Approved: April 25, 2007
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:32 A.M. on February 14, 2007, in Room 123-S of the Capitol.

All members were present except:
Dwayne Umbarger arrived, 9:35 A.M.
Barbara Allen arrived, 9:36 A.M.
Les Donovan arrived, 9:36 A.M.
Derek Schmidt arrived, 9:36 A.M.
Terry Bruce arrived, 9:38 A.M.
Phil Journey arrived, 9:39 A.M.
David Haley arrived, 9:42 A.M.

Committee staff present:
Athena Anadaya, Kansas Legislative Research Department
Bruce Kinzie, Office of Revisor of Statutes
Nobuko Folmsbee, Office of Revisor of Statutes
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Sandy Barnett, Executive Director, Kansas Coalition Against Domestic & Sexual Violence
Ronald W. Nelson, Attorney, Nelson & Booth
Senator Roger Reitz
Randall Allen, Executive Director, Kansas Association of Counties
Michael B. Kearns, Chair, Riley County Commissioners
Linden Appel, Chief Legal Counsel, Kansas Department of Corrections
Chris Joseph, General Counsel, Kansas Professional Bail Bond Association, Inc.
Manuel Baraban, Bail Bondsman
Shane Rolf, Bail Bondsman
Hon. Steve Tatum, Chief Judge, 10th Judicial District
Hon. Nancy Parrish, Chief Judge, 3rd Judicial District

Others attending:
See attached list.

Approval of Minutes
Senator Goodwin moved, Senator Betts seconded, to approve the committee minutes of January 25, 2007 and January 29, 2007. Motion carried.

The hearing on **SB 182–Interference with parental custody** was opened.
Sandy Barnett appeared in support, indicating the bill was a response to the Uniform Child Abduction Prevention Act (UCAPA) which passed the Senate (Attachment 1). Ms. Barnett stated **SB 182** would bring the language of K.S.A. 21-3422 and K.S.A. 21-3422(a) in line with UCAPA and UCCJEA (Uniform Child Custody Jurisdiction Act).

Ron Nelson spoke in opposition, stating Kansas has existing laws that provide children protection against abuse (Attachment 2). Enactment of this bill would allow children to be used as pawns in domestic disputes, encourage disrespect for the law and disrespect for the other parents rights.

Written testimony in opposition to **SB 182** was submitted by:
N. Trip Shawver, Attorney (Attachment 3)

There being no further conferees, the hearing on **SB 182** was closed.

The hearing on **SB 184--Paying costs related to sexually violent predators** was opened.
Senator Roger Rietz appeared in support, indicating his opinion that it is unfair for counties to bear the brunt of the cost associated with cases of sexual predator commitment cases (Attachment 4).

MINUTES OF THE Senate Judiciary Committee at 9:32 A.M. on February 14, 2007, in Room 123-S of the Capitol.

Randall Allen testified in support, relating that although counties have no role with initiating the procedure for commitment of sexual predators, all of the costs associated with the proceedings are placed upon the county (Attachment 5). Mr. Allen indicated the unfunded mandate on county governments is burdensome.

Michael Kearns appeared as a proponent, stating that current law places an unreasonable financial burden on counties (Attachment 6). Mr. Kearns suggested that since these cases are Attorney General driven from start to finish, it is only appropriate that the State be responsible for the cost.

Linden Appel spoke in opposition, indicating the Department of Corrections (DOC) does not support shifting the fiscal burden for the Kansas Sexually Violent Predators Act to the DOC (Attachment 7). Mr. Appel indicated that the DOC should not be held subject to payment of all cost associated cost with committal proceedings because:

- the DOC does not have the legal relationship with a released offender;
- not every person subject to the Kansas Sexually Violent Predators Act is a convicted criminal; and
- the DOC has absolutely no control over the course of the proceedings once the petition is filed.

There being no further conferees, the hearing on **SB 184** was closed.

The hearing on **SB 203--Release prior to trial, appearance bonds; cash deposit required to equal amount of bond; court administrative fees prohibited** was opened.

Chris Joseph spoke in support, indicating enactment would eliminate a judicially created form of bail and clarify when bonds may be forfeited and revoked creating uniformity across the state (Attachment 8). Mr. Joseph provided copies of two reports: *Public versus Private Law Enforcement: Evidence from Bail Jumping*, by Eric Helland and Alexander Tabarrok, *The Journal of Law and Economics*, Volume 47 (April 2004), pages 93-122, and *The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California's Large Urban Counties: 1990-2000* by Dr. Michael K. Block, Professor of Economics and Law, University of Arizona, March 2005.

Manual Baraban, appeared in support, providing background on the development of the bail bond system in Kansas (Attachment 9). Mr. Baraban suggested alternative language for Section 1 (3) that would hold the attorney in fact liable to the State.

Shane Rolf testified in support, providing statistics regarding the efficacy of deposit bonds in Shawnee and Johnson Counties (Attachment 10). Mr. Rolf indicated studies have consistently shown that a pre-trial system utilizing surety bail bonds produces the lowest rate of failure to appear of all methods of pre-trial release.

Judge Steve Tatum spoke in opposition, stating he believes the court bonding program is a good program (Attachment 11). The program motivates defendants to appear in court so they will get their money back when the case is resolved. Judge Tatum also indicated judges of a judicial district are in the best position to observe the behavior and conduct of bondsmen in that district.

Judge Nancy Parrish appeared in opposition, providing information on the program in Shawnee County (No written testimony). Judge Parrish indicated income from Own Recognizance-Cash Deposit Bond (ORDC) program helps save money in terms of court costs, restitution, and indigent defenses.

Written testimony in support of **SB 203** was submitted by:

Darrel Manning, Bail Bond Recovery Agent (Attachment 12)
David Stuckman, Bail Bondsman (Attachment 13)
Randall J. Kahler, Bail Bondsman (Attachment 14)
N. Trey Pettlon, III, Attorney (Attachment 15)
Stephen L. Parker, Attorney, (Attachment 16)

There being no further conferees, the hearing on **SB 203** was closed.

The meeting adjourned at 10:31 A.M. The next scheduled meeting is February 15, 2007.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/14/07

NAME	REPRESENTING
Lindan Appel	KS. Dept. of Corrections
Eric C. Willis	KPBBA
Loren Thormodsgard	Visiting
David Stuckman	American Surety Co. Ins.
Darrel Manning	KPBBA
Aaron Gunderson	KPBBA
Shane Rolf	Shane's Bail Bonds
[illegible]	[illegible] Co.
Doug Smith	Professional Sureties
Randall Kahler	Professional Sureties
Ronald W. Nelson	—
Jim Clark	KBA
Mike Kearns	Riley County
Randall Allen	Kansas Assoc. of Counties
Annie McKay	KCSDV
Joyce Grover	KCSDV
Sandy Barnett	KCSDV
[illegible]	KPBBA

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-14-07

NAME	REPRESENTING
Bill Warfield	Greenleather Bondsy
CHRIS FISHER	Big Fish Bail Bonds
Chris Joseph	KPBBA
Richard Samaniego	KCBAA

Kansas Coalition Against Sexual and Domestic Violence

634 SW Harrison Topeka, Kansas 66603
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org • www.kcsdv.org

TO: Senator Vratil and Members of the Senate Judiciary Committee
FROM: Sandra Barnett, Executive Director
RE: Senate Bill 182
DATE: February 14, 2007

KCSDV is a statewide association of programs providing direct services to victims of sexual and domestic violence. These 30 member programs provide services in all areas of the state to both adult and child victims of abuse. These programs are refuges of safety for both women and children.

The impact of domestic violence is not just limited to the violence perpetrated against the spouse or intimate partner; it also reaches deeply into the family and the family relationships. The manipulation and abuse of children is one of the tactics used by domestic violence perpetrators to maintain or gain control over the intimate partner. Men who batter their spouses or partners physically abuse their children at a seven times higher rate than non-battering men and they sexually abuse their children at a six times higher rate than non-battering men.[1] The risk of physical abuse of children by a batterer rises with the severity and the frequency of his violence toward his partner.[2]

Battered women who are attempting to protect themselves and their children from both sexual and physical abuse are often put in a catch-22 situation. If they flee with the children, they may be accused of child abduction or charged with the crime of interference with parental custody. These accusations can result in battered women being sought after as fugitives of the law, may result in their arrest, and may ultimately end up with the children being placed either in foster care or in the custody of the abuser. If battered mothers stay with the abuser, they may be held criminally responsible if the abuser injures or, worse, kills the child. Our laws do not help and we know that domestic and sexual violence perpetrators are becoming savvier at using these laws against the protective parent.

SB18, which is the Uniform Child Abduction Prevention Act and which has already passed the Senate, has brought this issue to the forefront. During the hearing on that Bill, we requested that the crimes of Interference with Parental Custody (K.S.A. 21-3422) and Aggravated Interference with Parental Custody (K.S.A. 21-3422a) be amended. By bringing the language of these criminal statutes in line with UCAPA and the UCCJEA,

[1] Bancroft, L., Silverman, J. (2003). The Batterer as Parent. Thousand Oaks, CA: Sage. Pp 42-47.
[2] Id. at 43.

the Legislature will be saying loudly and clearly that it does not intend to punish mothers who flee domestic and sexual violence and take their children with them.

Senate Bill 182 would do four things:

First, it would make the criminal statutes consistent with the UCCJEA which provides for temporary emergency jurisdiction when a protective parent flees with children when "subjected to or threatened with mistreatment or abuse." See K.S.A. 38-1351. So, civilly or criminally, the standard would be the same if she flees because she or the child is subjected to or threatened with mistreatment or abuse. See lines 22-23, 36 of page 1 and lines 21-22 of page 2.

Second, it creates an exemption from criminal prosecution if, as soon as circumstances allow, the fleeing parent files a report with the county or district attorney in the county where the child resided. The amended statute details what must be included in this report on lines 25-28 of page 1 and lines 24-27 of page 2.

