Approved: February 1, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on January 11, 2005, in Room 123-S of the Capitol.

Committee members absent: Derek Schmidt- excused

Committee staff present: Mike Heim, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:

Marlee Carpenter, Kansas Chamber of Commerce & Industry
Kathy Damron, Phillip Morris USA Inc
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Others attending: See attached list

Chairman Vratil welcomed all to the first meeting of the Senate Judiciary Committee for the 2005 Session. The Chair asked the Senators to introduce themselves and provide some brief background about their service and interests as Judiciary Committee members.

Chairman Vratil stated that the committee had no written rules and he had only one, not in writing, that everyone act in a civil manner and respect their fellow committee members and audience members. He indicated that committee meetings would be run as open meetings, and it was his intent that everyone have full and fair time to express their viewpoints. He also asked that everyone arrive in a timely manner. He asked if there were any committee members that would like to propose any new rules, but no proposals were offered.

The Chair called for bill introductions. Marlee Carpenter requested a bill that would change the way one introduced scientific evidence in a courtroom. It would move from the Frey standard to the Daubert standard. Basically, the Frey standard lets the jury decide whether the evidence is good evidence and should be considered, whereas with the Daubert standard, the judge is the gatekeeper and determines whether the jury should hear the evidence. (The Daubert standard is used in federal courts, and the Frey standard is used in Kansas courts.) (Attachment 1) Senator O'Connor moved to introduce the bill, seconded by Senator Donovan, and the motion carried.

Kathy Damron, representing Phillip Morris USA Inc., requested a bill be introduced, called the "Allocable Share" amendment. It is model legislation passed in 39 other states. The bill would close a loophole that affects the non-participating manufacturers of cigarettes who are supposed to make payments to an escrow account. A loophole allows these companies to make the payments and immediately get the money back. (Attachment 2) Senator O'Connor moved to introduce the bill, seconded by Senator Goodwin, and the motion carried.

Chairman Vratil introduced a bill on behalf of Senator Barnett which would exempt Kansas from provisions of federal law which denies welfare payments. The Chair indicated a fiscal note would be obtained should the committee vote to introduce this bill. (Attachment 3) Senator Haley moved to introduce the bill, seconded by Senator Betts, and the motion carried.

Chairman Vratil introduced a bill to address the Kansas Supreme Court's decision in *Marsh* on December 17. The Court said that current law on capital offenses indicates that when a jury is considering both aggravating and mitigating factors, that the tie goes to the State and the death penalty can be imposed. The Court said that is unconstitutional, that the tie cannot go to the State but must go to the defendant. Senator O'Connor asked if the KBI or the Attorney General had taken a look at this, and Chairman Vratil indicated not at his initiative, that he had asked the Revisor's Office to draft the bill to fix the *Marsh* problem. Senator Bruce asked if the

case was going to be appealed to the U.S. Supreme Court, and the Chair indicated that the Attorney General has indicated the intention to appeal it, but has also acknowledged the reality, which is there is a slim chance that the Supreme Court would consider the appeal. (Attachment 4) Senator O'Connor moved to introduce the bill, seconded by Senator Donovan, and the motion carried.

Chairman Vratil introduced another bill, stating that there is an existing Kansas statute that says that in actions brought for the recovery of property damages only, sustained and caused by the negligent operation of a motor vehicle, and if the claim for damages is less than $7,500, the prevailing party will be allowed reasonable attorney's fees. This bill would amend that existing statute by striking the $7,500 limit. (Attachment 5) Senator Journey moved to introduce the bill, seconded by Senator Donovan, and the motion carried.

Mike Heim and Jerry Donaldson, Kansas Legislative Research Department, covered most of the study topics and report recommendations provided in the Reports of the Special Committee on Judiciary to the 2005 Kansas Legislature (Attachment 6). Mr. Heim passed out a copy of the Judiciary Committee section of the report.

On the issue of eminent domain, the United States Supreme Court added an eminent domain, economic development and private property rights case to its Fall 2004 docket. It was recommended legislation be deferred until after the Court renders its decision. Senator O'Connor asked for clarification as to when the Court might render a decision. It was the general consensus that by June a decision might be expected. Senator O'Connor then asked whether the committee might expect to take up legislation on this issue next year, and this was affirmed.

Senator Betts asked for an elaboration and update of the Cowley County situation. Senator Goodwin shared that the eminent domain issue affecting Cowley County affected 22,000 acres of prime agricultural land, which had lakes and a beautiful valley that was popular. There were two developers that wanted to use eminent domain to take all the land and dam up the streams and lakes, to make a recreational lake for Sedgwick County. This concerned many of her constituents, including the ranchers and owners of the acres, which was the reason for the bill (2004 **SB461**), which was enacted. Since that time, there have been other parties that have become interested in this lake, from the Sedgwick County area, and the issue has been discussed openly. The Water Authority Board held extensive hearings during this past summer and decided there was no need for water in Sedgwick County, which was one of the prime reasons for taking this water in Cowley County. The Water Authority Board would not address this issue any further. Since that time, several committees in Wichita have held meetings, and the Cowley County lake was their number one project. In conclusion, Senator Goodwin indicated the issue is ongoing, as there has been more money garnered for support in Wichita. This has caused the ranchers and owners to be actively involved in sending out letters, because there is still concern that their land could be taken.

Regarding the statute of limitation issue for registration violations under the Uniform Securities Act, the Special Committee agreed to introduce, without recommendation, a bill (**HB2029**) which would expand the statute of limitations for private individuals bringing an action for securities registration violations under Section 38(j)(l) of 2004 **HB 2347.** The bill would provide for a statute of limitations of one year from the date of discovery of the registration violation with an overall two-year statute of limitation from the actual registration violation. (**HB 2347** was enacted by the 2004 Legislature with an effective date of July 1, 2006. The bill passed both Houses of the Legislature with a two-year statute of limitations, but the time frame was changed to one year in conference committee and was ultimately enacted as a one-year period.)

