Approved: April 4, 2003
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 9:30 a.m. on February 24, 2003, in Room 123-S of the Capitol.

All members were present except: Senator Donovan (E)
Senator O'Connor (E)

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Chris Biggs, Geary County Attorney and Legislative Chair of Kansas County and District Attorneys Association
Donna Heintze, mother of murder victim (written only)
Michelle Brown, Pubic Defender 8th Judicial District
Steve Obermeier, Assistant District Attorney, 10th Judicial District
Kevin Graham, Assistant Attorney General
Roger Werholtz, Secretary of Corrections
Ed Collister, Kansas Bar Association
Martha Coffman, Kansas Bar Association (written only)

Others attending: see attached list

SB 206 - One year time limitation on writs of habeas corpus

Chairman Vratil opened the hearing on **SB 206**. Conferee Biggs testified on behalf of the Kansas County and District Attorneys Association (KCDAA) in support of the proposed legislation. He encouraged passage of **SB 206** as it promotes victim's interests, finality in criminal proceedings, and is fiscally responsible. He stated that it also protects the inmate with a truly meritorious claim while at the same time providing a procedure to eliminate petitions which are technical, mundane, and ridiculous. (Attachment 1)

Written testimony was submitted by Donna Heintze, mother of the victim. (Attachment 2)

Conferee Brown presented testimony in favor of **SB 206** which proposes a time limit for filing a 60-1507 writ of habeas corpus. She explained the proposed bill has a time limit of one year after all direct appeals are finished for a defendant to file a claim under 60-1507 unless manifest injustice requires an extension. Ms. Brown asked the Committee for favorable consideration of **SB 206**. (Attachment 3)

Committee discussion and questions followed.

Steven Obermeier testified in support of **SB 206**, and said the current law gives inmates more rights than law-abiding citizens who must operate under statutes of limitation. He gave some examples of past cases where inmates have waited as long as 26 years before filing a writ claiming they were denied effective assistance of counsel. He explained that inmates or parolees may raise the issue of ineffective assistance of counsel "at any time". Mr. Obermeier encouraged the Committee to pass **SB 206.** (Attachment 4)

Assistant Attorney General Kevin Graham appeared before the Committee to offer support for **SB 206**. He stated that the proposed legislation is designed to promote the State's legitimate interest in the finality of convictions, and in general to address the problem of unduly delayed petitions filed by state prisoners seeking redress years after their convictions. He added that the legislation promotes a simplified approach to state collateral review by discouraging piecemeal litigation. He said the Attorney General's Office suggested that the bill be amended in subsection (a) of K.S.A. 60-1507 to read: "A prisoner . . . may ~~at any time~~, *pursuant to the time limitations imposed at paragraph (f)*, move the court which imposed the sentence to vacate, set aside or correct the sentence." (Attachment 5)

MINUTES OF THE SENATE JUDICIARY COMMITTEE on February 24, 2003 in Room 123-S of the Capitol.

The Chair asked Mr. Graham to submit a balloon amendment to **SB 206** for consideration by the Committee when they work this bill.

Roger Werholtz, Secretary of Corrections, submitted written testimony in support of **SB 206**. He said the Department of Corrections recommends that the bill be amended by striking the phase "at any time" at line 21 on page 1, as this language conflicts with the time limit established in subsection (f). (Attachment 6)

Conferee Collister, representing the Kansas Bar Association, presented testimony in opposition to the bill. He said that the bill violates the Kansas Constitution, and the time limitation is a bad concept. Mr. Collister included with his written testimony the testimony of John Tillotson, past KBA President, who testified at a previous hearing of April 24, 2000 on this topic. (Attachment 7)

Written testimony was submitted by Martha J. Coffman, Kansas Bar Association, in opposition to **SB 206**. (Attachment 8)

Following Committee discussion and questions, Chairman Vratil closed the hearing on **SB 206**.

Final action on:
SB 123 - Drug convictions; possession is a level D4 classification; mandatory drug treatment; border boxes on D4 replaced with probation boxes

Chairman Vratil reopened the floor for discussion on **SB 123**. He reviewed briefly the Committee's action of adopting the amendments proposed by the Kansas Sentencing Commission at the previous meeting. He called the Committee's attention to amendments requested by the Kansas Department of Corrections (KDOC) that were distributed at the previous meeting for the Committee's review and consideration. He clarified the three proposed amendments by the KDOC. (Attachment 9)

Senator Goodwin moved to accept the three amendments as proposed by the Department of Corrections, seconded by Senator Haley, and the motion carried.

Senator Oleen made a motion to pass the bill favorably as amended, seconded by Senator Goodwin. The Chair called for discussion, and Senator Schmidt offered that **SB 189** is another option other then passing the amended bill. Chairman Vratil stated that **SB 189** will not be worked unless **SB 123** is not passed out favorably with amendments. Senator Goodwin commented that Judge Johnson, Chairman of the Sentencing Commission, stated if treatment was not funded then the Kansas Sentencing Commission will ask that this bill be withdrawn. Discussion continued on the bill.

Chairman Vratil called for a vote on the motion to pass out favorably as amended. The motion carried. Senators Schmidt, Umbarger, and Pugh requested to be recorded as voting no on **SB 123**.

The meeting adjourned at 10:30 a.m. The next scheduled meeting is February 25, 2003.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon., Feb. 24, 2003

NAME	REPRESENTING
Steve Clemmons	Johnson County DA's Office

Senate Judiciary
Testimony 2/24/2003
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. HB 2138 proposes a reasonable time limit following direct appeal upon an inmate's opportunity to challenge a conviction by a separate lawsuit under K.S.A. 60-1507. This does not interfere with any direct appeal rights.