Third, SB182 provides for a defense. We know that mothers do not generally read the statute books nor do they necessarily consult with an attorney before they flee with their children. They may not have contacted the county or district attorney. In those cases, the protective parent may still raise the defense provided for in lines 34-36 of page 1 and lines 32-35 of page 2.

Fourth, in *State v. Al-Turck*, 220 Kan. 557 (1976), the Kansas Supreme Court held that without a custody order in place, a parent could not be criminally prosecuted for interference with parental custody. This decision was never codified into the statutes and it is included in SB182 in lines 33, 39-40 of page 1.

Please help battered mothers and protective parents navigate this catch-22 that they find themselves in. An exemption and a defense to criminal prosecution for taking steps to protect their children will go a long way toward doing so.

TESTIMONY OF RONALD W. NELSON
Nelson & Booth, Overland Park, Kansas

Members of the Committee: Good morning. I am Ronald W. Nelson. I am a Johnson County lawyer who practices exclusively in the area of domestic relations. I've been involved in domestic relations issues for a number of years and had the pleasure of being involved in working on the re-write of the Kansas Child Custody statutes in 2000. I've written extensively in local, state and national publications, and presented numerous seminars to lawyers on various domestic relations issues. My clientele is fairly evenly split between representation of men and women and I have handled a significant number of matters, both in the trial and appellate courts regarding those issues. I have especially focused my practice on high conflict child custody cases, which involve interstate and international child custody and support issues and I've handled a significant number of international and interstate cases in which child abduction has occurred. I'm a Fellow in both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers.

Today I am testifying in opposition to the changes included in SB 182, which deals with criminal interference with child custody.

As I indicated in my testimony to this Committee on SB 18, the Uniform Child Abduction Prevention Act (UCAPA), interstate and international abduction (and, indeed, intrastate abduction) of children is a growing problem. Although "stranger" abductions and kidnappings are most publicized – and the most feared – by far the most common child abduction is parental child abduction, which often occurs when parents separate or begin divorce proceedings, but which also may occur in other periods of turmoil. A parent may remove or retain the child from the other seeking to gain an advantage in expected or pending child-custody proceedings or because that parent fears losing the child in those expected or pending child-custody proceedings or a parent may refuse to return a child at the end of an access visit or may flee with the child to prevent an access visit because that parent thinks (rightly or wrongly) that the other parent is going to harm that parent or the child. Parental child abductions may be within the same city, within the state region or within the same country, or may be international. Studies performed for the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention reported that in 1999, 53% percent of family abducted children were gone less than one week, and 21% were gone one month or more.[1]

The problem of interstate and international child abduction by parents and others often occurs when one parent seeks to use the child as a pawn in disputes with the other parent. The excuse used by the abducting parent in a majority of cases – whether it is true or not – is that the other parent has either abused that parent, abused the child, or has threatened to abuse one or the other. In virtually every case I have handled seeking return of an abducted child, the abducting parent asserts that the "left behind" parent abused or threatened to abuse the child – and in virtually every one of those cases, the court before which the case was tried found there was no factual basis for that allegation. Often times, the allegation was made by a person who had previously been found to have abused the person now accused of abuse; often times, the allegation rested on such flimsy and fallacious grounds that the judge hearing the allegations

[1] , NISMART National Family Abduction Report, October 2002.

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dismissed the allegations out-of-hand. Simply stated, the allegations were used to further the abuse that was already carried out, including the abusive action in abducting the child.

I have no doubt that there are persons who keep their children from the other parent truly believing that they are protecting that child from horrible abuse by the other parent and that secreting the child is the only way they have to protect the child from further abuse. The question is, however, who decides who is right and who is wrong and do we encourage people in our ordered society to ignore the mandates of a court order merely because they believe in their own mind that they are right to take unilateral actions affecting the other parent.

The proposition advanced in this bill is the state of the law before passage of the Uniform Child Custody Jurisdiction Act in 1978 – a situation in which parents commonly traveled from state-to-state-to-state seeking a favorable state in which the plead their claims that the other parent wasn't entitled to contact with the child.

Even though strides have been made by limiting the State where child custody actions can be filed by passage of the Uniform Child Custody Jurisdiction Act and federal Parental Kidnapping Prevention Act and, more recently, by procedures for enforcement of temporary and final child custody orders by the Uniform Child Custody Jurisdiction and Enforcement Act, more efficient – not less – and rapid – rather than extended – remedies need to be instituted to protect children against being used as pawns in tragic interstate and international games of "custody-chess." As society has become increasingly mobile, as long distance travel and communication has become easier and less expensive, as intermarriage between faiths, nationalities and social groups has become more common, as society has become more complex, and as the decision of how parent's should divide their time with their children has become less based on old ideas that mothers should automatically be granted primary residency of their children (the tender-years doctrine and other gender based rules), and as the outcomes of child custody decisions have become less predictable, the more often parent's have sought to use extra-judicial and non-judicial methods of gaining advantage in those situations.

As previously stated, a significant portion of my practice involves cases in which interstate or international jurisdictional issues are present and, as a result, I've handled a large number of cases in which threatened or actual parental child abduction is a concern. In those cases, rapid and effective action is critical. Child abduction is child abuse. A parent's attempt to "take the law into their own hands" by spiriting their child away from the other parent – without any authority from anyone other than their own sense of what is "right" harms their child and expresses contempt for ordered society. They seek not what is best for their child, but to impose what they want without regard to any independent or objective assessment of that situation. Numerous psychological studies show the harm visited upon the children by these unilateral acts.[2]

There are much better ways to address abuse than "protecting" a child by hiding that child in violation of court orders and without any independent assessment of the risk as these amendments seek. Kansas has protection from abuse and stalking laws that an abuse victim can

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[2] *See e.g.* Forehand, et al., CHILD ABDUCTION: PARENT AND CHILD FUNCTIONING AFTER RETURN. Clinical Pediatrics 28(7):311-316; The Impact of Parental Abduction on Children: A Review of the Literature, AMERICAN JOURNAL OF ORTHOPSYCHIATRY 62(4):599-206.

use if they truly believe there is abuse. Those laws provide protections against abuse and allow a court to temporarily modify court ordered child custody and parenting time provisions *ex parte* if the judge believes that there is a credible risk based on the information provided that judge. This procedure was used thousands of times just this past year by people alleging abuse and, no doubt, hundreds of times by people alleging that a child was at risk. Is this procedure so cumbersome and so unknown by the general population that we must provide an expansive defense to people who abduct children? I suggest "no." Such a broad-based defense would eviscerate the law protecting children from parental abduction. Such a broad-based defense would give license to abusers to claim that the abused put their children at risk. Such a broad-based defense would create an "open season" on the use of children as pawns in domestic disputes and would encourage disrespect for the law, disrespect for the other parent's rights and disrespect for the child's connections with both parents.

I strongly urge the Committee to reject these amendments. This law does not need weakening; it needs strengthening. We need to protect children from becoming embroiled in an already tense situation that threatens to cause irreparable and unfathomable harm on the family and the subject children – not to encourage it.

Thank you.

Ronald W. Nelson
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SB 182

I am N. Trip Shawver. I am an attorney who has practiced 37 years and spent a lot of time in the family law area. I have dealt with retrieving children who had been abducted and taken to other states many times. I am currently President of the KBA Family Law Section. I am presenting this written testimony in opposition to the proposed bill.

If this bill is enacted, child snatching will again be condoned in Kansas, and Kansas will become a safe harbor for all child snatching parents throughout the United States. K.S.A. 21-3422 starts with the presumption that there is a valid, existing court order designating who is legally supposed to have possession of a child. The proposed change in this bill says if you reasonably believe you have been mistreated (by whom?), you can take the law in your own hands and snatch and hold a child against a valid court order. I don't understand what that has to do with the child. If a parent from Kansas steals a child in violation of a Court order, if they comply with the notification, they can't be arrested. If they go to another state, they can raise the defense that they can't be arrested under the Kansas law from which they fled with the child, therefore, they can keep running with the child. Persons fleeing with a child who had been court-ordered into protective custody with an SRS foster family cannot be arrested in Kansas if they comply or intend to comply with the notification part of law.

What are officers to do when they cannot make an arrest when they have stopped a

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car because of an "Amber Alert," and the parent who has stolen a child in violation of an existing Court order says he/she reasonably believes that the child was being mistreated in the SRS foster care or by the parent with legal residency? Courts generally place a child in one parent's care or foster care for a reason. This severely hinders law enforcement in the prevention of stealing children in violation of a Court order. The officer can be shown a valid Court order declaring one parent is to have custody, and the officer cannot enforce it because the person who may have the child hidden cannot be arrested.

Prior to the enactment of the UCCJA, child snatching was rampant throughout the United States. Kansas enacted the UCCJA in 1978, and Kansas was one of the leaders in the country in enacting the UCCJEA in 2000 (I believe we were the third in the nation). Attached is a copy of the notes to the UCCJEA discussing the need to stop child snatching through the UCCJEA and the PKA (Parental Kidnapping Act). We are attempting to expand this to protect the children from being abducted and taken overseas under the Uniform Child Abduction Prevention Act. Enactment of this bill (SB 182) as law would give any child snatcher a head start to get across the border. Many times when a parent abducts a child in violation of a court order, it ends in violence and tragic results. With this law, law enforcement can only stand by and watch and can't arrest the parent if the parent says the magic words (true or not). If the officer arrests after the magic words are said or filed with a D.A. (how are they going to check?) where they ran from, the officer is subject to suit for unlawful arrest.

I have read the fiscal note on the bill, and it fails to discuss the cost to file and monitor, on a real time basis, all the County Attorney and District Attorney offices in the state to see if the required notice has been received. Some offices are not open 24 hours a day, therefore, that will have to be arranged so an officer in Sedgwick County can call the County Attorney offices in Grant County to see if there has been compliance on Sunday when he is wanting to arrest someone for abduction of a child. What if the person is fleeing from Oklahoma? Do they contact the District Attorney in that Oklahoma County? If so, we will need an interstate network for these filings. The Oklahoma District Attorney also needs to know what to do with the paper he receives. How long does the District Attorney keep the papers?

