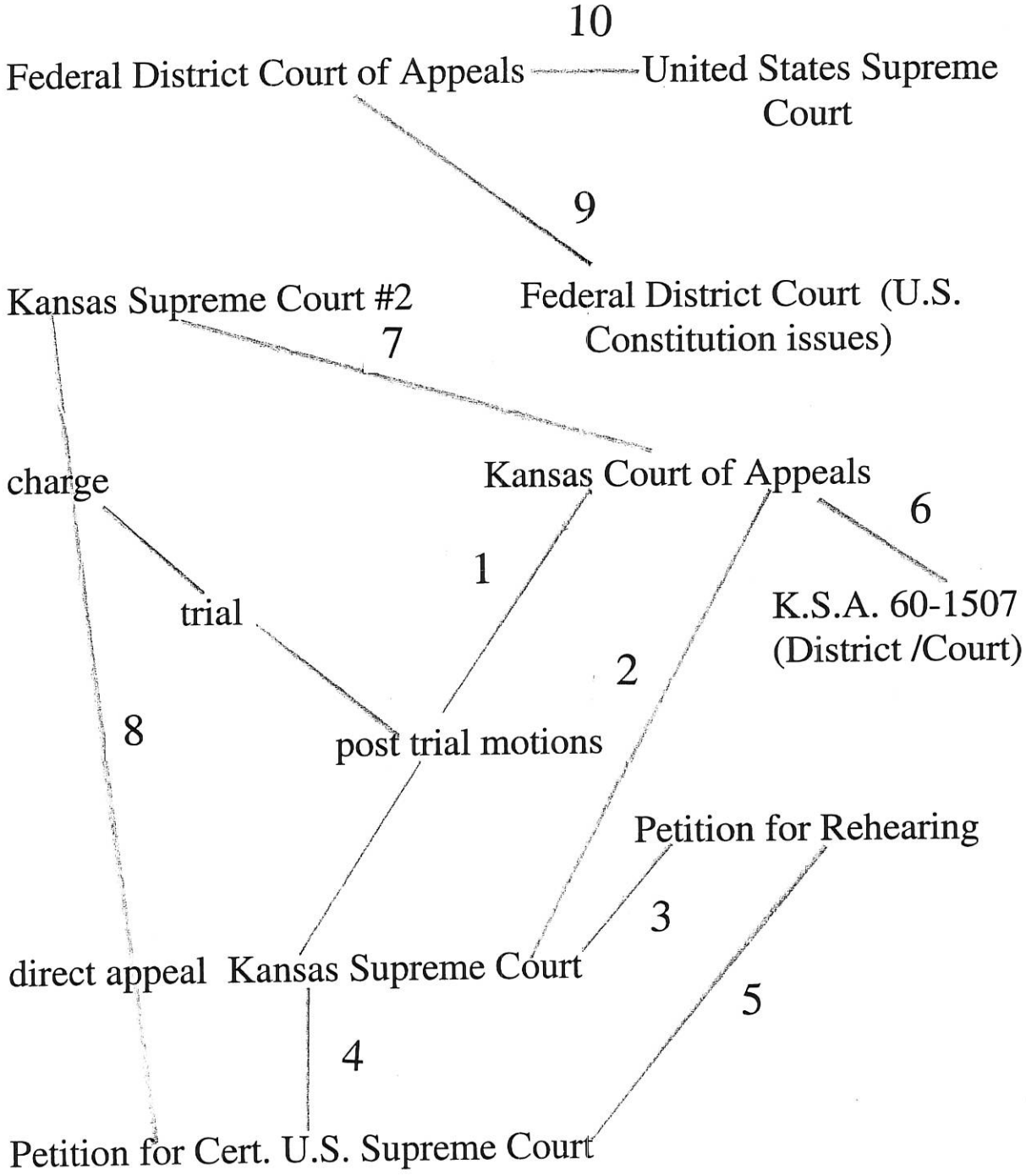
By this time his sentence (or probation) has probably already been served, many trees have been sacrificed for the cause, and his appeals finally exhausted - - - unless of course there is a new change in the law that applies retroactively to his conviction, in which case he files a new 60-1507, which of course could also be appealed.