TIME LIMITS

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

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Attachment 1-1

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

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

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

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

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

* Geary County presently has a case where a defendant is appealing a denial of a K.S.A. 60-1507 following a 1992 plea of guilty to murder. He has previously had his sentencing appeal and a prior 60-1507 appeal denied . He 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 was 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.

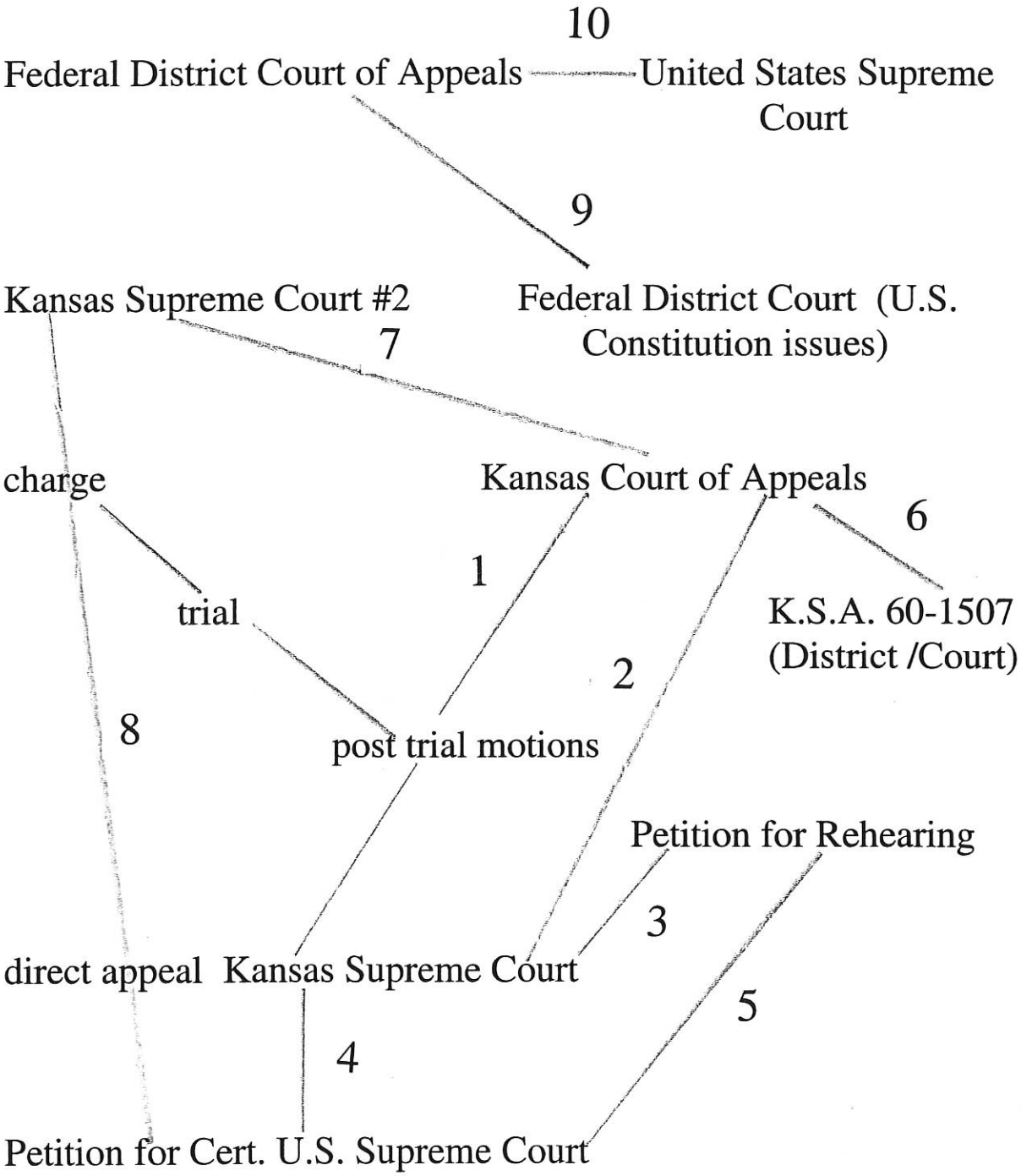
By this time his sentence (or probation) has probably already been served, many trees have been sacrificed for the cause, and his appeals finally exhausted - - - unless of course there is a new change in the law that applies retroactively to his conviction, in which case he files a new 60-1507, which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

House Judiciary
Testimony 2-24-03
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

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2-24-03
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Senate Judiciary
Testimony 2/24/03
In Support of Senate Bill 206
Michelle L. Brown

I wish to thank the members of the Committee for granting me the opportunity to address you on SB 206 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 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 206 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 <u>of some type</u>, 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 206 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 defendant's kept any notes of their conversations with their attorneys.

As a practicing criminal defense attorney, I suggest the Committee favorably consider a proposal such as SB 206 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.

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

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

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

February 24, 2003

Chairperson John Vratil
Senate Judiciary Committee
Kansas Statehouse
Topeka, KS

RE: Testimony concerning **2003 SB 206**

Dear Chairman Vratil and Members of the Senate Judiciary Committee,

Thank you for permitting me to speak to you today concerning SB 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). Such a proposal would encourage litigation of ineffective assistance of counsel claims while trial counsel still remembers the case, is still available to testify and while witnesses are still available to prove the underlying criminal case. The federal government has a similar statute of limitation in its Anti-Terrorism and Effective Death Penalty Act. This act has passed constitutional muster.