Many parents think that a child is being mistreated by a person who has lawful custody. Instead of following the Court order until a court-ordered decision is made after a full and complete hearing, the change in the law would allow vigilante justice by allowing the parent to take the law in their hands.

There are no provisions for the statements being under oath. There are no definitions of "mistreatment" or "abuse."

Because this amendment of existing law is proffered to correct possible deficiencies in the UCAPA, I believe it would be prudent to let the UCAPA be enacted and watched before any changes are made.

If this bill must be passed, then at least require law enforcement to take the child

into protective custody so that the child snatcher cannot continue to run with the child.

I have checked with the executive committee of the KBA Family Law Section, and they are opposed to this change.

I have asked Judges and Prosecutors, and they too are opposed. I have asked officers, and they are dismayed at the position they would be put in if this becomes law. I have found few in favor of the change once they understand the ramifications.

I would ask that the bill not be supported. I apologize that I could not appear personally, but I was in trial at the time of your hearing. Thank you for your attention to this matter.

STATE OF KANSAS

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TOPEKA

SENATE

COMMITTEE ASSIGNMENTS
MEMBER: COMMERCE
ELECTIONS AND LOCAL GOVERNMENT
FEDERAL AND STATE AFFAIRS
UTILITIES

If a person suspected of being a sexually violent predator is incarcerated for a crime and is scheduled for release and the prosecutor's review committee has determined that the person meets the definition of a sexual predator this amendment will apply.

The attorney general may file a petition in the county where the person was convicted or charged with a sexually violent offense claiming that the person is such a predator and sufficient facts are available to support such an allegation. The petition from the Attorney General is to be filed within 75 days of written notification by the agency of jurisdiction.

All costs incurred as a result of the incarceration including investigation, prosecution, defense, juries, witness expert fees and expenses, and all other expenses relating to whether a person may be a sexually violent predator shall be the responsibility of the state.

Heretofore, these persons remain in jail while the Attorney General makes a determination in the case and all expenses are paid by the county, an egregious circumstance.

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Testimony on SB 184
Senate Judiciary Committee
Randall Allen, Executive Director
Kansas Association of Counties
February 14, 2007

Chairman Vratil, I am Randall Allen, Executive Director of the Kansas Association of Counties. I am here today to express strong support for SB 184, a bill amending K.S.A. 59-29a04, the Sexually Violent Predators Act.

At our annual conference held last November, our membership unanimously adopted a position supporting legislation requiring the state to pay the costs of cases filed under the Act. The Association has no disagreement with the intent of the Act; however, we view the financial impact of the Act as an unfunded mandate on county government. The Act provides that the Attorney General has the exclusive authority to initiate the procedure to legally determine whether a person is a sexually violent predator. However, currently all of the costs associated with these proceedings are placed upon the county where the criminal conviction was made. This process is time consuming and expensive, and it is difficult if not impossible to budget for the expenses. For example, in 2003, Riley County paid $20,050 in just two cases. Smaller counties have even less budget flexibility to handle unforeseen expenses related to sexual violent predator civil commitment processes. For all counties, however, we question the logic of the placing the financial burden on counties when they have no role in initiating the procedure.

County resources are very scarce and although we support the goals of the Act, all Kansas residents through their state taxes should share the cost of enforcement. As such, we urge the committee to report SB 184 favorably for passage. Thank you.

The Kansas Association of Counties, an instrumentality of member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services to its member counties. For more information, please contact Randall Allen or Judy Moler at (785) 272-2585.

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2-14-07
Attachment 5

Testimony before the Judiciary Committee
Regarding Senate Bill 184
February 14, 2007
Michael B. Kearns
Chairman, Riley County Board of Commissioners

Mr. Chairman and distinguished members of this Committee. My name is Michael B. Kearns and I am a Riley County Commissioner.

I am testifying regarding S.B.184 and the need to place the cost of sexual predator commitment cases with the State of Kansas.

The issue we are addressing is the unreasonable financial burden placed on counties by the Commitment of Sexually Violent Predators Act, K.S.A. 59-29a01 *et seq.* (The "Act"). As you know, under the Act if someone is convicted in a county district court as a sex offender, the Kansas Attorney General has the sole discretion to determine whether to file proceedings to designate the individual a "sexually violent predator" in an attempt to have that person, after release from prison, committed until such time as the person is safe to rejoin society. Even though the Attorney General in his or her sole discretion brings the actions, the county must pay the cost of the action. These proceedings can be very expensive. Between 1998 and 2005 Riley County had 7 sexual predator cases brought in our District Court. The total expense to Riley County for those cases was $86,889.14. One case alone, which ended in dismissal, cost Riley County $29,498.26.

Because cases under authority of the Act are civil cases brought to protect all Kansans from these transitory predators, and since these cases are Attorney General driven from start to finish, we believe it is only appropriate that the State be the responsible party for payment of all costs in these cases. We respectively urge that S.B.184 be passed but with it modified in such a manner that the State of Kansas directly pays the costs associated with sexual predator commitment cases

Thank you for considering Senate Bill 184.

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2-14-07
Attachment 6

KANSAS
DEPARTMENT OF CORRECTIONS

Kathleen Sebelius, Governor
Roger Werholtz, Secretary

www.dc.state.ks.us

Testimony on SB 184
to
The Senate Judiciary Committee

By Linden G. Appel
Chief Legal Counsel
Kansas Department of Corrections
February 14, 2007

SB 184 would amend K.S.A. 59-29a04, a section of the Kansas Sexually Violent Predators Act, (KSVPA) by providing that all costs incurred in the determination of whether a person may be a sexually violent predator are to be borne by the Kansas Department of Corrections, including, but not limited to costs of investigation, prosecution, defense, juries, witness fees and expenses, expert fees and expenses, and other unspecified expenses associated with such a judicial determination. The Department does not support SB 184.

Under current law, established by the Kansas Supreme Court in the case of In re Care & Treatment of Raborn, 259 Kan. 813, 819-21, 916 P.2d 15 (1996), counties are responsible for costs of appointed counsel and expert witness fees in proceedings under KSVPA, pursuant to the provisions of K.S.A. 20-348, coupled with the silence of the KSVPA on the subject. By extension, the other costs enumerated in SB 184, with the possible exception of salaries of prosecutors, also fall to the respective counties to pay. The Department wishes to state and emphasize that it takes no position in regard to the propriety or soundness of the ruling in that case, nor on the proposition that counties should, as a matter of state policy, be the governmental entities responsible for payment of the costs of a KSVPA proceeding.

However, the Department does emphatically state that it opposes shifting of the fiscal burden for KSVPA proceedings to the DOC's shoulders. There are three reasons for this position.

First, in regard to those proposed patients who are convicted felons committed to the custody of the Secretary of Corrections, at the juncture in an offender's career in which a KSVPA proceeding falls, i.e., immediately following release from the prison portion of a felony sentence, the Department's only legal connection with the offender is that of supervisor of the offender's postrelease supervision term, or in the case of indeterminate-sentenced offenders, parole or conditional release. That legal relationship has never before been considered to present a basis for imposition upon the Department of the costs

of similar forensic proceedings--mental health commitment proceedings, pursuant to K.S.A. 59-2946, *et seq*., drug and alcohol treatment commitments pursuant to K.S.A. 59-29b45, *et seq*., or guardian or conservatorship proceedings pursuant to K.S.A. 59-3051, *et seq*. Simply put, the legal relationship between the State of Kansas, as represented by the Department of Corrections, and the released offender on some form of community supervision is not that of guardian and ward, nor does the Department stand *in loco parentis* to convicted felons committed to its custody.

Secondly, as pointed out in In re Care and Treatment of Raborn, *supra*, at page 817, not every person subject to a KSVP commitment must be a convicted criminal. See K.S.A. 2006 Supp. 59-29a02(13), defining as an instance of a "sexually violent offense...any act which either at the time of sentencing...or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated." In such an instance, there would be no connection whatsoever between the proposed patient and the Department.

Finally, the Department has absolutely no control over the course of the proceedings in a KSVP case once the petition is filed, when the costs of the proceeding are incurred, and its role prior to filing is strictly and only advisory. Any case proposed for a KSVP commitment by the multidisciplinary team established and maintained by the Department is referred to the Attorney General's Office for assessment and final determination by a prosecutor's review committee as to whether or not a petition will be filed; the recommendation by the multidisciplinary team is non-binding. See K.S.A. 59-29a03(d)&(e).

In short, the nexus between the Department and the typical proposed patient in a KSVP proceeding is not such that imposition of the costs of the proceeding upon the Department is self-evident or otherwise logical. Therefore, the Department of Corrections opposes SB 184.

KPBBA

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General Counsel
Christopher Joseph, Joseph & Hollander P.A.

Kansas Professional Bail Bond Association, Inc.

TO: Senate Judiciary Committee

FROM: Christopher M. Joseph, General Counsel

DATE: February 14, 2007

RE: Support for SB 203

Good morning Chairman and members of the Committee, my name is Chris Joseph and I am the General Counsel for the Kansas Professional Bail Bond Association, Inc. The KPBBA is an association of professional sureties in the State of Kansas. We are here to testify today in support of SB 203.

SB 203 accomplishes two objectives: (1) It eliminates a judicially-created form of bail that puts the courts in the bail bond business, and (2) it clarifies when bonds may be forfeited and revoked, thereby creating uniformity across the state.

Courts should not be in the bail bond business

Supreme Court Administrative Order 96, creates a hybrid bond, known as the "own recognizance-cash deposit bond" or "ORCD bond." The order authorizes judges to allow defendants to post bond by paying 10% of the total bond, in the form of cash, to the district court clerk. The court keeps 10% of this payment as an "administrative fee." This "ORCD bond" is set up to be direct competition to bondsmen. Jail staff routinely tell defendants that they should pay 10% to the courts instead of to a bondsman.