On the issue of access to victim information by law, the Special Committee believed the issue of the availability of crime victim information to the Secretary of Social and Rehabilitation Services in regard to the release of sexually violent predators has been resolved through a Memorandum of Understanding with the Department of Corrections. Therefore, it recommended no legislation on the topic.

On the death penalty and the mentally retarded, after discussion of this topic, the Special Committee concluded that a new bill should be drafted and prefiled based on 2004 **SB 355** that would correct some flaws in the bill. The new bill (2005 **SB14**) would contain an improved and expanded definition of "mentally retarded" and "mental retardation"; omit the age of onset language; delete the nexus language regarding the

criminality provision that is contained in 2004 **SB 355**; include the pre-trial component of 2004 **SB 355** for a finding of mental retardation; include the post-trial provisions of 2004 **SB 355** regarding a special verdict on the question of a finding of mental retardation; and include the provision of new section 4 of 2004 **SB 355** that allows for the Kansas Board of Indigents' Defense Services to provide counsel for a person who is unrepresented in order to determine whether to file a petition for relief from the sentence of death on the grounds that the defendant was an individual who was mentally retarded at the time of the commission of the capital offense.

Chairman Vratil asked for clarification on the changes in the definition of "mental retardation". The current definition of mentally retarded means having significantly sub-average general intelligence, intellectual functioning to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct and to conform one's conduct to the requirements of law. The new definition of "mental retardation" would mean having significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior. Further, the definition of significantly sub-average general intellectual functioning means the performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the Secretary of SRS.

Chairman Vratil noted the meeting time was up. Senator O'Connor moved to adjourn the meeting, seconded by Senator Journey, and motion was carried. The meeting was adjourned at 10:30 A.M. The next meeting is scheduled for January 12, 2005.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-11-05

NAME	REPRESENTING
Sandy Jacquot	LKM
Mark Carpenter	KS Chamber
Azure Miller	Damron & Associates
Kathy Damron	Philip Morris
Scott Schneider	City of Wichita
Anne Goodwin	City of Wichita
Scott Heidner	KADC
Ron Hein	Hein Law Firm Chtd
Ron Sachse	Hein Law Firm Chtd
Dan Murray	Federico Consulting
Michael White	KCDAA
Steve Kearney	Kearney & Assoc.
Bill Lucero	MVFR
Lana Walsh	OJA
Josie Torres	SILCK
Jeff Bottenberg	Polsinelli, et al.
Kevin Barone	KTLA
Bill Brady	KGC
Mike Hutfles	KGC

Continued

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-11-05

NAME	REPRESENTING
J. Butler	KSC
P Biggs	KSC
B Harmon	KSC

KANSAS EXPERT EVIDENCE

Submitted by Marlee Carpenter

K.S.A. § 60-456 **[Adopts FRE 702]**

KANSAS STATUTES ANNOTATED
CHAPTER 60.--PROCEDURE, CIVIL
ARTICLE 4.--RULES OF EVIDENCE
G. EXPERT AND OTHER OPINION TESTIMONY

60-456. Testimony in form of opinion.

(a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.

(b) ~~If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.~~ **Testimony by experts.-- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.**

(c) Unless the judge excludes the testimony he or she shall be deemed to have made the finding requisite to its admission.

(d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

History: L. 1963, ch. 303, 60-456; Jan. 1, 1964.
K. S. A. § 60-456, KS ST § 60-456

K.S.A. § 60-457 **[Requires Preliminary Hearing]**

KANSAS STATUTES ANNOTATED
CHAPTER 60.--PROCEDURE, CIVIL

Senate Judiciary
1-11-05
Attachment 1

H

ARTICLE 4.--RULES OF EVIDENCE
G. EXPERT AND OTHER OPINION TESTIMONY

60-457. Preliminary examination.

(a) If a witness is not testifying as an expert, then the judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

(b) If a witness is testifying as an expert, then upon motion of a party, the court ~~must~~ may hold a pre-trial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Sec. 60-456(b) and Sec. 60-458. The court shall allow sufficient time for a hearing and shall rule on the qualifications of the witness to testify as an expert and whether or not the testimony satisfies the requirements of Sec. 60-456(b) and Sec. 60-458. Such hearing and ruling shall be completed no later than the Final Pretrial Conference contemplated under Sec. 60-216(d).

History: L. 1963, ch. 303, 60-457; Jan. 1, 1964.
K. S. A. § 60-457, KS ST § 60-457

K.S.A. § 60-458 **[Adopts FRE 703]**

KANSAS STATUTES ANNOTATED
CHAPTER 60.--PROCEDURE, CIVIL
ARTICLE 4.--RULES OF EVIDENCE
G. EXPERT AND OTHER OPINION TESTIMONY

~~**60-458. Hypothesis for expert opinion not necessary.**~~

~~Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his or her discretion so requires, but the witness may state his or her opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross-examination the witness may be required to specify such data.~~

60-458 Bases of opinion testimony by experts.—

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be

admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

History: L. 1963, ch. 303, 60-458; Jan. 1, 1964.
K. S. A. § 60-458, KS ST § 60-458

_____ BILL No. _____

Submitted by
KATHY DAMRON

By _____

_____

AN ACT implementing an amendment to the tobacco master settlement agreement; amending K.S.A. 50-6a03.

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

Section 1. K.S.A. 50-6a03 is hereby amended to read as follows: 50-6a03. Requirements for sale of cigarettes; penalties.

Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after the effective date of this act shall do one of the following:

(a) Become a participating manufacturer (as that term is defined in section II(jj) of the master settlement agreement) and generally perform its financial obligations under the master settlement agreement; or

(b) (1) place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

(A) 1999: $ .0094241 per unit sold after the effective date of this act;

(B) 2000: $ .0104712 per unit sold;

(C) for each of 2001 and 2002: $ .0136125 per unit sold;

(D) for each of 2003 through 2006: $ .0167539 per unit sold;

(E) for each of 2007 and each year thereafter: $ .0188482 per unit sold.