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 crime must operate under statutes of limitation. See K.S.A. 60-501 *et seq*. As a prosecutor since 1985 who handles most of the appeals in the Johnson County District Attorney's Office, I have seen the current law lead to absurd results.

Thomas P. Lamb was convicted of two counts of kidnapping and one count of murder. He committed these crimes in 1969 and 1970. His conviction was affirmed by the Kansas Supreme Court in 1972 in State v. Lamb, 209 Kan. 453, 497 P.2d 275 (1975). More than 26 years after he committed the murder and kidnappings, Lamb filed a writ 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.

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JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051
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PHILL KLINE
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215
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TESTIMONY OF
ASSISTANT ATTORNEY GENERAL KEVIN GRAHAM
BEFORE THE SENATE JUDICIARY COMMITTEE
RE: SENATE BILL 206
February 24, 2003

Chairperson Vratil 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.

However, our office has identified one portion of S.B. 206 we believe must be amended in order to accomplish the intent of the legislation. While at new subsection *(f)* the bill creates a one year time period in which prisoners may file a petition under K.S.A. 60-1507, the bill does not amend the language of K.S.A. 60-1507 subsection (a) that states: "A prisoner . . . may, ***at any time*** move the court which imposed the sentence to vacate, set aside or correct the sentence." (emphasis added.) The Attorney General respectfully suggests that the words ***"at any time"*** be stricken from the

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language of subsection (a) and be replaced with the words "**pursuant to the time limitations imposed at paragraph (f)**." This change in the wording of subsection (a) would remedy the inconsistency that would exist between subsection (a) and the proposed new subsection *(f)*.

Thus, subsection (a) of K.S.A. 60-1507 would read: "A prisoner . . . may ~~at any time~~**, pursuant to the time limitations imposed at paragraph (f),** move the court which imposed the sentence to vacate, set aside or correct the sentence."

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

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

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Memorandum

DATE: February 24, 2003

TO: Senate Judiciary Committee

FROM: Roger Werholtz
Secretary of Corrections

RE: SB 206

SB 206 provides a one-year time limit for initiating collateral litigation that challenges the legality of a conviction or sentence. That time period does not commence until after the direct appeal process has been completed. Additionally, the one-year time limitation may be extended to prevent a manifest injustice. SB 206 prevents frivolous, untimely collateral actions and thus reduces the burden that litigation places upon courts and the state in defending habeas corpus actions.

SB 206 amends K.S.A. 60-1507 to provide a time limitation for bringing an action to collaterally challenge the legality of a conviction or a sentence. SB 206 requires prisoners claiming that they are entitled to release due to an illegality in the manner in which they were convicted or sentenced, to bring such action within one year from the last decision of an appellate court regarding a direct appeal or the expiration of the jurisdiction of those courts to hear a direct appeal. SB 206 accounts for the jurisdiction of the Supreme Court of the United States to review state appellate court decisions involving federal constitutional issues by including that Court's decision or the termination of its jurisdiction in the computation of the time limitation.

Congress in 1996 adopted a one-year deadline for the filing of habeas corpus actions by persons collaterally challenging federal convictions. 28 U.S.C. §2255. SB 206 provides the same time limit for the commencement of a habeas action by a state offender.

The state Habeas Corpus Act, K.S.A. 60-1507 et seq, as well as the Habeas Corpus Act for federal prisoners, 28 U.S.C. §2255, provide a mechanism for a person convicted of a

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crime to challenge the legality of the conviction or sentence separate and apart from the criminal trial and the appeal process following the original criminal trial. Therefore, a person charged with having committed a crime in state court is afforded a trial before the state District Court, and if convicted; may appeal that conviction and sentence to the Kansas Appellate Courts. Furthermore, if a request of the defendant for further review is granted by the United States Supreme Court, the United States Supreme Court may review the decision of the Kansas Appellate Court. This process completes the direct review of a criminal conviction and triggers the time limitation provided by subsection (f) of SB 206 for commencement of a habeas corpus collateral challenge.

The completion of the direct review process described above and defined in subsection (f) of SB 206 does not end the ability of the offender to litigate the legality of his or her conviction or sentence under either current law or SB 206. After completion of the direct appeal process, a convicted offender may seek habeas corpus relief pursuant to K.S.A. 60-1507. The Habeas Corpus Act provides a mechanism for collaterally changing the legality of the conviction or the sentence separated from the direct appeal process. It is not uncommon for inmates to attempt to rehash the same issues that were raised during the criminal trial and on appeal in their lawsuit requesting habeas relief.

Though SB 206 retains the right to collaterally challenge a conviction or sentence, it establishes a time limitation for when a habeas corpus challenge can be brought. Under current law, a state habeas corpus action may be brought at any time. The ability to bring such an action at any time may significantly prejudice prosecutors in their defense of the legality of the conviction. Witnesses may have died or moved. For example, in habeas corpus cases raising the issue of the competency of the counsel that represented the defendant at trial, the death of that counsel may preclude a prosecutor from presenting evidence as to why the defense counsel took certain actions in the course of defending the offender at the criminal trial.

The Department recommends that SB 206 be amended by striking the phase "at any time" at line 21 on page 1. This language conflicts with the time limit established in subsection (f).

TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE
Re: Senate Bill 206

February 24, 2003

Mr. Chairman, Ladies & Gentlemen:

Thanks for giving me an opportunity to express the views of the Kansas Bar Association on Senate Bill 206, which basically establishes a one-year time limit to file a proceeding to challenge the validity of a conviction or sentence as set out in K.S.A. 60-1507.

The Kansas Bar Association has adopted a position opposing any such time limitation, a position that has not changed over the years to my knowledge. Past attempts at comparable changes have failed.

I have enclosed for your interest the testimony of one KBA representative who presented testimony in a previous hearing. John Tillotson, a past president of the KBA, who for many years was a federal magistrate and therefore came in contact with Kansas post-conviction relief cases in that capacity since there has been a requirement for years that a state prisoner exhaust state remedies before moving to the federal court. He continues to believe as expressed in his earlier letter, as I verified in a phone call several days ago, that the proposed amendment is not wise.

Please consider the following:

The ability to challenge deprivation of freedom and liberty (by criminal conviction for example) is found in the so-called Great Writ - Habeas Corpus.

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The right is so significant that those who wrote the Kansas Constitution specifically included it in the Kansas Bill of Rights to our Kansas Constitution. It is found at Section 8 of the Bill of Rights:

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

On its face the current bill proposes to terminate the right after a year. If that is the objective, it violates the Kansas Constitution.

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

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

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

To protect these rights they adopted, among other protections, Article I, Section 9 of the Federal Constitution. In that section the Habeas Corpus remedy was preserved.

The Kansas constitutional expression of the writ of habeas corpus protects liberty. While it is true that unfortunately some forfeit the right to liberty by

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

60-1507 motions.

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

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

I have tried to read all the complaints about 1507s that one can find. There does not appear to be any pressing problem created by the existence of the statute in its current form. OJA records indicate 260 1507-motions were filed in fiscal 2000, 289 in fiscal 2001, and 297 in fiscal 2002. There is no indication why there is a demonstrable problem created by the existence of those 1507 motions. And, as a matter of fact, many of the motions are generated by the fact that this legislature over the years changes the substantative and procedural law resulting in challenges to the validity of existing convictions and sentences.

The process from arrest to incarceration is much more complicated today than it used to be. As I am sure the committee members are aware, in recent history representatives of the court system and representatives of the Bar Association have repeatedly pled for more money resources for the court system to handle its ever expanding work load. That money was for more judges, more nonjudicial personnel, more facilities, more technical tools to get the work done in a more expeditious fashion. The pleas were made because the ability to get

the results done and done correctly, was succumbing to the absolute press of business. Press of business can result in errors.

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

problems where they exist by the current system does not seem to have posed a great problem resulting in an uproar demanding a change in the law. There is simply no sufficient reason to change the law.

Last, the proposed changes give a court at least one, and perhaps two additional tasks to resolve a 1507 motion's issues. And, if the issue is considered in the light of a manifest injustice requirement, the motion must be reviewed on its merits in any event. The proposal before you would add work for the judge. More work for the courts is justifiable in today's environment only if absolutely necessary. This proposed amendment creates only more work for the courts.

Concern may be expressed that frivolous motions are filed. In the general practice of law most lawyers are of the opinion that sometimes frivolous lawsuits are filed, even by lawyers, concerning all types of issues. Most 1507s are filed by non-lawyers, some of whom are not well educated. It should not be a surprise if some were in fact frivolous. The ultimate solution to that problem is to provide qualified legal help to prospective movants. That's impractical and will not be done. The real issue is whether there is a method of dealing effectively if a frivolous motion is filed. Since the adoption of Supreme Court Rule 183, frivolous motions are handled in the pleading process, as in all other types of cases. The rule itself is designed, among other things, to weed out frivolous motions. Further, the proposed time limitation would not address any alleged problems of frivolous motions being filed.

The proposed amendment is not smart, may be unconstitutional or in the alternative merely shift work load to district courts of the institutions' location, and likely would increase judge time if adopted.

Respectfully submitted,

Ed Collister

Edward G. Collister, Jr.
3311 Clinton Parkway Court
Lawrence, Kansas 66047-2631
(785) 842-3126

Rule 183

PROCEDURE UNDER K.S.A. 60-1507

(a) NATURE OF REMEDY. K.S.A. 60-1507 is intended to provide in a sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in district courts in whose jurisdiction the prisoner was confined. A motion challenging the validity of a sentence is an independent civil action which should be separately docketed, and the procedure before the trial court and on appeal to the Court of Appeals is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required. When the motion is received and filed by the clerk, he shall forthwith deliver a copy thereof to the county attorney and make an entry of such fact in the appearance docket.

(b) EXCLUSIVENESS OF REMEDY. The remedy afforded by K.S.A. 60-1507 dealing with motions to vacate, set aside or correct sentences is exclusive, if adequate and effective, and a prisoner cannot maintain habeas corpus proceedings before or after a motion for relief under the section.

(c) WHEN REMEDY MAY BE INVOKED. (1) The provisions of K.S.A. 60-1507 may be invoked only by one in custody claiming the right to be released, (2) a motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected, (3) a proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal.

(d) SUCCESSIVE MOTIONS. The sentencing court shall not entertain a second or successive motion for relief on behalf of the same prisoner, where (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

(e) SUFFICIENCY OF MOTION. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto which shall be furnished by the court.

(f) HEARING. Unless the motion and the files and records of the case conclusively show that the movant is entitled to no relief, the court shall notify the county attorney and grant a prompt hearing. "Prompt" means as soon as reasonably possible considering other urgent business of the court. All proceedings on the motion shall be recorded by the official court reporter.