A brief history on Supreme Court Administrative Order 96 is helpful. On October 26, 1993, the Shawnee County District Court adopted local rule 3.324. The rule created the ORCD bond. **On February 22, 1994, Attorney General Robert Stephan issued Attorney General Opinion No. 94-25, concluding that the Shawnee County bond program was prohibited by statute.** *See* Exhibit 1. The opinion addressed concerns expressed by Representative Marvin Smith and Senator Lana Oleen. The Attorney General noted that "while courts have inherent authority to make general rules, those rules must conform to constitutional and statutory provisions." The Attorney General concluded that the ORCD hybrid bond was prohibited by statute. **On January 17, 1995, the Supreme Court issued Administrative Order Number 96, allowing district courts to implement programs allowing the bonds that Bob Stephan had determined were illegal.** *See* Exhibit 2. Administrative Order 96 provided that "in addition to the current statutory pretrial release system, regulation of the conditions of and procedures for pretrial release of persons charged with crime in the district courts of Kansas may be accomplished by promulgation of a local rule substantially as provided in the attached example." The attached rule was Shawnee County rule 3.324. The order was signed by former Chief Justice Richard W. Holmes.

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This "10% to the courts" bond was modeled after programs in other states. **Studies have shown that such programs result in a high rate of defendants failing to appear in court as well as overwhelming law enforcement with warrants.** *See* Exhibit 3. Without a massive increase in funding to hire new officers, law enforcement is unable to actively seek out defendants who failed to appear in court. While such defendants roam the streets, they commit other crimes. **Each year, numerous such crimes are committed in Kansas by defendants who post this hybrid bond, fail to appear in court, and remain at large for months because no one is actively searching for them.** *See* Exhibit 4.

Studies attached to this memorandum, Exhibit 1, provide compelling statistics. For example, according to the Helland & Tabarrok study:

> Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance and if they do fail to appear they are 53 percent less likely to remain at large for extended periods of time. Deposit bonds perform only marginally better than release on own recognizance.... Given that a defendant skips town, however, the probability of recapture is much higher for those defendants on surety bond. As a result, the probability of being a fugitive is 64 percent lower for those released on surety bond compared to those released on cash bond. These finding indicate that bond dealers and bail enforcement agents ("bounty hunters") are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law.

Helland & Tabarrok, *Public versus Private Law Enforcement: Evidence from Bail Jumping*, 47 Journal of Law and Economics 93 (April, 2004).

SB 203 recognizes that the fee paid to bondsmen by defendants provides the funding for bondsmen to track whether defendants appear in court and, if they fail to appear, actively hunt them down and return them to jail. Without bondsmen providing this essential service, when a defendant fails to appear in court all that happens is that a warrant is issued, the criminal process stops, and the courts wait for the defendant to come into contact with law enforcement, most often in the form of a traffic stop. **Unless the legislature is prepared to provide millions of dollars to fund the hiring and training of hundreds of new police officers to actively hunt down defendants who fail to appear, SB 203 should be passed.**

Bail should be forfeited only upon a failure to appear in court

Section 9 of the Kansas Bill of Rights has provides for the right to bail by sureties. The definition of "bail" as a verb is this:

> To deliver the defendant to persons who, in the manner prescribed by law, become securities for his appearance in court. To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called "bail," because the party arrested or imprisoned is delivered into the hands of those who bind themselves for his forthcoming.

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Black's Law Dictionary 127 (5th ed. 1979). As a noun, "bail" means:

> The surety or sureties who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated. Those persons who become sureties for the appearance of the defendant in court.

Black's Law Dictionary 128 (5th ed. 1979).

Case law has also made it clear that bail means delivering a person to a surety who guarantees the person's appearance in court. **A surety is not charged with any duty other than guaranteeing appearance in court. It follows that the surety cannot be made to pay the court if the defendant makes all court appearances.** This rule is followed by the vast majority of the courts in Kansas.

Unfortunately, a minority of courts attempt to forfeit bond and order a bondsmen to pay when a defendant violates some other condition of bond, such as refraining from the use of drugs or alcohol. SB 203 recognizes that the purpose of bail, indeed the constitutional guarantee to bail, is limited to guaranteeing that a defendant appears in court. A surety should not be required to pay the bond when a defendant violates a condition of bond other than failing to appear in court.

While a surety cannot be held to any guarantee other than assuring that a defendant appears in court, the court should have the authority to revoke bond for violations of any condition of bond. As written, the statute does not differentiate between revocation and forfeiture. SB 203 recognizes this distinction and limits bond forfeitures to instances where a defendant fails to appear in court and, at the same time, allows a court to revoke bond and return a defendant to custody when other conditions of bond are violated.

Office of the Attorney General
State of Kansas

Opinion No. 94-25
February 22, 1994

Re: Criminal Procedure--Conditions of Release--Release Prior to Trial--Local Court Rule Concerning Pretrial Release

Synopsis: District court rule 3.324 does not sanction the practice of nonjudicial officers admitting persons in custody to bail. Rather, the court has determined bond amounts and types of bonds for certain crimes and the nonjudicial officers are charged merely with executing the court's mandate.

K.S.A. 22-2814 et seq. do not authorize the practice of allowing a defendant to post 10% of the bond amount with the clerk of the district court. Furthermore, it is not permissible for a court to retain any portion of a cash deposit for the purpose of bond, however, the "fee" which the third judicial district is currently collecting from the defendants is not a "fine, penalty, or forfeiture" pursuant to K.S.A. 1993 Supp. 20-350 and, therefore, does not have to be turned over to the state treasurer.

K.S.A. 22-2809 requires that a court release a surety on the bond if the latter surrenders the defendant and requests discharge from the obligation. Consequently, a court may not impose a condition in the bond obligation which requires that a surety remain liable on the bond until the criminal proceeding is over.

Paragraph 15 of the district court rule requires that the court's order reflect the type of bond procedure that the defendant is using. Cited herein: K.S.A. 1993 Supp. 20-350; 22-2802; K.S.A. 22-2809; 22-2814; Kan. Const., art. 2, § 16.

The Honorable Marvin Smith
State Representative, Fiftieth District
State Capitol, Room 115-S
Topeka, Kansas 66612

The Honorable Lana Oleen
State Senator, Twenty-Second District
State Capitol, Room 136-N
Topeka, Kansas 66612

Honorable William Carpenter
Administrative Judge of the Third Judicial District
Shawnee County Courthouse
Topeka, Kansas 66603-3922

Dear Representative Smith, Senator Oleen and Judge Carpenter:

You request our opinion concerning a pretrial release program embodied in district court rule no. 3.324 of the third judicial district. Briefly, the program which is administered by court services officers and employees of the department of corrections establishes an automatic bond schedule for pretrial release for certain crimes. Representative Smith and Senator Oleen are concerned that certain facets of this program violate the statutes which deal with pretrial release and surety bonds. Those concerns can be summarized as follows:

1. Do court services officers (CSOs) and employees of the department of corrections (DCOs) who are sworn as deputy clerks of the district court, have authority to admit to bail persons in custody?

2. Is it permissible for a court to allow an accused person to post 10% of the amount of an appearance bond?

3. Is it permissible for a court to retain 10% of an appearance bond as an administrative "fee" and must the court turn over this amount to the state treasurer pursuant to K.S.A. 1993 Supp. 20-350?

4. Does the court have the authority to impose certain conditions upon the surety relative to the surrender of the defendant?

5. If a defendant requests to be released on a professional surety bond, can the court modify the bond which is currently in place to reflect that change?

Our inquiry will focus on whether certain provisions of district court rule 3.324 violate the statutes. In order to make that determination, it is important to not only review the rule itself but to understand the mechanics of how it operates.

The rule establishes an automatic bond schedule (schedule) for certain crimes ranging from county resolution violations to "C" felonies. The schedule sets forth the amount and type of bond which the court will accept. Under certain conditions, persons in custody are not eligible for schedule bonds. (Some of those circumstances include situations involving prior bond forfeitures, extradition, prior felony convictions and if there is a threat to public safety or fear that the accused may flee the jurisdiction.) If the schedule requires a surety bond in the amount of $1,000 or less, Shawnee county residents may be released on their own recognizance if they or their surety have significant ties to the county. (E.g. real estate, employment, Kansas driver's license, etc.) Such a defendant as well as his or her surety enter into a written recognizance bond by which the defendant agrees to appear in court when required. If the defendant fails to appear, the bond is forfeited and the surety or the defendant is liable for the face amount of the bond.

If the schedule requires a surety bond in an amount over $1,000 and less than $2,500, Shawnee county residents may be released if they or their surety meet the significant ties condition and if the defendant posts an "OR cash deposit bond" (OR-CD). This bond requires that the defendant or surety deposit 10% of the face amount of the bond to the clerk of the district court. If the defendant fulfills all the conditions that the bond requires, 90% of the deposited amount is

returned to the defendant and the clerk retains the remainder as an "administrative fee" which is then turned over to the county. For example, if the bond amount is $2,500, the defendant or surety pays $250 to the clerk. If the defendant complies with the bond conditions, $225 is returned to him or her and the clerk retains $25. If the defendant fails to comply and the bond is forfeited the surety or the defendant is liable for the face amount of the bond minus the amount previously deposited.

With this background, we will answer your queries keeping in mind that while courts have inherent authority to make general rules, those rules must conform to constitutional and statutory provisions. Therefore, a court cannot promulgate rules which contravene statutory provisions. Gas Service v. Coburn, 389 F.2d 831 (10th Cir. 1968), reversed on other grounds; Synder v. Harris, 89 S.Ct. 1053, 394 U.S. 332, 22 L.Ed.2d 319 (1969); 21 C.J.S. Courts § 126. Supreme court rule 105 authorizes judicial districts to make rules necessary for the administration of their affairs to the extent that they are not inconsistent with applicable statutes.

***3** 1. Do court services officers and employees of the department of corrections who are sworn are deputy clerks of the district court have authority to admit to bail persons in custody?