(2) A tobacco product manufacturer that places funds into escrow pursuant to paragraph (1) of subsection (b) shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(A) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this subparagraph (i) in the order in which they were placed into escrow and (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(B) to the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow *on account of units sold in the state* in a particular year was greater than the ~~state's allocable share of the total payments that such manufacturer would have been required to make in that year under the master settlement agreement (as determined pursuant to section IX(i)(2) of the master settlement agreement, and before any of the adjustments or offsets described in section IX(i)(3) of that agreement other than the inflation adjustment)~~ *Master Settlement Agreement payments, as determined pursuant to section IX(i) of that Agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold* had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

Senate Judiciary
1-11-05
Attachment 2

(C) to the extent not released from escrow under subparagraphs (A) or (B) of paragraph (2) of subsection (b), funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(3) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this subsection shall annually certify to the attorney general that it is in compliance with this subsection. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

(A) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation of this subsection, may impose a civil penalty to be credited to the state general fund in an amount not to exceed 5% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100% of the original amount improperly withheld from escrow;

(B) in the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation of this subsection, may impose a civil penalty to be paid to the state general fund in an amount not to exceed 15% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300% of the original amount improperly withheld from escrow; and

(C) in the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary) for a period not to exceed two years.

Each failure to make an annual deposit required under this section shall constitute a separate violation. A tobacco product manufacturer who is found in violation of this section shall pay, in addition to other amounts assessed under this section and pursuant to law, the costs and attorney's fees incurred by the state during a successful presentation under this paragraph (3).

Sec. 2. If this act, or any portion of the amendment to subsection (b)(2)(B) of K.S.A. 50-6a03 made by this act, is held by a court of competent jurisdiction to be unconstitutional, then such subsection (b)(2)(B) of K.S.A. 50-6a03 shall be deemed to be repealed in its entirely. If subsection (b)(2) of K.S.A. 50-6a03 shall thereafter be held by a court of competent jurisdiction to be unconstitutional, then this act shall be deemed repealed, and subsection (b)(2)(B) of K.S.A. 50-6a03 be restored as if no such amendment had been made. Neither any holding of unconstitutionality nor the repeal of subsection (b)(2)(B) of K.S.A. 50-6a03 shall affect, impair, or invalidate any other portion of K.S.A. 50-6a03, or the application of such section to any other person or circumstance, and such remaining portions of K.S.A. 50-6a03 shall at all times continue in full force and effect.

2005 5rs0169

SENATE BILL NO. ____

By Senator Barnett

AN ACT concerning public assistance; relating to persons convicted of a controlled substance related felony.

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

Section 1. Under the authority of subsection (d)(1)(A) of 21 U.S.C. §862a, the state of Kansas hereby exercises its option out of subsection (a) of 21 U.S.C. §862a, which makes any individual ineligible for certain state and federal assistance if that individual has been convicted under federal or state law of any offense which is classified as a felony by the law of the jurisdiction and which has as an element of such offense the possession, use or distribution of a controlled substance as defined by subsection (6) of 21 U.S.C. §802, only if, after such conviction, such individual has:

(a) Been assessed by a licensed substance abuse treatment provider as not requiring substance abuse treatment; or

(b) been assessed by a licensed substance abuse treatment provider and such provider recommended substance abuse treatment and such individual:

(1) Is participating in a licensed substance abuse treatment program; or

(2) has successfully completed a licensed substance abuse treatment program.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

SENATE BILL NO. ____

By Committee on Judiciary

AN ACT concerning crimes, punishment and criminal procedure; relating to the sentence of death; amending K.S.A. 2004 Supp. 21-4624 and repealing the existing section.

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

Section 1. K.S.A. 2004 Supp. 21-4624 is hereby amended to read as follows: 21-4624. (a) If a defendant is charged with capital murder, the county or district attorney shall file written notice if such attorney intends, upon conviction of the defendant, to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. Such notice shall be filed with the court and served on the defendant or the defendant's attorney not later than five days after the time of arraignment. If such notice is not filed and served as required by this subsection, the county or district attorney may not request such a sentencing proceeding and the defendant, if convicted of capital murder, shall be sentenced to life without the possibility of parole, and no sentence of death shall be imposed hereunder.

(b) Except as provided in K.S.A. 21-4622 and 21-4623, and amendments thereto, upon conviction of a defendant of capital murder, the court, upon motion of the county or district attorney, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If any person who served on the trial jury is unable to serve on the jury for the sentencing proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If there are insufficient alternate jurors to replace trial jurors who are unable to serve at the sentencing proceeding, the trial judge may summon a special jury of 12 persons ~~which~~ who shall determine the question of whether a sentence of death shall be imposed. Jury selection procedures, qualifications of jurors and grounds for exemption or challenge of prospective jurors in criminal trials shall be

Submitted by
Senator Vratil

Senate Judiciary
1-11-05
Attachment 4

applicable to the selection of such special jury. The right to a jury at the sentencing proceeding may be waived in the manner provided by K.S.A. 22-3403 and amendments thereto for waiver of a trial jury. If the jury at the sentencing proceeding has been waived or the trial jury has been waived, the sentencing proceeding shall be conducted by the court.

(c) In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the sentencing proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.

(d) At the conclusion of the evidentiary portion of the sentencing proceeding, the court shall provide oral and written instructions to the jury to guide its deliberations.

(e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances ~~is--not--outweighed--by~~ outweighs any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. If such jury finds

that the aggravating circumstances and mitigating circumstances are equal, the defendant shall not be sentenced to death and shall be sentenced to life without the possibility of parole. The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of life without the possibility of parole and shall commit the defendant to the custody of the secretary of corrections. In nonjury cases, the court shall follow the requirements of this subsection in determining the sentence to be imposed.

(f) Notwithstanding the verdict of the jury, the trial court shall review any jury verdict imposing a sentence of death hereunder to ascertain whether the imposition of such sentence is supported by the evidence. If the court determines that the imposition of such a sentence is not supported by the evidence, the court shall modify the sentence and sentence the defendant to life without the possibility of parole, and no sentence of death shall be imposed hereunder. Whenever the court enters a judgment modifying the sentencing verdict of the jury, the court shall set forth its reasons for so doing in a written memorandum which shall become part of the record.