If at any time the conviction is overturned, the State must start over again at the trial court. If a conviction results a second time,. the process starts all over again.

The purpose for this exhaustive (and exhausting) process is to make sure that the laws are followed, rights protected, and only the guilty convicted. The unfortunate aspect is that victims and their families can never rest in the belief that as case is finally "done".

There are moves afoot to limit appellate rights in certain cases and impose time limits on others.

The Appeal Process



PRESS RELEASE:
4/24/2002

A hearing was held today in Geary County District Court concerning a petition filed by Sabine Davidson challenging her conviction for unintentional second degree murder for the mauling death of Christopher Wilson allegedly caused by her three Rottweilers. She has claimed that appellate counsel was ineffective for not raising issues on appeal and that DNA tests should have been performed before trial. The Court has not yet issued a ruling. Today marks the five year anniversary of Christopher's death.

Chris Biggs
Geary County Attorney

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

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

March 13, 2003

Chairperson Michael O'Neal
House Judiciary Committee
Kansas Statehouse
Topeka, KS

Re: Testimony concerning **2003 SB 206**

Dear Chairman O'Neal and Members of the House Judiciary Committee,

Thank you for permitting me to speak to you today concerning Senate Bill 206, a measure that would impose a statute of limitations on inmates' claims of ineffective assistance of counsel.

The purpose of statutes of limitation is to "secure the peace of society and to protect the individual from being prosecuted upon stale claims." Rochester American Ins. Co. v. Cassell Truck Lines, 195 Kan. 51, 54, 402 P.2d 782 (1965). Senate Bill 206 encourages litigation of ineffective assistance of counsel claims while trial counsel still remembers the case, is still available to testify and while witnesses are still available to prove the underlying criminal case. The legislation also gives crime victims some closure (please see the attached letter from Robert Hunter for an example).

In most instances, criminal defendants are aware that they may want to pursue claims against their trial counsel as soon as the adverse verdict is handed down. Alvin Gaines thought his trial counsel was ineffective the moment the jury convicted him of rape, aggravated kidnapping, and aggravated criminal sodomy in April 1993. The Kansas Supreme Court affirmed Gaines' convictions in October 1996. State v. Gaines, 260 Kan. 752, 926 P.2d 641 (1996). Yet Gaines waited until 2001, more than eight years after his trial, before claiming that trial counsel should have called two alibi witnesses at his jury trial. The case is currently pending on appeal. Gaines v. State, Court of Appeals Case Number 02-88319-A.

Under the current version of K.S.A. 60-1507, inmates or parolees may raise the issue of ineffective assistance of counsel "at any time." The current law gives inmates more rights than law-abiding citizens, who must operate under statutes of limitation. Victims of violent crime must operate under statutes of limitation. See K.S.A. 60-501 *et seq*. There is already a limitation in K.S.A. 60-1501(b) for inmates in the custody of the secretary of corrections, who shall file a petition for writ of habeas corpus "within 30 days from the date the action was final." K.S.A. 21-2512 already provides a mechanism to certain felons in state custody, who may petition the sentencing court for forensic DNA testing "at any time after conviction."

Senate Bill 206 bars the lawsuit "within one year from the date on which the judgment of conviction becomes final ..." The appellate courts have the discretion to remand cases on appeal back to the district court for a determination of the effective assistance of counsel. See State v. Van Cleave, 239 Kan. 117, 119-20, 716 P.2d 580 (1986)[court set forth two alternate remedies for an ineffective assistance of counsel claim not raised before the trial court: (1) a motion brought pursuant to K.S.A. 60-1507; and (2) seeking remand to the trial court for determination of the issue]; and State v. Greene, 272 Kan. 772, 37 P.3d 633 (2001) [appellate court addressed claim of ineffective assistance of counsel on direct appeal after previously remanding to trial court for consideration of claim at request of appellate counsel while retaining jurisdiction over appeal].