Paragraph 1 of district court rule 3.224 states, as follows:

"1. Court services officers (CSO) and Shawnee county department of corrections officers (DCO) who are sworn as deputy clerks of the district court, are authorized to admit to bail persons in custody in accordance with the provisions of this order."

Absent statutory authority nonjudicial officers may not admit accused persons to bail. 8 C.J.S. Bail § 50. Specifically, a district court clerk has no power to take or approve recognizances and the court may not deputize the clerk to do so. Morrow v. State, 5 Kan. 563 (1869); 8 C.J.S. Bail § 52; 8 Am.Jur.2d Bail and Recognizance § 21. However, admitting a person to bail is an entirely different act from the taking, accepting or approving bail after its allowance by a court; the former is generally considered to be a judicial act to be performed by a court or judicial officer while the latter is merely a ministerial function which may be performed by any authorized officer. 8 C.J.S. Bail § 39, 8 Am.Jur.2d Bail and Recognizance § 9. The act of taking and approving the bail bond in accordance with court orders has been held to be a ministerial act which may be delegated without statutory authority. Thus, after bail has been allowed and its amount fixed by the proper judicial officer, a clerk, by direction of the court, may accept and approve a bail bond. 8 C.J.S. Bail, § 53.

While the choice of language in paragraph 1 of the court rule is unfortunate because it appears to allow CSOs and DCOs to admit people to bail, in actuality, this is not what occurs. The court, through its inherent rule making power, has established bond amounts and types of bonds which are required for certain crimes. Basically, the court has decreed that if certain conditions exist, a person may be released from custody. The CSOs and DCOs do not set bond amounts nor do they determine whether a surety is required. They merely determine whether the defendant meets the conditions that the court has already prescribed, and, if so, they ensure that the appropriate paperwork is filled out by the defendant who is then released. In effect, the court has preset the bond amounts, the types of bonds, and the conditions under which a defendant may be released

and it is the responsibility of the nonjudicial officers to ensure that the court's order is carried out. Consequently, it is our opinion that the district court rule does not sanction the practice of nonjudicial officers admitting persons in custody to bail. Rather, the nonjudicial officers are merely performing ministerial acts pursuant to court order.

You indicate concern that this procedure may violate K.S.A. 1993 Supp. 22- 2802 by releasing defendants prior to their first court appearance. This statute states, in relevant part, as follows:

"Release prior to trial. (1) Any person charged with a crime shall, at the person's first appearance before a magistrate, be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount specified by the magistrate and sufficient to assure the appearance of such person before the magistrate when ordered and assure the public safety."

There is nothing in the statutes which prohibits the release of a defendant on bond prior to his or her first appearance. In fact, K.S.A. 22-2901(1) and (3) contemplate that a person who is arrested be taken "without unnecessary delay" to a magistrate who can then fix the terms and conditions of an appearance bond. Consequently, it is our opinion that K.S.A. 1993 Supp. 22-2802 provides that if the defendant has not been released prior to the first appearance, the defendant will be released upon execution of an appearance bond.

2. Is it permissible for a court to allow accused persons to post 10% of the amount of an appearance bond?

K.S.A. 1993 Supp. 22-2802(3) and (4) provide, in relevant part, as follows:

"(3) The appearance bond shall be executed with sufficient solvent sureties who are residents of the state of Kansas, unless the magistrate determines, in the exercise of such magistrate's discretion, that requiring sureties is not necessary to assure the appearance of the person at the time ordered.

"(4) A deposit of cash in the amount of the bond may be made in lieu of the execution ofthe bond by sureties."

The statutes do not specifically address the propriety of the court's 10% OR- CD program. K.S.A. 1993 Supp. 22-2802 was originally enacted in 1970 and it drew heavily on federal bail reform law which was designed to encourage the release of defendants without money bail and to minimize the number of cases where the defendant would be detained pending trial. Kansas Judicial Council Bulletin, October, 1969, p. 45. Release on the person's own recognizance was the norm and money bail or pretrial detention in lieu thereof was contemplated only when special circumstances existed which could best be met by use of traditional bond.

K.S.A. 1993 Supp. 22-2802 contemplates three types of bonds: Appearance bonds with sureties, appearance bonds without sureties, and a cash bond in the full amount. On at least three occasions legislation has been introduced which would have variously prohibited or codified this 10% program. (House bill no. 2009 introduced during the 1985 session, house bill no. 2961 in 1986 and house bill no. 2252 in 1987). All three bills were defeated at various stages.

The court justifies its use of this program under the authority of K.S.A. 22-2814 et seq. which authorize each district court to "establish, operate and coordinate release on recognizance programs and supervised released programs". We have reviewed the legislative history of these statutes in order to determine whether the legislature intended to allow such a program under the auspices of these recognizance statutes.

These statutes were originally enacted in 1978, however, the supreme court concluded that they violated the one subject rule in article 2, § 16 of the Kansas constitution. State ex rel. Stephan v. Thiessen, 228 Kan. 136 (1980). The statutes were reenacted in 1981 without the constitutional infirmities.

Recognizing the unfairness of a system that relied heavily on money bail and professional bondsmen, these statutes were enacted to rely less on the financial resources of the defendant and concentrate on the risk of nonappearance. Minutes, Senate Committee on Federal and State Affairs, March 23, 1978.

"House bill No. 3129 would permit the establishment of release-on- recognizance (ROR) and supervised released programs in the state. These programs will permit the pretrial release of those selected individuals who are unable to post money bond but who have stable roots in the community indicating that they will appear at trial and their release will not jeopardize public safety. House bill no. 3129 would authorize each district court to establish, operate, and coordinate ROR and supervised released programs which would be administered by probation officers and other personnel of the district court." Proposal No. 14, Report on Kansas Legislative Interim Studies to the 1978 Legislature, Feb. 1978, p. 56.

Neither proposal no. 14 nor any of the testimony before the senate federal and state affairs committee included any discussion of a 10% cash deposit bond program. However, it is interesting to note that included in house bill no. 3129 was an amendment to then K.S.A. 1977 Supp. 22-2802 which would have allowed a defendant to execute an appearance bond and deposit with the court a sum not to exceed 10% of the bond amount -- the deposit to be returned if the defendant made the required appearances. (House bill no. 3129, sec. 5). However, the senate committee struck the amendment and the 10% cash deposit provision was never enacted.

In determining legislative intent, the historical background, legislative proceedings and changes made in the statutes during the course of their enactment may be considered in determining legislative intent. Urban Renewal Agency of Kansas City v. Decker, 197 Kan. 157 (1966). Rejection by the legislature of a specific provision contained in a proposed enactment is persuasive to the conclusion that the act should not be so construed as in effect to include that provision. City of Manhattan v. Eriksen, 204 Kan. 150 (1969). (In Erikson, the court interpreted the eminent domain act as not including as an element of damage the cost of removal of personal property -- noting that while the original bill included such a cost as an element of damage, the senate judiciary committee deleted the item.)

We cannot ignore the fact that when the ROR statutes were being considered this 10% cash deposit program - which is currently in use by the third judicial district court - was specifically rejected. Consequently, it is our opinion that the district court's 10% OR-CD program goes

beyond the authority granted to district courts under the purview of K.S.A. 22-2814

***6** 3. Is it permissible for a court to retain 10% of the OR-CD bond as an administrative fee or must the clerk of the district court turn it over to the state treasurer pursuant to K.S.A. 1993 Supp. 20-350?

In attorney General Opinion No. 89-113, we concluded that if an appearance bond is in the form of a cash deposit, the authority of the court to retain the deposit or to apply any of it to court costs or fines depends on the statute because the court has no inherent power to do so. In the absence of such a statute, retention of the cash deposit is impermissible. While we realize that this opinion addressed K.S.A. 1993 Supp. 22-2802(4) - (a deposit of cash in the amount of the bond may be made in lieu of the execution of the bond by sureties), the rationale can be applied to the situation at hand where the court accepts a percentage of the bond amount in cash and then retains a portion of that cash as a "fee." Consequently, it is our opinion that the third judicial district court lacks the power to withhold any amount from the cash deposit because there is no statutory authorization to do so.

However, this "fee" is not a "fine, penalty or forfeiture" which would trigger the operation of K.S.A. 1993 Supp. 20-350 which requires that "all moneys received by the clerk of the district court from the payment of fines, penalties and forfeiture shall be remitted to the state treasurer." A fee is generally regarded as a charge for some service whereas a fine, penalty, or forfeiture is a pecuniary punishment imposed by a tribunal for some offense. Executive Aircraft Consulting Inc. v. City of Newton, 252 Kan. 421 (1993); Vanderpool v. Higgs, 10 Kan.App.2d 1, 2 (1984); United States v. Safeway Stores, 140 F.2d 834, 839 (10th Cir. 1994); Missouri-Kansas-Texas Railroad Company v. Standard Industries Inc., 192 Kan. 381, 384 (1964). It is our opinion that the fees collected by the district court clerk do not fall under the purview of K.S.A. 1993 Supp. 20-350 and, therefore, do not have to be turned over to the state treasurer.

4. Does the court have the authority to impose certain conditions upon the surety relative to the surrender of the obligor?

Paragraph no. 14 of the district court rules states:

"It is a condition on all private or professional surety bail bonds in this judicial district that sureties shall agree to remain liable on all bail bonds until all proceedings arising out of the arrest and/or case for which the bond was posted are concluded or until they are released by court order. No surety shall be released on their obligation on a bail bond once posted without court approval. Any surety or person arrested and turned in on bond by their surety, may file a motion with the court for a determination of whether or not the bail bonds should be revoked or continued."

Your concern is whether this provisions violates K.S.A. 22-2809 which provides:

"Any person who is released on an appearance bond may be arrested by his surety ... and delivered to a custodial officer of the court in any county in the state in which he is charged and brought before any magistrate having power to commit for the crime charged; and at the request of the surety, the magistrate shall commit the parties so arrested and endorse on the bond ... the discharge of such surety; and the person so committed shall be held in custody until released as

provided by law." (Emphasis added.)