(g) A defendant who is sentenced to imprisonment for life without the possibility of parole shall spend the remainder of the defendant's natural life incarcerated and in the custody of the secretary of corrections. A defendant who is sentenced to imprisonment for life without the possibility of parole shall not be eligible for parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence. Upon sentencing a defendant to imprisonment for life without the possibility of parole, the court shall commit the defendant to the custody of the secretary of corrections and the

court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole.

Sec. 2. K.S.A. 2004 Supp. 21-4624 is hereby repealed.

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

2005 5rs0218

SENATE BILL NO. ____

By Committee on Judiciary

AN ACT concerning civil procedure; relating to attorney's fees taxed as costs; amending K.S.A. 2004 Supp. 60-2006 and repealing the existing section.

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

Section 1. K.S.A. 2004 Supp. 60-2006 is hereby amended to read as follows: 60-2006. (a) In actions brought for the recovery of property damages only ~~of less than $7,500~~, sustained and caused by the negligent operation of a motor vehicle, the prevailing party shall be allowed reasonable attorney fees which shall be taxed as part of the costs of the action unless:

(1) The prevailing party recovers no damages; or

(2) a tender equal to or in excess of the amount recovered was made by the adverse party before the commencement of the action in which judgment is rendered.

(b) For the plaintiff to be awarded attorney fees for the prosecution of such action, a written demand for the settlement of such claim containing all of the claimed elements of property damage and the total monetary amount demanded in the action shall have been made on the adverse party at such party's last known address not less than 30 days before the commencement of the action. For the defendant to be awarded attorney fees, a written offer of settlement of such claim shall have been made to the plaintiff at such plaintiff's last known address not more than 30 days after the defendant filed the answer in the action.

(c) This section shall apply to actions brought pursuant to the code of civil procedure and actions brought pursuant to the code of civil procedure for limited actions.

Sec. 2. K.S.A. 2004 Supp. 60-2006 is hereby repealed.

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

Submitted by
Senator Vratil

Senate Judiciary
1-11-05
Attachment 5

Reports of the Special Committee on Judiciary to the 2005 Kansas Legislature

CHAIRPERSON: Representative Mike O'Neal

VICE-CHAIRPERSON: Senator John Vratil

RANKING MINORITY MEMBER: Representative Jan Pauls

OTHER MEMBERS: Senators Donald Betts, Jr., Greta Goodwin, Phil Journey, and Derek Schmidt; and Representatives Sydney Carlin, Eric Carter, Paul Davis, Jeff Jack, Judy Morrison, and Tim Owens

STUDY TOPICS

- Access to Victim Information by Law
- Adult Care Homes
- Death Penalty and the Mentally Retarded
- Eminent Domain and the Kansas Eminent Domain Procedures Act
- Statute of Limitations for Registration Violations Under the Uniform Securities Act

Use of a Controlled Substance

December 2004

Submitted by
Mike Heim

Special Committee on Judiciary

Access to Victim Information by Law

Conclusions and Recommendations

The Committee believes the issue of the availability of crime victim information to the Secretary of Social and Rehabilitation Services in regard to the release of sexually violent predators has been resolved through a Memorandum of Understanding with the Department of Corrections.

Proposed Legislation: The Committee recommends no legislation on this topic.

Background

The charge to the Special Committee on Judiciary on the Topic – Access to Victim Information by Law Enforcement Agencies and the Department of Social and Rehabilitation Services (SRS) – called for the Committee to study 2004 HB 2636 which would have authorized SRS and law enforcement agencies access to victim information so that those entities could have provided the required notifications to victims.

HB 2636 would have allowed the Secretary of the Department of SRS to obtain access to personal information of a crime victim from data gathered under the Kansas Offender Registration Act. At the time, this personal information was available only to law enforcement agencies. Under the bill, as introduced, the Secretary of SRS, in addition to law enforcement agencies, would have been able to obtain crime victim information from the Department of Corrections (DOC) that was formerly available only to the victim or the victim's family.

The bill was referred to the House Corrections and Juvenile Justice Committee which conducted a hearing on the bill before passing it out of the Committee. The bill then passed the full House and was referred to the Senate Judiciary Committee, where it remained when the 2004 Session ended.

Committee Activity

The Special Committee on Judiciary scheduled a hearing on 2004 HB 2636. At the time of the hearing, a written transmittal was received by the Committee. In the written testimony, the interested parties representing SRS and DOC stated that in order to meet the victim notification requirements imposed upon the Secretary of SRS in regard to the release of civilly committed sexually violent predators in lieu of enactment of HB 2636, SRS and DOC entered into a Memorandum of Understanding, whereby DOC would provide the necessary victim notifications on behalf of SRS. The Memorandum of Understanding provides for interagency cooperation between SRS and DOC and allows the utilization of the DOC's crime victim services resources on behalf of SRS. Therefore, SRS and DOC respectfully believe that the spirit of the legislation has been fulfilled without the need for further legislative action.

Conclusions and Recommendations

Based upon the written testimony received on behalf of SRS and DOC, the Committee recommends no further legislative action.

Special Committee on Judiciary

ADULT CARE HOMES

CONCLUSIONS AND RECOMMENDATIONS

After review and discussion of the hearing on the topic dealing with adult care homes and prohibiting the use of state inspection reports as evidence in civil litigation, the Committee concluded that no legislation is needed at this time.

Proposed Legislation: None.

BACKGROUND

The charge to the Committee on this topic – Adult Care Homes and Prohibiting the Use of State Inspection Reports as Evidence in Civil Litigation – directed the Committee to study 2004 SB 430 and 2003 HB 2306 which related to whether or not state inspection reports of adult care homes may be used in civil litigation.

SB 430, as amended by the House Committee on Health and Human Services, relates to adult care home inspection reports in judicial proceedings. Inspection reports are defined as any document prepared by any officer, employee, or agent of the state during the course of or otherwise in connection with any inspection, investigation, or survey of any licensed adult care home conducted to determine compliance with any licensing, certification, or program participation requirements under any provision of federal or state law. However, there is no prohibition on the use and admissibility in evidence of one or more excerpts from any such inspection report that directly refer and relate to the named plaintiff if the judge determines on the record, after a hearing outside the presence of the jury, that every such excerpt is otherwise admissible under the rules of evidence.