(g) BURDEN OF PROOF. The movant has the burden of establishing his grounds for relief by a preponderance of the evidence.

(h) PRESENCE OF PRISONER. The prisoner should be produced at the hearing on a motion attacking a sentence where there are substantial issues of fact as to events in which he participated. The sentencing court has discretion to ascertain

whether the claim is substantial before granting a full evidentiary hearing and requiring the prisoner to be present.
(i) RIGHT TO COUNSEL. If a motion presents substantial questions of law or triable issues of fact the court shall appoint counsel to assist the movant if he is an indigent person.
(j) JUDGMENT. The court shall make findings of fact and conclusions of law on all issues presented.
(k) APPEAL. An appeal may be taken to the Court of Appeals from the order entered on the motion as in a civil case.
(l) COSTS. If the court finds that a movant desiring to appeal is an indigent person it shall authorize an appeal in *forma pauperis* and furnish him without cost such portions of the transcript of such proceeding as are necessary for appellate review.
(m) ATTORNEY. If a movant desires to appeal and contends he is without means to employ counsel to perfect the appeal, the district court shall, if satisfied that the movant is an indigent person, appoint competent counsel to conduct such appeal. If for good cause shown appointed counsel is permitted to withdraw while the case is pending in either the district court or the supreme court, the district court shall appoint new counsel in his stead.

APPENDIX

IN THE DISTRICT COURT OF _____ COUNTY, STATE OF KANSAS

_____

PERSONS IN CUSTODY

_____

Full name of Movant

_____

Prison Number

Case No.:_____

(To be supplied by the Clerk of the District Court)

vs.

STATE OF KANSAS, *Respondent.*

INSTRUCTIONS--READ CAREFULLY

In order for this motion to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular

question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.
Since every motion must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.
If the motion is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay costs of the proceedings. When the motion is completed, *the original and one copy* shall be mailed to the Clerk of the District Court from which he was sentenced.

MOTION

1. Place of detention

_____

2. Name and location of court which imposed sentence

_____

_____

_____

_____

_____

_____

3. The case number and the offense or offenses for which sentence was imposed:

(a)_____

_____

(b)_____

_____

(c)_____

_____

4. The date upon which sentence was imposed and the terms of the sentence:

(a)_____

_____

(b)_____

_____

(c)_____

_____

5. Check whether a finding of guilty was made after a plea:

(a) of guilty

_____;or

(b) of not

guilty_____

6. If you were found guilty after a plea of not guilty, check whether that finding was made by
(a) a
jury_____; or
(b) a judge without a
jury_____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
_____
_____
8. If you answered "yes" to (7), list
(a) the name of each court to which you appealed:
i._____
_____
ii._____
_____
(b) the result in each such court to which you appealed and the date of such result:
i._____
_____
ii._____
_____
9. If you answered "no" to (7), state your reasons for not so appealing:
(a)_____
_____
_____
_____
_____
_____
(b)_____
_____
_____
_____
_____
_____
(c)_____
_____
_____
_____
_____
_____
10. State concisely all the grounds on which you base your allegation that you are being held in custody unlawfully:
(a)_____
_____
_____
_____

_____

(b)_____

_____

_____

_____

_____

(c)_____

_____

_____

_____

_____

_____

11. State concisely and in the same order the facts which support each of the grounds set out in (10), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:

(a)_____

_____

_____

_____

_____

_____

(b)_____

_____

_____

_____

_____

_____

(c)_____

_____

_____

_____

_____

_____

12. Prior to this motion have you filed with respect to this conviction:

(a) any petitions in state or federal courts for habeas corpus?_____

(b) any petitions in the United States Supreme Court for certiorari other than petitions, already specified in (8)?_____

(c) any other petitions, motions or applications in this or any other court?

_____

_____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:
i._____
_____
ii._____
_____
iii._____
_____
(b) the name and location of the court in which each was filed:
i._____
_____
ii._____
_____
iii._____
_____
(c) the disposition thereof and the date of such disposition:
i._____
_____
ii._____
_____
iii._____
_____
(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:
i._____
_____
ii._____
_____
iii._____
_____
iv._____
_____
14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed?_____
15. If you answered "yes" to (14), identify
(a) which grounds have been previously presented:
i._____
_____
ii._____
_____
iii._____
_____
(b) the proceedings in which each ground was raised:
i._____
_____

ii._____

_____

iii._____

_____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a)_____

_____

_____

_____

_____

_____

(b)_____

_____

_____

_____

_____

_____

(c)_____

_____

_____

_____

_____

_____

17. Were you represented by an attorney at any time during the course of

(a) your preliminary hearing?_____

(b) your arraignment and plea?_____

(c) your trial, if any?_____

(d) your sentencing?_____

(e) your appeal, if any, from the judgment of conviction or the imposition of sentence?

(f) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?_____

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i._____

_____

ii._____

_____

iii._____

_____

(b) the proceedings at which each such attorney represented you:

i._____

_____

ii._____

_____

iii._____

_____

(c) was said attorney

i. appointed by the

court?_____; or

ii. of your own

choosing?_____

19. If your motion is based upon the trial court's refusing you counsel, attach the transcript of the proceedings which supports your allegation.

20. If your motion is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

(a)_____

_____

(b)_____

_____

21. Are you now serving a sentence from any other court that you have not challenged?

_____

_____

22. If you are seeking leave to proceed in *forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)?____

_____

Signature of Petitioner

STATE OF _____

SS.