An appearance bond is a contract between the principal (defendant) and surety on the one hand and the state on the other. State v. Indemnity Insurance Company of North America, 9 Kan.App.2d 53, 55 (1983). Theoretically, the court is a party to the contractual obligation between the surety and the defendant and, therefore, would have the right to negotiate a condition that the surety remain liable on the bond until the conclusion of the proceedings or until the court releases the surety on the bond. The problem with this theory is that we interpret K.S.A. 22-2809 as requiring the court to discharge the surety upon the latter's request (if the defendant is surrendered) and consequently paragraph 14's requirement that sureties agree to remain liable until the criminal proceeding is over violates K.S.A. 22-2809's provision that sureties be released upon request. However, it is appropriate for the court to require that a surety file a motion for release as long as that motion is granted without delay.

5. If the defendant requests to be released on a professional surety bond, can the court modify the bond which is currently in place to reflect such a change?

Paragraph 15 of the district court rule states:

"Bail bonds designated as OR-cash, cash or professional surety shall be written only on the terms specified by the district judge. If a defendant requests release on a professional surety bond when cash or OR-cash deposit has been specified, the CSO or DCO shall contact the judge authorizing the bond, for modification of the bond."

Whenever a defendant has been released on bond, the court issues an order which designated the bond amount, bond conditions, and the type of bond (i.e. professional surety, nonprofessional surety, OR, OR-cash deposit, OR- supervised, cash). If the defendant desires to use a professional surety, the order will reflect this fact. If the order indicates a bond with a nonprofessional surety and the defendant desires to use a professional surety instead, then paragraph 15 requires that the CSO or DCO contact the court so that the order will reflect the change.

Senator Oleen indicates concern that the court is somehow restricting the ability of a defendant to obtain the services of a professional bondsman by requiring that a defendant select the OR-CD program. This complaint is beyond our purview and moot in light of our opinion that the court's OR-CD program goes beyond the authority granted to the court under K.S.A. 22-2814 et seq. We interpret this paragraph to require that the court order reflect the type of bond the defendant is currently using as well as the conditions of the bond and we find no violation of any statute in this procedure.

Summarizing our opinion, we conclude the following:

1. District court rule 3.324 does not sanction the practice of nonjudicial officers admitting persons in custody to bail. Rather, the court has determined bond amounts and types of bonds for certain crimes and the nonjudicial officers are charged merely with executing the court's mandate.

***8** 2. K.S.A. 22-2814 et seq. do not authorize the practice of allowing a defendant to post 10% of the bond amount with the clerk of the district court.

3. Furthermore, it is not permissible for a court to retain any portion of a cash deposit. However, the "fee" which the third judicial district is currently collecting from defendants is not a "fine, penalty, or forfeiture" pursuant to K.S.A. 1993 Supp. 20-350 and, therefore, would not be required to be turned over to the state treasurer.

4. K.S.A. 22-2809 requires that a court release a surety on the bond if the latter surrenders the defendant and requests a discharge from the obligation. Consequently, a court may not impose a condition in the bond obligation which requires that a surety remain liable on the bond until the criminal proceeding is over.

5. Paragraph 15 of the district court rule requires that the court order reflect the type of bond procedure that the defendant is currently using.

Very truly yours,

Robert T. Stephan
Attorney General of Kansas

Mary Feighny
Assistant Attorney General

Kan. Atty. Gen. Op. No. 94-25, 1994 WL 869642 (Kan.A.G.)

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order No. 96

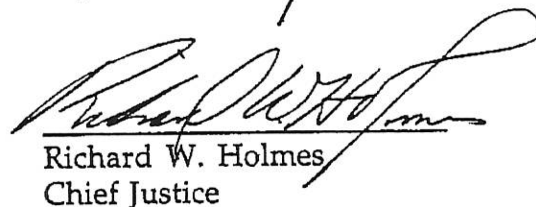
In re: Pretrial Release

1. Reference: Article 1, Section 3, Kansas Constitution, K.S.A. 20-101, and K.S.A. 20-342.

2. In addition to the current statutory pretrial release system, regulation of the conditions of and procedures for pretrial release of persons charged with crime in the district courts of Kansas may also be accomplished by promulgation of a local rule substantially as provided in the attached example. Examples of necessary supporting materials are also attached.

3. Judicial districts whose current own recognizance-cash deposit pretrial release programs are not substantially in compliance with the attached example have until July 1, 1995, to submit a local rule substantially in compliance with the attached example. All other districts may adopt a local rule for this purpose whenever the judges of the district court determine such a rule should be adopted. An information copy of any OR-cash deposit local rule adopted shall be forwarded to the office of judicial administration concurrently with filing with the clerk of the supreme court.

BY ORDER OF THE COURT this 17th day of January 1995.



Richard W. Holmes
Chief Justice

Attachments

IN THE JUDICIAL DISTRICT OF KANSAS

DISTRICT COURT RULE NO.
PRETRIAL RELEASE

This District Court Rule establishes procedures and qualifications for release from custody in situations other than upon specific direction from a judge of the district court. (If applicable--This rule supersedes ________________________.)

1. Court Service Officers, Deputy Sheriffs and Correctional Officers who are sworn in as Deputy Clerks of the District Court are authorized to permit persons in custody to post bail bonds in accordance with the provisions of this rule.

2. The attached Automatic Bond Schedule (ABS) is approved for the amount of bail bonds for particular crimes. For those offenses where no bond is set or is designated "see judge," the accused shall be brought before a judge of the district court at the next court date to have a bond set. If a person has been in custody for 48 hours and no bail bond has been set, a judge of the district court shall be contacted.

3. Notwithstanding the ABS, persons in custody with any of the following conditions are not eligible for an ABS bond and shall be brought before a judge to have bond set:

(a) Prior bond forfeitures,
(b) Has been extradited or is awaiting extradition to another state,
(c) Has a detainer or hold from other states or federal authorities,
(d) Has a prior conviction of a felony classified as A, B, or C or level 5 or lower.
(e) Has been detained for a violation of probation.
(f) If a deputy clerk believes in good faith that the accused may flee, pose a danger to public safety or is not eligible for bond under the ABS, the matter of setting a bail bond shall be referred to a judge of the district court.

4. On bonds requiring $1,000 surety or less, __________ County residents eligible for bond under the ABS may be released on the person's own recognizance bond (OR) if they meet one of the following criteria:

(a) Own real estate located in ____________ County in own name; or
(b) Any three of the following five:
  (1) Resident of __________ County- more than 6 months:
  (2) Valid Kansas drivers license;
  (3) Employment in __________ County-more than 3 months;
  (4) Current telephone service-in own name;
  (5) Is enrolled as a student in the State of Kansas; or
(c) Active duty military and stationed at a military base in the State of Kansas.

All factors shall be determined upon a sworn statement made under penalty of perjury by the accused or the accused's private surety. Court service officers, deputy sheriffs or correctional officers who are sworn in as deputy clerks are authorized to require further verification of any item as they deem appropriate before permitting a person in custody to post bond. Victims reflected in an arrest report cannot act as private surety on a bail bond.

5. On bonds requiring $1,000 surety or less ______________ County residents eligible for bond under the ABS, but not meeting the criteria at paragraph 4, may be released on bond with a surety if the surety completes a sworn statement and qualifies under both items (a) and (b) of paragraph 4.

6. On bonds requiring surety of more than $1,000 and up to $2,500, ________ County residents eligible for bond under the ABS may be released by posting an OR cash deposit bond and meeting one of the criteria set forth in paragraph 4, sections (a), (b) or (c). A __________ County resident eligible for release under the ABS, but not meeting the criteria of paragraph 4 may be released by posting an OR-cash deposit bond and obtaining a private surety who qualifies under both items (a) and (b) of paragraph 4.

7. Persons may be admitted to personal recognizance cash deposit (OR-cash deposit) bail bonds who meet the criteria set forth in this rule or upon special screening and recommendation of a person authorized to permit posting of a bond in accordance with this rule. Any person determined eligible to be admitted to bail on an OR-cash deposit bond shall deposit with the clerk of the court cash equal to 10 percent of the amount of the bond and execute a bail bond in the total amount of the bond. All other conditions of the bond set by the court and this rule must be satisfied.

8. When an accused person qualifies for an OR-cash deposit bond, the cash deposit shall be held by the Clerk of the Court until such time as the accused has fully performed all conditions of the bond and is discharged from the person's obligation by the court. When an accused has been so discharged, 90% of the cash deposit shall be returned to the accused upon surrender of the cash deposit receipt previously issued by the clerk. Ten percent of the cash deposit shall be retained by the Clerk as an administrative fee. Cash deposit bonds shall be placed in an interest-bearing financial institution account by the clerk. No interest shall be paid to the person or surety posting a cash deposit bail bond. Annually the aggregate amount of administrative fees retained and interest earned on cash deposit bail bonds shall be turned over to the general fund of ________ County.

9. A cash receipt for an OR-cash deposit bail bond shall be issued only to the person being released on bond. Any person posting cash for another person shall be informed that any cash posted as a bail bond is the property of the accused person and may be subject to forfeiture, application to payment of fines, court costs and fees, and will be refunded only to the arrested party. Any arrangements to furnish bond money are between the lender and the accused person.

10. When an accused person who has posted a cash deposit bail bond is discharged from the person's obligation to the court and files the receipt for the cash deposit with the clerk at the conclusion of the proceedings, the refundable portion of the cash deposit may be allocated to restitution, court costs or to an attorney for payment of attorney fees, upon order of the court.

11. All OR-cash deposit bail bonds issued in this county shall be subject to the condition of forfeiture and the amount deposited will become the absolute and permanent property of the district court or of ______________ County should one or more of the following occur:

(a) Accused person or surety makes a false statement or representation regarding the criteria for OR-cash deposit as set forth in paragraphs 3 through 6, above.
(b) Accused person fails to appear in court pursuant to court order at any stage of the proceedings.
(c) Accused person fails to report as directed to CSO.
(d) Accused person fails to perform any other condition of bail imposed by the court.