This language contains the same provisions as HB 2306, as passed by the House Committee on Health and Human Services. SB 430 originally amended the same statute, KSA 39-935, but in a different manner as HB 2306.

COMMITTEE ACTIVITIES

During the hearing on this topic, those in support of SB 430, as amended by the House Committee, included delegates on behalf of Wells, Conrade, and Sims; the Kansas Association of Insurance Agents; the Kansas Health Care Association, Inc.; and Wheatland Nursing Center.

Opposition to the bill was expressed by representatives with:

- Kansas Advocacy and Protective Services, Inc.;
- American Association of Retired Persons;
- Kansas Advocates for Better Care;
- Topeka Independent Living Resource Center;
- Kansas Trial Lawyers Association;
- Kansas ADAPT; and
- a private citizen.

CONCLUSIONS AND RECOMMENDATIONS

After review and discussion of the hearing on this topic, the Committee concluded that no legislation is needed on this topic.

Special Committee on Judiciary

DEATH PENALTY AND THE MENTALLY RETARDED

CONCLUSIONS AND RECOMMENDATIONS

After discussion of this topic, the Committee concluded that a new bill should be drafted and prefiled based on 2004 SB 355that would do the following:

- Retain the definition of "mentally retarded" and "mental retardation" as contained in the current statutes;
- Remove the "age of onset" language contained in 2004 SB 355;
- Delete the nexus language regarding the criminality provision that is contained in 2004 SB 355;
- Include the pre-trial component of 2004 SB 355 for a finding of mental retardation;
- Include the post-trial provisions of 2004 SB 355 regarding a special verdict on the question of a finding of mental retardation; and
- Include the provisions of new section 4 of SB 355 that allows for the Kansas Board of Indigents' Defense Services to provide counsel for a person who is unrepresented in order to determine whether to file a petition for relief from the sentence of death on the grounds that the defendant was an individual who was mentally retarded at the time of the commission of the capital offense.

Proposed Legislation: The Committee recommends one bill on this topic.

BACKGROUND

The charge to the Special Committee on Judiciary regarding the topic – Death Penalty and the Definition of "Mentally Retarded" – designated the Committee to study the definition of "mentally retarded" in conjunction with death penalty cases as provided for in 2004 SB 355 and to study the appropriate state response to the United States Supreme Court decision in *Atkins v. Virginia*, which held that execution of a person with mental retardation violates the *Eighth Amendment* prohibition of cruel and unusual punishment.

SB 355 was introduced in the 2004 Session and assigned to the Senate Judiciary Committee. The bill was amended and passed out of Committee. Ultimately, the bill was rereferred to the Senate Judiciary Committee where it remained. In its present form, SB 355 would make changes to the Kansas death procedure to conform with the constitutional requirements set by the U.S. Supreme Court in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), which held that execution of a person with mental retardation violates the *Eighth Amendment* prohibition of cruel and unusual punishment.

The bill also would have implemented a policy decision to extend the ban on imposition of death penalty to persons with mental retardation (required by the *Atkins* decision) to include all persons who suffer a cognitive disability *i.e.*, not only those persons who are mentally retarded but also those

persons who suffer a brain injury after their 18th birthday. The bill would have established a procedure for the cognitive disability finding to be applied to those already sentenced to death.

The bill would have allowed the issue of cognitive disability to be raised prior to trial or whenever defense counsel gains a good faith belief that the defendant has a cognitive disability. Under current law, the determination of mental retardation is made by the judge following the guilty verdict.

The bill would have deleted references to defendants who are mentally retarded and would have replaced the terminology with persons who suffer a "cognitive disability." The bill would have defined "cognitive disability" as a disability characterized by significant limitations both in intellectual functioning and deficits in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The term "significant limitations" in intellectual functioning means two or more standard deviations below the norm.

If the capital murder trial results in a verdict of guilty, the parties would have been entitled to present evidence to the jury on the issue of whether the defendant had cognitive disability at the time of the commission of the capital murder. The jury would have been asked to render a special verdict on the issue of cognitive disability. If the jury finds beyond a reasonable doubt the defendant had a cognitive disability, the defendant may be sentenced to any penalty available under state law, other than death.

In cases in which a defendant already has been convicted of capital murder, sentenced to death, and is in custody pending execution of the sentence of death, the following procedures would have applied. The Kansas State Board of Indigents' Defense Services would have arranged to provide counsel to any such person who is unrepresented at the time this act takes effect to determine whether to file a petition for relief from the sentence of death on the grounds that the defendant was an individual having cognitive disability at the time of the commission of the capital offense.

The bill was recommended by the Kansas Judicial Council's Criminal Law Advisory Committee which had been requested to study the issue. The Advisory Committee relied on the expert advice of a law professor from the University of New Mexico School of Law who expressed concern about the current definition of "mentally retarded" in the criminal code; the Kansas statute is different from other states to the point it could be argued it does not conform to the "national consensus" and that the current Kansas law may be subject to a constitutional challenge on its face to the extent it could be read to require a causal conviction.

During hearings on the bill in the 2004 Session, the bill was supported by representatives of the Kansas Bar Association, the Kansas Association of Criminal Defense Lawyers, Kansas Advocacy and Protective Services, Inc., and the Kansas Council on Developmental Disabilities.

Opposition during the 2004 Session was expressed by several prosecutors from the Sedgwick County District Attorney's Office.

COMMITTEE ACTIVITIES

The Committee held a hearing on the topic named "Death Penalty and the Mentally Retarded" in November.

Conferees favoring the concept of changes to the Kansas death penalty procedure in order to conform with constitutional safeguards and include the definition of cognitive disabilities in lieu of mental retardation included representatives from Kansas Advocacy and Protective Services, Inc. (KAPE), the University of New Mexico School of Law, and the Council on Developmental Disabilities. In addition, the Committee heard from a University of Missouri, Kansas City, law professor.