COUNTY OF _____

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true.

_____

Signature of Affiant

SUBSCRIBED AND SWORN to
before me this _____
day of _____, 19____.

_____

Notary Public

My commission expires:

_____

(month) . . . . . (day) . . . . . (year)

FORMA PAUPERIS AFFIDAVIT
(See instructions page 1 of this form)

_____

_____

_____

_____

_____

_____

_____

_____

_____
Signature of Petitioner

STATE OF _____

SS.

COUNTY OF _____

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

_____
< of>

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19___.

_____
Notary Public

My commission expires:

_____

(month) . . . . . (day) . . . . . (year)

7-16

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Lawyers

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April 24, 2000

Re: House Bill 2684

Dear Senators and Representatives:

I understand this bill has been amended into an omnibus crime bill which will be before you for consideration in the final week of the 2000 legislative session. The concept to restrict the use of K.S.A. 60-1507 collateral attacks upon sentence (habeas corpus) is ill-conceived and will not work.

You have previously heard from Ed Collister of Lawrence regarding his experience in the criminal appellate arena. In addition, the memorandum of Martha J. Coffman, who has devoted much time and thought to consideration of habeas corpus remedies and their effect on the entire system, is appended to this letter. No one in Kansas enjoys greater respect for scholarship and clear thinking with respect to these issues than Ms. Coffman. Her views are due great deference.

In commending the Collister and Coffman views to you, I would like to chime in with respect to my nineteen years of experience as a United States Magistrate in Kansas. During this time, my job was almost exclusively to handle post-conviction proceedings by state and federal prisoners in the federal courts. I lost track of the number of these cases that I considered when the number passed 900. Nevertheless, the question in all of the cases in which the "legality" of the petitioner's custody was in question was whether, as a matter of federal comity, the petitioner had given the state of Kansas an adequate opportunity to address the alleged wrong before seeking relief in federal court. Where the federal petition revealed that an adequate state remedy had not been properly invoked, the petition was consistently dismissed in deference to the state having the primary opportunity to address the legality of the prisoner's custody. I point this out because most students of our constitutional system believe that principles of federalism require that the states first have the opportunity to provide and protect for constitutional rights of our citizens. Only if the states make inadequate provisions do the federal courts intervene.

7-17

My federal experience also taught me that it is easy to deal with the obviously frivolous and repetitive claims. First, I don't believe I had over twelve to fifteen cases in nineteen years that required me to analyze whether the claims were repetitive. Certainly, it is much easier when the court of conviction (the Kansas 60-1507 procedure) can maintain "book" on successive filings to determine whether or not the same issues are being realleged. Moreover, the usual advantage of having the same trial court (and perhaps the same prosecutor) address a successive filing would lead to a quick determination of whether that filing is repetitive or frivolous.

In conclusion, if the 60-1507 procedure is unavailable due to a statute of limitations, then I think it is certain that a) you will invite habeas corpus filings in the counties of incarceration (Leavenworth, Reno and Butler); and b) that federal courts will be invited to reexamine and perhaps intervene because of inadequate state remedies.

The Kansas Bar Association Legislative Committee and Board of Governors considered this proposal and unequivocally opposed it. We hope you will do likewise.

Respectfully,

John C. Tillotson
KBA Legislative Committee Chairman

JCT:mkv

7-18

Oppose written only

RAMIFICATIONS OF LIMITING K.S.A. 60-1507
By Amendments Proposed in Senate Bill 206
By Martha J. Coffman
February 20, 2003

I am concerned about the proposal to place a time limitation on K.S.A. 60-1057. A person convicted of a crime uses this procedure to challenge a conviction after the direct criminal appeal is completed. I oppose placing a time limit on filing of 60-1507 petitions. I will briefly summarize my concerns about the continuing effort to limit the availability of this collateral remedy for those convicted of offenses in Kansas.

Let me begin by reviewing my background. Currently I am Advisory Counsel for the Kansas Corporation Commission and work in the area of telecommunications. I am not here today to talk about telephones. Before going to the Commission 3 years ago, I was Director of Central Research for the Kansas Court of Appeals for 9 years. In that position, I supervised 14 attorneys who provided research for the Court of Appeals judges. The caseload of the intermediate appellate court includes all direct criminal appeals, except those involving the death penalty, a life sentence, or off-grid crimes. The Court of Appeals also handles all appeals from K.S.A. 60-1507 proceedings. Before becoming Director, I served as a research attorney for Justice Donald Allegrucci, as an Assistant Appellate Defender, and as a private practitioner in Lawrence, KS.

Twice I have served as President of the Criminal Law Section of the Kansas Bar Association. I have written two articles about habeas corpus in Kansas. The first deals with habeas corpus generally under K.S.A. 60-1501. *Habeas Corpus in Kansas: How is the Great Writ Used Today?* 1995 J. Kan. Bar. Assoc. 26. The second article discusses K.S.A. 60-1507 proceedings specifically. *Habeas Corpus in Kansas: The Great Writ Affords Postconviction Relief at K.S.A. 60-1507*, 1998 J. Kan. Bar Assoc. 16. I would be happy to provide you with a copy of either article. I appear today because I am concerned about the proposed changes to 60-1507.