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JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051
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E-mail: steve.obermeier@jocoks.com

Senate Bill 206 permits actions to be filed to prevent a manifest injustice. In all other cases, the action must be brought within one year after the direct appeal. Currently, direct appeals of a conviction take about two years from the time that a notice of appeal is filed until the time that the appellate courts render a decision and the mandate from the appellate clerk's office returns to the district court.

As a prosecutor since 1985 who handles most of the appeals in the Johnson County District Attorney's Office, I have seen the current law lead to absurd results. There are "jailhouse lawyers" in the prison system who write these petitions in trade for fellow inmates who are serving lengthy sentences who want to pursue these solely because the law allows it and because there is nothing to lose by doing it. The criminal defense attorneys who are the object of such actions, meanwhile are expected to stop their practice and attempt to re-construct what was done a thousand clients ago and years later.

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

Charles Peck was convicted in 1984 of aggravated kidnapping, robbery, aggravated battery, burglary and felony-theft. He committed these crimes in 1983. His convictions were affirmed in State v. Peck, 237 Kan. 756, 703 P.2d 781 (1985). In 1995, Peck filed a K.S.A. 60-1507 action claiming ineffective assistance of counsel. One of the arguments Peck raised on appeal was that he was denied due process because the Clerk of the District Court could not find the transcript of the closing arguments. Depending on how the Court of Appeals had ruled, Peck could have received a new trial for the crimes he committed in 1983.

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

Thank you for time and attention. I encourage you to recommend passage of Senate Bill 206. The federal government has a similar statute of limitation in its Anti-Terrorism and Effective Death Penalty Act, which has passed constitutional muster.

Sincerely,

Steven J. Obermeier
Assistant District Attorney

February 24, 2003

Kansas Senate
Judiciary Committee

I understand your Committee is considering legislation to place a time limitation on 60-1507 actions by convicted criminals. I'm writing to urge you to pass the legislation, although personally I'd prefer to see it coincide with the time limitation on appeals rather than a year later.

On Labor Day weekend, 1995 my daughter, Kristin, was attacked in her apartment and brutally beaten. Only her courage, strength and more than a little luck kept her from being murdered. With still more luck, and quick police work, the man who attacked her was caught and later convicted. He also lost, and finally exhausted, all of his appeals of his conviction. Sounds like a good end to a very bad story. But it wasn't the end.

After first living through the fear that her attacker would get out on bail during the nearly nine months before the trial and then the trauma of the trial, Kristin, and the rest of our family, breathed a giant sigh of relief when we were notified the interminable appeal period had ended. Imagine our dismay and anger when we were notified of a hearing on the attacker's claim of inadequate counsel. Ultimately his claims were denied, but not before all of the wounds and fears of the attack were reopened.

I'm well aware of, and agree with, the need to protect the accused's rights, but we have extended those concepts too far for the convicted criminal. My wife has described the process as a bad "B" movie where the villain keeps coming back to life. To most of the community the trial is the end. To victims of crime it is the beginning of closure. It would be nice if the whole process would stop without a surprise ending.

I urge you to pass Senate bill 206.

Sincerely,

Robert T. Hunter

Robert T. Hunter

This man's daughter, a school teacher, was the victim of aggravated kidnapping, aggravated battery and aggravated burglary in State v. Gaudina, Appeal No. 97-78698-A.