Written testimony in favor of the proposal was received from a clinical associate professor at the University of Kansas Medical Center. Opposition to the concepts in SB 355 were voiced by a Sedgwick County Deputy District Attorney.

Arguments were made that the contents of 2004 SB 355, dealing with cognitive disability, were lacking in the protection afforded to certain people. According to KAPE's delegate, SB 355:

- Does not protect every Kansan with a cognitive disability from the death penalty. Only those with both intellectual functioning two or more standard deviations below the norm and significant limitations in adaptive behavior would be protected. Further, the bill does not protect every person with a brain injury or intellectual functioning disabilities. Only those with the most *significantly* impaired intellectual functioning who meet this strict definition are protected.

- Does not tie protection from the death penalty to any particular age of onset of the disability. The definition of cognitive disability in the bill is the latest American Association on Mental Retardation definition of mental retardation, without an age of onset limitation.

- Does not involve determinations of mental illness, not guilty by reason of insanity, capacity to stand trial, or guilt or innocence. Those are separate issues.

According to the conferees, SB 355 still allows justice to be served by allowing any other punishment for those who fit this rigid definition of cognitive disability, including life without parole.

It was stated that SB 355 is better than current law which is unclear on certain matters such as when to raise the issue of cognitive disability: pre-trial or post-trial.

One of the issues at the core of the opposition testimony was the assertion that legislation such as SB 355 is not needed since Kansas already has a law prohibiting the execution of the mentally retarded.

CONCLUSIONS AND RECOMMENDATIONS

After discussion of this topic, the Committee concluded that a new bill should be drafted and prefiled that would do the following:

- Retain the definition of "mentally retarded" and "mental retardation" as contained in the current statutes;

- Omit the age of onset language;

- Delete the nexus language regarding the criminality provision that is contained in 2004 SB 355;

- Include the pre-trial component of 2004 SB 355 for a finding of mental retardation;

- Include the post-trial provisions of 2004 SB 355 regarding a special verdict on the question of a finding of mental retardation; and

- Include the provision of new section 4 of 2004 SB 355 that allows for the Kansas Board of Indigents' Defense Services to provide counsel for a person who is unrepresented in order to determine whether to file a petition for relief from the sentence of death on the grounds that the defendant was an individual who was mentally retarded at the time of the commission of the capital offense.

Special Committee on Judiciary

EMINENT DOMAIN AND THE KANSAS EMINENT DOMAIN PROCEDURES ACT

CONCLUSIONS AND RECOMMENDATIONS

The Committee recommends legislation which will require cities and counties to hold a public hearing and to allow property owners whose land is scheduled to be condemned to be heard. The hearing requirement will apply only when the power of eminent domain is used to take private property for economic development purposes or where the ownership or control of the condemned property will be in private hands.

The majority of the Committee believes further action on this topic should be deferred until after the United States Supreme Court renders its decision on this topic.

Proposed Legislation: The Committee recommends one bill for introduction.

BACKGROUND

The 2004 Special Committee on Judiciary was assigned the following two interrelated study proposals:

- **Use of Eminent Domain for Purpose of Economic Development.** Review the types of local government entities that may exercise the powers of eminent domain for economic development projects; how this power has been used around the state; and what the courts have determined is a proper public purpose for the exercise of the powers of eminent domain. This topic was requested by the House Committee on Local Government.

- **Eminent Domain.** Review the need for an appropriate state policy on the use of eminent domain to achieve a proper balance between individual rights of ownership and the potential for economic growth and development which might benefit the entire state. This topic was requested by Senator Dave Kerr, President of the Kansas Senate.

Eminent domain powers of local governments and the state were issues raised in the following bills before the 2004 Legislature.

SB 461

SB 461 (which was enacted), among other things, provides that neither Cowley County nor a port authority shall have the right of eminent domain to acquire any land or site in Cowley County for which at least one of the purposes is a recreational-use purpose. If a port authority exercises the right of eminent domain to acquire any land or site in Cowley County, the land or site shall be used only for the public purpose stated in the port authority's original official plan and there shall be no private development on any land or site for a period of 30 years after the acquisition of any land or site. Neither Cowley County nor a port authority operating or intending to operate in Cowley County shall exercise the right of eminent domain to acquire any land or site prior to a showing that all required state and federal permits to use or develop any such land or site in the manner specified in the port authority's official plan have been obtained.

SB 395

SB 395 (which was enacted), among other things, amends the tax increment financing law to provide that a city that exercises eminent domain under this law must compensate the property owner at least 125 percent of the highest appraised valuation based on the prior three years valuation.

SB 547

SB 547, which was killed by the Senate on Final Action, would have amended the Eminent Domain Procedure Act to provide that the taking of private property for the purpose of selling, leasing or transferring the property to any private entity to be used by the private entity for industrial or economic development shall not constitute a valid public use. The bill provided that it would be prima facie evidence that the purpose of a taking was industrial or economic development if the sale, lease or transfer resulted in commercial or economic benefit to a private entity.

Eminent Domain and Economic Development: A National Issue

The United States Supreme Court added an eminent domain, economic development and private property rights case to its Fall 2004 docket. The case, *Kelo v City of New London*, 843 A. 2d 500 (Conn. 2004), involves an appeal by seven property owners in a neighborhood in New London, Connecticut, that the city has designated for economic development. The Connecticut Supreme Court upheld the city's right to exercise its power of eminent domain to take the parcels, pay compensation to the owners and turn the land over to a private developer.

The question for the Supreme Court in the *Kelo v City of New London* case, is whether the taking of property for private development of a 90-acre tract—which now contains a neighborhood of small homes to be replaced with a waterfront hotel and conference center, office space for high technology research and development, retail space and 80 new homes—amounts to the kind of public use for which eminent domain is authorized by the *United States Constitution.*

Kansas Court Upholds Right of Eminent Domain For Economic Development

The Kansas Supreme Court in two recent cases has upheld the use of eminent domain to take private property for economic development purposes.