12. All persons admitted to bail on OR or OR-cash deposit bond shall be required to report as directed to a court service office (CSO).

13. Other special conditions may also be imposed by the court as a requirement of release on OR or OR cash deposit bonds.

14. All private or professional surety bonds in this district court shall have as a condition that sureties shall agree to remain liable on any bail bond until all proceedings arising out of the arrest or case for which the bond was posted are concluded or the surety is released by court order. No surety shall be released on an obligation on a bail bond without court approval. Either a surety or a person arrested and turned in on a bond by a surety may file a motion with the court for a determination of whether the bail bond should be revoked or continued in force.

15. Bail bonds designated as OR-Cash, Cash or Professional Surety shall be written only on terms specified by a judge of the district court. If an accused person requests release on a professional surety bond when cash or an OR-cash deposit bond has been specified, the deputy clerk shall contact the judge authorizing the bond for modification of the bond.

16. This rule shall not limit or restrict the right of any person to seek or obtain pretrial release under other statutory methods of admitting accused persons to bail or the authority of a judge of the district court to determine bail. The participation of an accused person in this program shall be on a voluntary basis.

17. This rule shall <u>not</u> apply to civil bench warrants.

18. Definitions:
   (a) The term "cash" as used in this rule means United States currency, a money order, or a bank draft or certified check drawn on a Kansas banking or savings and loan institution.
   (b) The term "court" as used in this rule refers to the___________ County District Court.
   (c) The term "accused person" as used in this rule means a person in custody by reason of an arrest report or a defendant in a criminal, driving under the influence of drugs or alcohol, or traffic case.

BY ORDER OF THE JUDGES OF THE DISTRICT COURT IN ___________ COUNTY, KANSAS.

Dated this ___________ day of _______________ 19___.

____
Administrative Judge

IN THE DIST CT COURT OF COUNT , KANSAS
JUDICIAL DISTRICT

INFORMATION REGARDING OR - CASH DEPOSIT BONDS

1. Kansas residents who meet certain specified screening requirements may be eligible for release on their own ...izance by posting a cash deposit with the Clerk of District Court.

2. When a defendant qualifies for on OR - Cash Deposit bond, ten percent of the bond in cash shall be deposited with and held by the Clerk of District Court until such time as the defendant has fully performed all conditions of the bond and is discharged, ninety percent of the cash deposit shall be returned to the defendant upon filing the receipt with the Clerk. Ten percent shall be retained by the Clerk as an administrative fee. No interest will be paid on the cash deposit. The Court will only refund cash deposits to the defendant or persons in possession of the receipt and an assignment executed by the defendant.

3. The cash deposit shall be retained by the Clerk of the Court until the defendant has performed all conditions of the bond and has been discharged from all obligations by the Court, including fines, court costs, attorneys fees, child support or any other Court ordered obligation.

4. The cash deposit may be forfeited should one or more of the following events occur:

a. Defendant makes a false statement or provides false information in the written document entitled "SUPPLEMENTAL CONDITIONS" which is attached to and becomes a part of his/her OR-Cash Deposit bail bond;
b. Defendant fails to make any required court appearance;
c. Defendant fails to report as directed to a Court Services Officer;
d. Defendant fails to perform any other condition of bail imposed by the Court.

If the defendant's bond is forfeited, the defendant and any sureties will be obligated for the full amount of the bond. The cash deposit will be applied to such obligation and remain the absolute property of the Court or the State of Kansas.

5. An application for return of the refundable portion of the cash deposit must be made within one year after termination and final judgment in the case. If such application is not made within such period of time, the cash deposit shall become the absolute and permanent property of the Court or County.

6. The OR - Cash Deposit bail bond program is voluntary. If a defendant does not participate in this program he/she retains the right to seek or obtain pretrial release under any other statutory provision for admitting defendants to bail.

7. PERSONS POSTING BOND FOR ANOTHER ARE DEEMED BY THE COURT AS MAKING A LOAN TO THE ARRESTED PARTY. THE COURT IS NOT UNDER ANY OBLIGATION TO REFUND A CASH DEPOSIT TO ANYONE OTHER THAN THE ARRESTED PARTY AND CASH DEPOSITS ARE SUBJECT TO APPLICATION TO FINES, COSTS AND FEES.

8. This information sheet should be attached to every receipt for an OR - Cash Deposit.

I have read the foregoing and have received a copy of this information sheet.

____
(Defendant)

Date: ____________________ Name and Mailing Address (Please Print)

____

____

____

IN THE DIST‾‾CT COURT OF COUNTY, KANSAS
JUDICIAL DISTRICT

STATEMENT FOR OBTAINING OR AND ORC BONDS

Date ________________

1. ease print the following information:
NAME ______________________ AGE: _____ SEX _____ RACE _____
OFFENSE ______________________

2. Screening information to be furnished by defendant: (Check correct answers)
a. I am a Kansas resident. _____ Yes _____ No How long? _____ (months) (years).
b. Address: ______________________
How long at this address? __________ (months) (years)
c. Your home telephone number __________ Is this telephone listed in your name? _____ Yes _____ No
d. I have had prior bond forfeitures. _____ Yes _____ No
e. I have been extradited or waived extradition on pending charges. _____ Yes _____ No
f. I have detainers or holds from other state or federal authorities. _____ Yes _____ No
g. Are there other charges pending against you? _____ Yes _____ No
If yes, explain: ______________________

3. Additional screening information furnished by defendant:
a. I have not been previously convicted of an A, B or C felony or a level 5 or lower felony. _____ Yes _____ No
b. Closest relative or family member living in County.
Name __________ Home telephone No. __________ Address __________
c. I am presently employed in Kansas. _____ Yes _____ No
(If the answer is "yes", write employer's name and address below)
____
______________________ Employer's Telephone No. __________
How long employed here? __________ (months) (years).
d. I own an interest in real property in the State of Kansas _____ Yes _____ No
(If the answer is "yes", list the address or the legal description of the property)
____
____
e. I am a student in Kansas. _____ Yes _____ No
(If the answer is "yes", state the school or institution, date of last enrollment and class)
____
____

4. An active member of military service _____ Yes _____ No
(If yes, state Service number, duty station and name of commanding officer and c.o. telephone number)
____

5. In addition to any special conditions required by the Court, I understand the following are conditions of this BOND:
a. That all of the foregoing statements are true.
b. That I will report as directed to Court Services Officer.

6. When this document is signed and sworn to by the defendant, it shall be attached to and become a part of the Recognizance for Appearance in the District Court of _____ County, Kansas.

____
(DEFENDANT) (SURETY)

AFFIDAVIT OF DEFENDANT OR SURETY

I, the undersigned defendant, do solemnly swear under penalty of perjury that the foregoing statements are true, correct and complete. So Help Me God.

____
(DEFENDANT) (SURETY)

Su‾‾ribed and sworn to before me this _____ day of __________, 1993.

CLERK OF DISTRICT COURT

____
DEPUTY CLERK

8-18

TESTIMONY OF MANUEL BARABAN

SENATE JUDICIARY COMMITTEE

SENATE BILL No. 203

FEBURARY 14TH 2007

Mr. Chairman and Members of the Senate Judiciary Committee:

My name is Manuel Baraban and I have been in the bail bond business for almost 40 years in Olathe, Kansas. I have been a resident of the state of Kansas 57 years. I can supply the committee with more information about the surety business than time will permit. In addition I am a licensed General Bail agent in the State of Missouri by obeying the laws of Missouri and Placing a $25,000.00 C.D. with the Missouri Department of Insurance because I am a non resident of the State of Missouri I am also a Real Estate Broker in the State Kansas and Missouri for over 50 years.

When I started in the bail bond business the only way the defendant could be released from custody was by cash or surety. This included the cities. In 1970, K.S.A. 22-2802 was revised to include release by personal recognizance. This was to be limited to residence of the state no prior record, no crimes of violence and no threat to the community.

Recognizing the unfairness of a system that relied greatly on money, bail and the professional bondsman, these statutes were enacted to rely less on the financial resources of the defendant and concentrate on the risk of non-appearance. Minutes of the Senate committee on the Federal and State Affairs, March 23 1978: house bill 3129. This bill would permit the release on recognizance and supervised release programs in the state. These programs will permit the pretrial release of those selected individuals who are unable to post a money bond but have stable roots in the community; dedicating that those individuals will appear at trial and their release will not jeopardize public safety. House bill 3129 would also authorize each district court to establish, operate, and coordinate supervised release programs, which would be administered by probation officers and other personnel of the district court. Johnson County has this program, as well as Wyandotte County.

On at least three occasions the legislature introduced a bill, which would have independently prohibited or confirm this 10% program. These bills include: house bill 2009, introduced in 1985, house bill 2961, introduced in 1986, and house bill 2252 which was introduced in 1987. All three of these bills were defeated.

Senate Judiciary
2-14-07
Attachment 9

The 10% program began in 1986 on an administrative order by Judge William R. Carpenter. On Feb 16th 1994. Judge Carpenter suspended the 10% system based on the opinion of Attorney General Stephen, that it was not legal. On the 17th day of January 1995, the Supreme Court, authorized the 10% bond with out hearing a case that was appealed from the court of appeals who refused to hear the case to determine if it was legal to use the 10% system. The Supreme Court authorized Shawnee County to use the 10% system under the following rules. The defendant must be a resident of the county for 6 months, no prior convictions, no fail to appears, have a job, and no threat to the community. Shawnee County did not follow the guidelines set out. All types of crimes were released on 10% including rape, aggravated robbery, aggravated assault, illegal use of firearms and even persons charged with murder.

The average failure to appear on 10% cash deposit programs is 33% in Shawnee County and in Johnson County is 25% in Johnson County. These programs place greater burdens on the sheriff's office and local police department to find the defendants who fail to appear as well as protecting the public and protect the rights of the victims to get their day in court at a greater cost to the taxpayers. At one time Judge Buchele proposed that Shawnee County to hire 14 additional marshals to pick up the defendants that fail to appear due to the 10% cash deposit program, the commissioners refused to fund this because of the additional cost to the tax payers.