The history leading to adoption of K.S.A. 60-1507 helps explain why the proposed changes should be rejected. Before K.S.A. 60-1507 was enacted, all habeas petitions were filed in the jurisdiction where the person was confined under the general habeas statute, K.S.A. 60-1501. Most habeas cases were filed where the penitentiary and reformatory were located, in Leavenworth and Reno Counties. To decide these habeas cases, judges in those two counties (Leavenworth and Reno) had to reviewed records of convictions from all over the state. The Legislature enacted K.S.A. 60-1507 to require inmates to file a petition for the review of their conviction in the county where the trial occurred. Then a judge, often the same one who conducted the trial, would review the inmate's claims. This is a more sensible and efficient procedure.

The body of law surrounding K.S.A. 60-1507 is well settled. Supreme Court Rule 183 outlines procedures to use in these cases. Most 60-1507 petitions are decided after a review of the trial record and without an evidentiary hearing. K.S.A. 60-1507 and S. Ct Rule 183 do not allow 60-1507 petitions to raise issues presented in the direct appeal, to

Senate Judiciary
2-24-03
Attachment 8-1

raise mere trial errors that should have been raised in the direct appeal, or to use successive 60-1507 petitions. District courts rarely schedule an evidentiary hearing in these cases. When hearings are schedule, the petitioner, usually a confined inmate, has the burden of proof. A district judge rarely grants a 1507 petition.

Several problems arise if a one-year limitation is imposed on K.S.A. 60-1507. One involves newly discovered evidence. A motion for new trial based upon newly discovered evidence must be brought within two years after final judgment. K.S.A. 22-3501. If a claim for new trial based on newly discovered evidence arises after the two-year limitation of K.S.A. 22-3501, a prisoner must use a 60-1507 proceeding to request that the sentence be set aside and a new trial granted. *State v. Bradley*, 245 Kan. 316, 787 P.2d 706 (1990). If a one-year limitation is imposed on K.S.A. 60-1507, this proceeding will no longer be available for these cases. Another procedure will need to be created to replace the well known rules now used in K.S.A. 60-1507 proceedings.

What evidence can be newly discovered some time after trial? The most widely publicized is newly tested DNA evidence, which can establish the wrong person was convicted of a crime. Kansas is not immune. In fact, Kansas had one of the first cases that resulted in release of an inmate, Joe Jones, after serving 7 years for a rape he did not commit. DNA testing established the semen taken from the victim could not have been from Mr. Jones. The availability of such a remedy is particularly critical now that Kansas has inmates on death row.

Ineffective assistance of counsel is probably the most frequent claim brought under K.S.A. 60-1507. Both the United States Supreme Court and the Kansas Supreme Court recognize a person charged with a felony offense is entitled to counsel at trial. A perfect trial is not guaranteed. To present a successful claim of ineffective assistance of counsel, a person must show counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense by depriving defendant of a fair trial. The standard used to review this claim is highly deferential in scrutinizing counsel's performance. *State v. Rice*, 261 Kan. 567, 598-602, 982 P.2d 981 (1997). These claims are rarely successful. The attorney is presumed to provide effective assistance; the inmate must prove otherwise. Prosecuting attorneys criticize long delays before making a claim of ineffective assistance of counsel, but the question should be why did it take so long for the claim to be heard. An inmate that knows how to use a 60-1507 proceeding will not sit in Lansing for 10 years on a valid ineffective assistance of counsel claim waiting for his attorney to die. After all, the inmate must overcome the presumption the attorney provided effective counsel. Each year of delay makes this burden more difficult to meet.

The changes will not ease the workload of the appellate defender's office (ADO). ADO attorneys raise all issues possible in a direct appeal. ADO does not see a K.S.A. 60-1507 proceeding until after it has been to the trial court. By the time ADO is assigned, it is limited to raising issues preserved in the district court—if any.

8-2

The bill will not reduce the workload of prosecuting attorneys, who will have to respond to claims outside the procedures of 60-1507. The legislature should consider the admonition of now retired Kansas Supreme Court Justice Six when he noted a prosecutor is a servant of the law and a representative of the people of Kansas. A prosecutor represents "'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *State v. Pabst*, 268 Kan. 501, 510, 996 P.2d 321 (2000), *quoting Berger v. United States*, 295 U.S. 78, 88, 79 L.3d 1314, 55 S. Ct. 629 (1935).

This amendment to K.S.A. 60-1507 will not reduce the court caseload. If a test of manifest injustice is included in the statute, the filing of a petition will not be avoided. Instead, the court will have to address additional issues instead of ruling on the merits and resolving the case completely. After the Sentencing Guidelines Act went into effect July 1, 1993, the Kansas appellate courts saw an increase in appeals from 60-1507 petitions. The Court of Appeals ruled that a challenge to calculations under the new act must be brought in the sentencing court using 60-1507. *Safarik v. Bruce*, 20 Kan. App. 2d 61, 67-68, *rev. denied* 256 Kan. 996 (1994). A chart at the end of this statement shows a steady rise in these appeals from 1994 until 1997. This increase was not from traditional 60-1057 appeals but from challenges to the sentencing guidelines. In 1998 and 1999 the number of 60-1507 appeals decreased. Due to the way statistics are now recorded, the Clerk of the Appellate Courts does not have this number available for 2000 to 2002. If the Legislature wants to slow the number of 60-1507 appeals, it should limit the changes it enacts to the sentencing guidelines and other criminal statues.

Section 8 of the Kansas Bill of Rights states that "the right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion." Why did the founders of Kansas include this statement? Debates at the Wyandotte Convention in 1859 show little discussion about this section. Section 1 of our Bill of Rights assures, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 6 rejects slavery, thus embracing freedom for all. By adopting section 8, the founders guaranteed a way to preserve these rights for all, even those on the bottom rung of society's social ladder. I believe a one-year restriction on the use of habeas corpus violates section 8 of the Kansas Bill of Rights.