In the first case, *State ex rel. Tomasic v Unified Government of Wyandotte County/Kansas City* 265 Kan. 779, 790, (1998), the court upheld provisions of the tax increment financing (TIF) law which authorized special obligation (STAR) bonds, and the use of eminent domain to build an auto race track in Wyandotte County. The court held that the development of the auto race track facility and related projects were valid public purposes for which TIF and STAR bonds could be issued and eminent domain authority could be exercised.

More recently, in *General Building Contractors, LLC v Board of Shawnee County Commissioners* 275 Kan. 525 (2003), the Supreme Court held, among other things, that the taking of private property for industrial or economic development was a valid public purpose.

COMMITTEE ACTIVITIES

The Committee held a one-day hearing on the eminent domain topic in October. Conferees who expressed concern about using eminent domain for economic development purposes included a Topeka businessman whose business property was condemned by Shawnee County for a Target distribution center, a ranch owner from Arkansas City and Cowley County, and representatives of the Sierra Club, the Kansas Livestock Association, and the Kansas Farm Bureau.

These conferees said private property should not be taken from one private party for the benefit of another private party. The

power should be exercised sparingly and only for traditional governmental purposes.

Conferees who favored allowing eminent domain to be used for economic development purposes included representatives of the League of Kansas Municipalities, the Kansas Association of Counties, the Shawnee County Counselor's Office, the Hutchinson city attorney, the Greater Topeka Chamber of Commerce, and the mayor of Hesston. Written testimony was submitted by the Secretary of the Kansas Department of Commerce. These conferees noted that since the U.S. Supreme Court now has this issue before it, the Legislature should wait and see how the Court rules before acting. They argued that eminent domain, under the current economic environment of intense competition for jobs in a community, was a needed tool for economic development.

At the last Committee meeting, a representative of the Greater Topeka Chamber of Commerce reported the chamber had facilitated a series of meetings between over 25 groups interested in the eminent domain issue. Participating organizations included the following:

Kansas Livestock Association;
Wichita Area Chamber of Commerce;
Kansas Association of Realtors;
Kansas Farm Bureau;
City of Olathe;
Kansas Builders Association;
Kansas Agricultural Resources;
Greater Topeka Chamber of Commerce;
Manhattan Area Chamber of Commerce;
League of Kansas Municipalities;
Kansas Economic Developers Association;
Regional Economic Area Partnership;
Kansas Co-op Council;
Westar Energy;
Kansas Chamber of Commerce and Industry;
Kansas Department of Commerce;
Kansas Association of Counties;
Kansas Department of Transportation;
SBC;
Kansas Grain and Feed Association;
Wichita Realtors Association;
Overland Park Chamber of Commerce;
Lenexa Chamber of Commerce;
Topeka Builder/Realtor Coalition;
Manhattan Builder-Realtor-Landlord Coalition.

The group was not able to come to reach an agreement on the issue of "use of eminent domain for economic development purposes." The organizations, however, did agree with the following points:

- The scope of debate generally does not focus on the use of eminent domain for economic development purposes within city limits.

- The issue is not with the use of eminent domain when tax increment financing is used.

- The Cowley County lake concept was the cause of the most recent legislation regarding eminent domain.

- Current law states an economic development project in one county, which reaches into another county and results in the use of eminent domain, does require the approval of the use of eminent domain by both governing bodies; one governing body cannot reach into another governing body's territory without approval of both elected bodies in order to take property.

- The issue is only with the portion of an economic development project that requires the use of eminent domain; there is not an issue with the purchase of land by a governing body without the use of eminent domain. (Willing buyer/willing seller.)

- In order to alleviate some confusion and reduce intimidation or the perception of intimidation, the state should develop a brochure in "plain language" that describes the process of eminent domain, the time line, recourse to challenge a "taking", the rights of the landowner and the tax benefits that can be gained when property is taken through eminent

domain. This brochure should be given to a landowner when the governing body has not succeeded in negotiating the price for the land and has determined they must now consider the use of eminent domain to acquire the land.

Determination by the United States Supreme Court of the parameters for using eminent domain for economic development purposes is important in framing the future use of eminent domain in Kansas.

There was not agreement on these statements:

- There is not a problem with current law regarding eminent domain.
- There is a problem with determination of value of property being "taken."
- There are some issues with the use of eminent domain within the three mile development ring around cities.
- Driving the concern for legislative action is the use of "eminent domain for economic development" to acquire large tracts of agricultural land.
- There is concern for legislative action in the use of "eminent domain for economic development" to acquire large tracts of agricultural land.
- There is concern that what might have happened in Cowley County, regarding the use of eminent domain by parties outside the county, to acquire land for a recreational lake proposal could be repeated in other counties around the state.
- The Cowley County lake concept, although there was no governmental action, was cause for concern regarding the "taking" of land from one individual to be given to another private individual.
- Legal barriers are the basis of concern causing the request for legislative action.
- Determination by the United States Supreme Court of the parameters for using eminent domain for economic development is important, but should not preclude a discussion of the issue by the Kansas Legislature.
- It is in Kansas' best interests to hold off changes to state laws governing the use of eminent domain for economic development purposes until the United States Supreme Court renders a decision.

Conclusions and Recommendations

The Committee wishes to thank the Greater Topeka Chamber of Commerce for its efforts in bringing together the different groups interested in the eminent domain and economic development issues.

The Committee recommends legislation which will require cities and counties to hold a public hearing and to allow property owners whose land is scheduled to be condemned to be heard. The hearing requirement will apply only when the power of eminent domain is used to take private property for economic development purposes or where the ownership or control of the condemned property will be in private hands.

The majority of the Committee believes further action on this topic should be deferred until after the United States Supreme Court renders its decision on this topic.

Special Committee on Judiciary

Statute of Limitation for Registration Violations Under the Uniform Securities Act

Conclusions and Recommendations

The Committee agreed to introduce, without recommendation, a bill which would provide an expanded statute of limitations for private individuals bringing an action for securities registration violations under Section 38(j)(l) of 2004 HB 2347. The bill provides for a statute of limitations of one year from the date of discovery of the registration violation with an overall two-year statute of limitation from the actual registration violation.