State of Kansas
Office of the Attorney General
120 S.W. 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597

PHILL KLINE
Attorney General

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TESTIMONY OF

BEFORE THE HOUSE JUDICIARY COMMITTEE
RE: SENATE BILL 206
March 13, 2003

Chairperson O'Neal and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Phill Kline to offer support for S.B. 206. The bill would impose a time limitation on the presentation of collateral appeals under K.S.A. 60-1507. This legislation is designed to promote the State's legitimate interest in the finality of convictions and in general address the problem of unduly delayed petitions filed by state prisoners seeking redress years after their convictions have been affirmed. Additionally, this legislation promotes a simplified approach to state collateral review by discouraging piecemeal litigation.

The imposition of a one year limitation on the filing of a state collateral appeal does not place an undue burden upon a prisoner who seeks review of a constitutional claim. Just as Congress may impose limits on a writ of habeas corpus within the federal system, the legislature may pass judgment on the proper scope of K.S.A. 60-1507 as it pertains to time limitations. In fact, the Committee is likely already aware that in 1996, Congress passed similar legislation contained in 28 U.S.C. § 2244(d)(1) enacted under the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, to impose a one year statute of limitations on inmates seeking to file habeas corpus petitions in federal court. Senate Bill 206 does not divest the court of its authority to hear claims under K.S.A. 60-1507, it merely requires a prisoner to diligently pursue his or her claim(s), thus easing the burden placed upon the system in trying to address an issue that was viable some 10 or 15 years earlier.

On behalf of Attorney General Kline I would like to thank you again for the opportunity to appear before the committee and I urge your favorable consideration of S.B. 206. In closing, I respectfully present to the committee a quote from the late Justice Powell regarding numerous appeals brought by prisoners who abuse the system with continuous and frivolous pleadings:

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

Sincerely,

Eric Rucker
Chief Deputy Attorney General

House Judiciary
Testimony 3/13/03
In Support of Senate Bill 209
Michelle L. Brown

I wish to thank the members of the Committee for granting me the opportunity to address you on SB 209 which proposes a time limit for filing a 60-1507 civil action.

K.S.A. 60-1507 is a civil statute which allows a defendant in a criminal case to attack his/her sentence for a variety of reasons. For example, a defendant may claim ineffective assistance of counsel, the court lacked jurisdiction, the sentence violated the Constitution or was in excess of the maximum allowed by law. The statute is a necessary and additional safeguard for any person accused and convicted of a crime.

I am a criminal defense attorney and I am currently a deputy chief public defender for the State of Kansas in Junction City. I am appointed to represent a number of individuals on 60-1507 claims each year. Most of the claims involve allegations of ineffective assistance of counsel. SB 209 proposes that a defendant has a time limit of one year after all direct appeals are finished to file a claim under 60-1507 unless manifest injustice requires an extension past the one year.

Every stage of the criminal justice system has time limits. Some stages are more flexible than others. I believe a time limit of some type, whether it is one year or longer, would serve the interests of justice and a defendant's interests. Most time limits in the criminal justice system are flexible in order to avoid unfairness. The term "manifest injustice" is used in SB 209 and in several places in the criminal procedure code in order to add flexibility to rules and avoid unfairness. Although there is no single definition of "manifest injustice" in the criminal procedure code, the Kansas Court of Appeals and the Kansas Supreme Court have stated that "manifest injustice" is something which is obviously unfair and shocking to the conscience". Some attorneys believe "manifest injustice" is too high of a burden to meet and does not provide the necessary flexibility that a proposal such as this needs. If the members of the Committee feel that way, then the term "good cause" could be substituted for "manifest injustice".

I have found that it is extremely difficult for either a prosecutor or a defendant to litigate a 60-1507 case after years have passed. Files and evidence can be lost or destroyed; attorneys do not always remember cases and cannot recollect what they did or did not do. I successfully litigated two 60-1507 cases last year that involved allegations of ineffective assistance of counsel. The claims of both of the defendants against their attorneys were somewhat vague. One case was only three years old; the other was four years old. Neither attorney could recall their respective cases well and neither attorney could locate their file. Neither of the defendants kept any notes of their conversations with their attorneys.