I oppose a statute of limitation for 60-1507 proceedings. This is the last opportunity our system provides to correct unconstitutional proceedings in criminal cases. K.S.A. 60-1507 has rarely been amended since its enactment in 1963. The statute has worked well for 40 years. Its procedures are well established. Its use to test the dramatic changes brought about by the Sentencing Guidelines Act is a testament to how well it works. Unless the Legislature wants to develop a new statutory proceeding, which assures the constitutional protections now provided by K.S.A. 60-1507, the limitation should be rejected. I urge you to reject Senate Bill No. 206.

APPEALS FROM K.S.A. 60-1507 PROCEEDINGS[1]

Year	60-1507 Appeals
1999	117
1998	124
1997	205
1996	180
1995	99
1994	79
1993[2]	57
1992	57

[1] These numbers are based upon calendar year totals of the Kansas Court of Appeals. The Clerk of the Kansas Appellate Courts was unable to provide the number of K.S.A. 60-1507 appeals for 2000 and 2001.
[2] The Kansas Sentencing Guidelines Act became effective on July 1, 1992.

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Recommended Amendments

KDOC Comments on Specific Sections of SB 123

We addressed this

Page 1
New Section 1
and Page 2
New Section 2

Suggest amending the provisions relating to the statewide drug abuse assessment to provide that the risk-needs instrument be administered by court services as part of the presentence investigation and that the clinical drug abuse assessment be performed by the certified drug abuse treatment program following assignment of the offender to either court services or community corrections.

Pages 1-2
New Section 1

It is not clear what the bill's intent is regarding sentencing dispositions for offenders who meet the eligibility criteria but who live in an area of the state where there are no available placements in a certified drug abuse treatment program. This question also arises with KDOC inmates who receive sentence modifications under New Section 3. – We have been told by treatment providers that this will be addressed by the term the bill is created with the exception of long term residential, which will require the offender to go outside their jurisdiction

OK

Page 1
New Section 1

- In lines 22 and 26, delete "prior".
- In line 28, insert "or non-grid offense" after "10".
- Also need to clarify that offenders with current as well as prior convictions for person felonies are not eligible, unless the convictions are for severity level 8-10 crimes and the judge makes the determination outlined in subsection (a)(2).

addressed in our amendment

Page 2
New Section 2

In line 30, "supervision and monitoring" should be amended to clarify that court services or community corrections supervise the offender rather than the drug abuse treatment program.

Page 2
New Section 2

In lines 35-37, it is not clear whether every certified treatment program must offer each of the services listed in subsection (a)(3). – Our intent is to leave it up to the local jurisdiction based on their specific needs the types of treatment needed.

Page 3
New Section 2

We addressed this

In lines 27-30, responsibility for payment of the cost of the treatment program is placed upon the person receiving the service, i.e. the offender. In our view, there will be many instances in which the offender will not be able to pay all or even a significant portion of program costs. Some provision needs to be made for payment of costs, and designation of the agency or agencies responsible for administering any funds appropriated for this purpose. Also, it is not clear what is meant in line 30 by "further action on the offender's sentence" if the offender cannot make payment.

Senate Judiciary
2-24-03
Attachment 9-1

KDOC Comments on Specific Sections of SB 123

Pages 3-5
New Section 3

- Amend 3 (c) to provide that KDOC shall conduct a public safety evaluation and include that evaluation in the report made to the sentencing court.

Page 10
Section 4

- In line 23, because the treatment program is a nonprison disposition and the offender is not on postrelease supervision, amend language to "revocation of the nonprison disposition....."

- In line 22, change "shall" to "may be subject to". Otherwise, this subsection conflicts with the provisions of New Section 1 (f)(2) and Section 4(n), which provide for revocation under certain circumstances.

Page 18
Section 7

The provisions of SB 123 require offenders participating in a drug treatment program to abide by the conditions of the treatment program. References to the grounds for the revocation of that nonprison sanction are limited to a failure to participate or engaging in a pattern of intentional conduct that demonstrates a refusal to comply with the conditions of the program, or conviction for a new felony other than for violation of KSA 65-4160 or 65-4162. However, SB 123 is not clear in whether violations of other conditions imposed as part of supervision by court service or community corrections officials can result in the revocation of this nonprison disposition. As an example, it is not clear what kind of response is envisioned by the bill if an offender is found to be carrying a weapon. *The department recommends that SB 123 provide that offenders may have other supervision conditions imposed and violations of those conditions can result in the revocation of the nonprison sanction. Additionally, the department recommends that section 7(f) at page 18 line 22 be amended to provided that additional nonprison sanctions may be imposed by the court.*

Page 19
Section 9

The amendment of K.S.A. 75-5291 by SB 123 at section 9 regarding the offenders eligible for supervision by community corrections officers does not include: (1) those offenders who are sentenced for violations of K.S.A. 65-4160 or 65-4162 having a presumptive nonprison disposition criminal history classification and a high risk drug abuse assessment; or those offenders who are released from prison under New Section 3 of the bill. Therefore *the department recommends that SB 123 section 9 (a)(2)(E) be amended to include a high risk assessment as determined by the statewide, mandatory, standardized risk assessment tool or instrument validated for drug abuse treatment program placement as provided for by New Section 1(d), as well as offenders released from prison under the provisions of New Section 3.*

Page 21
Section 11

We do not believe it is feasible for this bill to be effectively implemented upon publication in the *Kansas Register*.