The Committee also authorized the Chairman and Vice Chairman of the Special Committee, who are both members of the National Conference of Commissioners on Uniform State Laws, to urge the National Conference to change the Uniform Securities Act statute of limitations as reflected in the above noted bill.

Proposed Legislation: The Committee recommends one bill on this topic.

Background

The Committee was charged under the topic concerning the Uniform Securities Act to study the allowable time for an investor to pursue civil litigation under the Kansas Uniform Securities Act (2004 HB 2347). In particular, the Committee was to review the one-year statute of limitations for an investor to pursue civil litigation to determine if this time period is adequate and appropriate.

Section 38 (j)(l) of the bill contains the one-year statute of limitations which applies to violation of provisions dealing with the registration of securities. Section 38(j)(2) contains a two-year statute of limitations for bringing an action to obtain relief for fraudulent actions.

HB 2347 was enacted by the 2004 Legislature with an effective date of July 1, 2006. The bill passed both Houses of the Legislature with a two-year statute of limitations, but the time frame was changed to one year in conference committee and was ultimately enacted as a one-year period.

Committee Activities

The Committee held a hearing on the Uniform Securities Act statute of limitations issue in October.

Conferees opposing a one-year statute of limitations and advocate a longer period included the following: the Kansas Securities Commissioner, securities attorneys from Topeka and Leawood, a representative of the Kansas Bar Association, and a representative of the AARP of Kansas. The conferees argued that a longer statute of limitations was needed to protect individuals who only may be able to bring suit alleging a registration violation since it is often difficult to prove fraud, especially in cases where it is the word of the plaintiff buyer versus the securities representative. In short, they argued that the longer statute of limitations provided better protection for individuals wanting to bring a case against a securities dealer.

Conferees who opposed the longer statute of limitations and wanted the one-year period to continue included a representative of the National Conference of Commissioners on

Uniform State Laws. Written testimony also was submitted on behalf of the Securities Industry Association. Both parties argued the shorter period was necessary to insure uniformity in laws of states adopting the uniform act. Further, they noted that violations for registration can be pursued by the Kansas Securities Commissioner beyond the one-year limit governing private suits.

CONCLUSIONS AND RECOMMENDATIONS

The Committee agreed to introduce, without recommendation, a bill which would provide an expanded statute of limitations for private individuals bringing an action for securities registration violations under Section 38(j)(l) of 2004 HB 2347. The bill provides for a statute of limitations of one year from the date of discovery of the registration violation with an overall two-year statute of limitation from the actual registration violation.

The Committee also authorized the Chairman and Vice Chairman of the Special Committee, who are both members of the National Conference of Commissioners on Uniform State Laws, to urge the National Conference to allow the Kansas modification to the Uniform Securities Act statute of limitations as reflected in the above noted bill and thus count Kansas among those states which have adopted the uniform act.

Special Committee on Judiciary

USE OF A CONTROLLED SUBSTANCE

CONCLUSIONS AND RECOMMENDATIONS

The Committee concluded that the sponsor of 2004 HB 2649 and officials from the Kansas Bureau of Investigation (KBI) should confer and devise a draft of a bill for the 2005 Session that would better deal with the concept of HB 2649 but that would not contain the problems, both constitutional and practical. The Committee indicated there was agreement with and support for the concept of HB 2649 but the Committee was reluctant to endorse the language of the bill.

Proposed Legislation: None.

BACKGROUND

The charge to the Special Committee on Judiciary on the topic – Use of a Controlled Substance and if the Defendant's Refusal to Take a Drug Test Would be Admissible Evidence at Any Trial on a Charge of Using a Controlled Substance – directed the Committee to study 2004 HB 2649 which deals with the criminal statutes dealing with the use of a controlled substance, and if the defendant's refusal to take a drug test would be admissible evidence at any trial on a charge of using a controlled substance. In addition, the Committee was to study the impact on the state's prison population if 2004 HB 2649 was enacted into law.

HB 2649 would make the unlawful use of any controlled substance punishable as a class A misdemeanor. A second offense, with a prior conviction, would be punishable as a drug severity level four felony.

The fiscal note indicates that the bill:

> . . . could increase the size of the prison population; however, the extent of the increase is not known. The Kansas Sentencing Commission cannot estimate the number of offenders with the information that is currently available. The state correctional system is near capacity. Therefore, if this legislation or the cumulative effect of similar legislation causes an increase in the prison population, additional space could be required. Although a precise fiscal effect cannot be determined, the Department of Corrections indicates it would consider constructing 128-cell living units at the El Dorado Correctional Facility for medium or maximum custody inmates, constructing a cell house at Hutchinson Correctional Facility for medium custody inmates, or leasing additional space from facilities in Groesbeck, Texas. If the bill does not require an expansion of existing space, the additional costs would be approximately $2,000 per capita for basic support, including food service, and adjustments might have to be made in the health service contract. In addition, the fiscal effect could involve additional resources to cover field supervision caseloads beyond the level that can be supervised by existing staff.

COMMITTEE ACTIVITIES

The Committee held a hearing on HB 2649 on November 30, 2004. Those conferees who spoke in favor of the bill included the sponsor of the bill, Representative Kathe Decker, and a delegate from the Kansas Highway Patrol. Written testimony in support of the measure

was received from the Butler County Attorney and on behalf of the Kansas Sheriff's Association. The Kansas Bureau of Investigation spokesperson appeared in support of the concept behind HB 2649 but addressed some potential problems, both constitutional and practical, with the bill.

There were no conferees that appeared in opposition to the concept behind HB 2649.

CONCLUSIONS AND RECOMMENDATIONS

The Committee concluded that the sponsor of HB 2649 and officials from the Kansas Bureau of Investigation should confer and devise a draft of a bill for the 2005 Session that would better deal with the concept of HB 2649 but that would not contain the problems, both constitutional and practical. The Committee indicated there was agreement with and support for the concept of HB 2649 but the Committee was reluctant to endorse the language of the bill.