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I have attended prior hearings before the legislature on this matter and listened to the testimony of opponents of this bill. One opponent stated that if the legislature imposes time limits on a 60-1507 claim, then the inmate will simply file the same claim in the county where he/she is housed under a different statute, K.S.A. 60-1501. I believe this assertion is incorrect. K.S.A. 60-1507 is an exclusive remedy and K.S.A. 60-1501 states "(a) subject to the provisions of K.S.A.60-1507... ."

As a practicing criminal defense attorney, I suggest the Committee favorably consider a proposal such as SB 209 and impose a reasonable time limit on 60-1507 claims. I believe that as long as a proposal has flexible language to ensure that unique cases can still be litigated outside the specific time limit, a defendant's Constitutional rights will be protected.

Thank you for taking the time to let me address the Committee on this issue. If anyone wishes to contact me with questions, please do not hesitate to do so.

Respectfully

Michelle Brown

Michelle L. Brown
email: mbrown@sbids.state.ks.us

House Judiciary
Testimony 03-14-03
In Support of Senate Bill 206
Donna Heintze
Mother of Victim

Good afternoon my name is Donna Heintze from Milford, Kansas. I cannot be here today because I have to work but please consider my comments in support of Senate Bill 206. On September 20, 1991, my 20 year old daughter, Cathy, a full-time student at Kansas State University, was working part-time at a convenience store when two men entered the store in full military gear. The robbery had been planned like a battle maneuver. Cathy was shot at close range in the head with a rifle containing a magnum shell. The cash register was never opened.

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

The appeal affects the whole family as they begin the long wait for the ruling to come back. This happens not once or twice, but many times. The appeals claim that the robbery was excused by the Desert Storm Syndrome; or that his partner had been drinking when he confessed; or that he had to plead guilty to avoid the military death penalty. He has appealed to our Supreme Court three times. He recently filed a 60-1507 claiming that his plea to second degree murder should be withdrawn because it was really first degree murder.

On January 24, 2002, when Chris Biggs called me asking for my comments, I realized that even after ten years my heart still sinks when I hear his voice out of fear of yet another appeal. Just this last year another K.S.A. 60-1507 was filed by one of these men who claims he was promised a five year sentence. It took him ten years to figure this out. I believe it is time to stop the nightmare and let the wound heal as best as they can for victims. This bill will be a big step in that direction. I pray that none of you will ever have to experience any of this, but if you do, I hope this bill will be in place, so you can have closure, which countless thousands of Kansas victims and their families do not now have.

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

Sincerely,

Donna Heintze

H. JUDICIARY
3.13.03
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State of Kansas

LANA OLEEN
SENATOR, 22ND DISTRICT
GEARY AND RILEY COUNTIES
(785) 296-2497

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 Committee
Thursday, March 13, 2003
SB 206

Chairman O'Neal and Members of the Committee:

Thank you for the opportunity to offer written testimony today in support of **SB 206** which would place a one-year time limitation on the ability to file writs of habeas corpus under KSA 60-157, unless a judge determines a "manifest injustice" exists.

In the past, both the Kansas House of Representatives and the Kansas Senate have passed the provisions in this bill. With a timely start on this bill this session, I am hopeful it will successfully complete the legislative process and be signed into law.

Federal law has a one-year time limitation on the filing of writs of habeas corpus. Adoption of **SB 206** would reflect Kansas law the same time limitations. In testimony before the Senate Judiciary Committee, this measure was supported by Attorney General Phill Kline's office, by prosecutors, defense attorneys and victims. The criminal justice system has time limits on most processes. This time limit would help prevent inconsequential, frivolous appeals that cost money and time, and are an emotional drain on victims.

I appreciate the opportunity to offer written testimony in support of **SB 206**, and I urge your favorable consideration.

Respectfully,

Lana Oleen

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3-13-03
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