Supreme Court Rule 114
Sureties on Bonds

When ever any bond is permitted or required to be taken by the clerk or sheriff in accordance with the provisions of Chapter 60 without being approved by the court it shall be sufficient if the surety thereon is a surety company admitted to do business in the state of Kansas. No corporation other than a surety company may be accepted as a surety unless ordered and approved by the judge. When ever a natural person is accepted and approved is accepted and approved as surety by a clerk or sheriff, the surety shall be required to attach to the bond a sworn financial statement which reasonably identifies the assets relied upon to qualify the personas a surety and total amount of liabilities, contingent or otherwise which may affect the persons qualifications as surety, No attorney or the attorney's spouse may act as a surety on a bond in any case in which the attorney is counsel. The principal on any bond may at his option, in lieu of providing surety, deposit with the clerk of the district court cash money in the full amount of the bond. The clerk shall retain the deposit until the bond is fully discharge and released or court order the disposition of the deposit.

(History): Amendment effective September 8th 2006)

The 10% program does not conform to the Kansas Constitution Bill of Rights article (9) Which states "All person shall be bail able by sufficient surety except for capital offenses where the proof is evident and presumption great." It also does not comply with Supreme Court Rule 114.

For those of you unfamiliar with the bond process let me explain. A surety bail bondsman charges a fee for this service, typically 10% of the bond. The surety then pledges to the court that defendant will be present when ordered by the court to appear. If the defendant fails to appear the surety will pay the full amount of the bond (100%) to the Court/State.

A : Property" surety, such as myself, has his own assets pledged to the court to insure the full amount of the bond is available to be paid if the defendant fails to appear. The Administrative Judge in each district reviews my applicaton, my Affidavit of Assets, my background and my financial conditions and then determines if and how much bail I can post in that District Court. Additionally, I am required on an ongoing basis, to update the court with current financial information including my presents bond obligations and change in my financial conditions. I also must be a resident of the state. When a defendant fails to appear in court I have a financial incentive to locate and return the defendant in court.

B: Insurance Company is the surety on the bond, the agent for the insurance company is not the surety but an attorney in fact who is granted by the insurance company the right to sign the bond guaranteeing the bond in the full amount by the insurance company only. The attorney in fact has no liability to the State. The Attorney in Fact is liable to the insurance company. The amount of liability to the insurance company depends on each individual contract with the insurance company. They also have an incentive to return the defendant to court or the insurance company will have to pay the court 100% of the bond. The attorney in fact then reimburses the insurance company if the Attorney in Fact does not pay the bond 100% to the court/state

I would like number (3) to read as follows

The appearance bond shall be executed by a licensed attorney in fact for a licensed insurance company authorized by the Kansas Department of insurance and authorized by he district court who are residence of the state of Kansas or by a surety authorized by the court pursuant to K.S.A. 22-2208, with sufficient solvent sureties who are residents of the state of Kansas. Unless the magistrate determines in the exercise of such magistrate discretion that requires sureties is not necessary to assure the appearance of the person at the time ordered. Every surety shall file an affidavit with each District Court Clerk that the surety is qualified to act as surety by the 15th of each month that the surety has no outstanding unpaid judgments.

The reasons I am for this bill are:

1. Does this change provide any benefits to the State? Yes
2. Does this change to the Statue provide any savings to the taxpayer's money? Yes
3. Does this change to the statue protect the citizens of the State of Kansas? Yes
4. Does this relieve law enforcement from having to spend time and money trying to apprehend fugitives and save the taxpayers money? Yes
5. Does this change provide that the state will collect 100% of the bond forfeiture instead of the county collecting 10% of the bond? Yes
6. Does the change conform to the Kansas Constitution and Supreme Court Rule 114? Yes.

In 1976 the legislature passed a bill authorizing the cities to release persons who were residence of the state with a valid driver's license to be released on a notice to appear. Since then the failure to appear rate in the cities by defendants has risen to 50% or 70% depending on which city you are referring to. If the defendant is appended he or she is again released on a notice to appear this not only includes residents of the state but residence from out of state. The only time surety is used in the cities if the defendant fails to appear two or more times. Before the notice to appear the fail to appear in the cities was less than 5% and 90% percent of those who failed to appear were appended by the bondsman.

Our chief criminal administrative Judge Davis has written a letter is support of Senate Bill 203, along with the president of the Johnson County Bar. (Letters attached.)

Thank you for letting me testify this morning.

Davis, James, DCA

To: owens@house.state.ks.us
Subject: bonding

Tim,

Sorry we've been playing phone tag..

Just to follow up, I do not support the houes bill or its revision for a number of reasons. I do approve of John Vratil's senate bill 203.

If you have questions or want input, give me a call.

TESTIMONY IN SUPPORT OF SB 203

My name is Shane Rolf, I have been a professional bail bondsman in Olathe for over 20 years. I am here to day to provide testimony in support of Senate Bill 203.

Effects of Bill – History

This bill would essentially reaffirm the actions taken by this Legislature on three different occasions. When 22-2802 was first adopted in 1970, the Legislature had the option of providing for a 10% deposit option. In fact, this option was the sole aspect of the Federal Bail Reform Act which was left out of the Kansas Statute. Clearly, the Legislature did not want that option for Kansas. Later in both 1985 and 1987 bills were introduced which would have provided statutory authority for a percentage deposit bail system. Both of those bills were defeated, [HB 2009 in 1985 and HB 2252 in 1987] reaffirming that the Legislature did not intend for Kansas to have a percentage deposit bail bond system.

In 1994, the Kansas Attorney General issued an opinion that indicated – again – that percentage deposit bonds were not permissible. In response to this, in 1995, the Supreme Court authored Administrative Order No. 96 which authorized percentage deposits bonds as a form of pre-trial release "in addition to the current statutory pretrial release system."

Propriety of Administrative Order 96

Does the Supreme Court have the ability and authority to write new *statutory* law?

Clearly, by its own language, Administrative Order No. 96 is outside of the current statutory scheme. It was not enacted by the Legislature, neither was it signed by the Governor. In other words, this "Administrative Order" which creates a process of release "in addition to the current statutory ... system," was vetted by only one branch of government. Specifically, the one branch that is not subject to electoral review.

Is it within the inherent rulemaking ability of the Supreme Court to create – without statutory authority – a system of pretrial release beyond the control and dictates of the Legislature? Various other courts have held that the *Legislature* designates the kind and character of security that is to be provided for release on bail. The Supreme Court determines the reasonableness and Constitutionality of that security. According to the Opinion of the Kansas Attorney General [94-25] "courts have inherent authority to make general rules, those rules must conform to constitutional and statutory provisions. Therefore, a court cannot promulgate rules which contravene statutory provisions. ….. Supreme court rule 105 authorizes judicial districts to make rules necessary for the administration of their affairs to the extent that they are not inconsistent with applicable

statutes." While this opinion references District Courts, the question still remains, does the Supreme Court have the authority to promulgate rules which contravene statutory provisions?

To date the Supreme Court has not ruled 22-2802 as unconstitutional and in fact in the Court's own Rule 114 the Supreme Court indicates that:

> The principal on any bond may at his option, in lieu of providing a surety, deposit with the clerk of the district court cash money in the **full amount of the bond**.

Is then the Supreme Court treading on ground and issues which are rightly the prerogative of the Legislature?

Obviously, we feel that the Court is overstepping its bounds.

This bill simply reaffirms that the Legislature has – and retains – the authority to establish the type and characteristics of bail available for pretrial release.

Purpose of Bail – Excessive Bail

Bail is a Constitutional right. However bail is not intended to be a source of revenue for the State.[1] Further, many courts have held that bond set in any amount higher than or for any purpose beyond securing appearance is to be considered "excessive." As noted above, excessive bail is also prohibited by the Kansas Constitution. If the purpose behind these "deposit bonds" is to generate revenue, either for the State or for some other party, then bail would be or should be considered excessive.

The commercial bail bond industry provides a valuable service to both the accused defendant and the State. The accused defendant is able to gain his freedom pending a determination of guilt or innocence, while the State is provided assurance that the defendant will be present to answer those charges. The defendant is able to post bail amounts which might normally be beyond his means, thus providing significant and measurable incentive for reappearance, while the State is spared the cost of housing the defendant during the pre-trial period. This process has been described as "balancing competing concerns" and "paying full fealty to the basic principles of freedom and the concept of the presumption of innocence."

With deposit bonds, this balance shifts away from the State and toward the criminal defendant. Deposit bonds may provide a less expensive means of release for the defendant, but this is only because deposit bonds carry less incentive for reappearance. The State and the taxpayers gain little from their use.

Effect on Commercial Surety Industry

Administrative Order No 96 and the programs it spawns have only one real function purpose: to do away with the Commercial Surety Industry.

[1] State v. Midland Insurance. "The purpose of bail is not to beef up public revenues."

It is important to recognize that the required cash deposit amount in this Order (10%) is identical to the fee commonly charged by professional bail bondsmen. The goal of these programs is to siphon clients away from bail bondsmen and lead to their eventual elimination. This would have a negative economic effect on the Commercial Surety Industry. In Shawnee County that goal has largely been met.

In Johnson County alone, the commercial bail bond industry employs about 20 people full time and at least another 20 part time. There are 24 surety companies authorized to post bail. The Industry owns or leases commercial space which pays over $16,000 in annual property taxes, as well as paying hundreds of thousands of dollars in regular business expenses – advertising, rents, utilities, insurance, etc. – which contribute to the local economy. All those employees pay income taxes and property taxes themselves and contribute to the local economy, as well.

Statewide, there are hundreds of individuals and families who have dedicated their lives and their efforts to this industry.

Allowing Administrative Order 96 to continue to multiply across the State will have a very negative on the industry and those Kansas residents who are engaged in the surety bail bond business.

Performance

As I noted above, the Kansas Legislature has rejected percentage deposit programs in the past. The reason is simple: they do not do a good job of ensuring appearance. Given that the primary purpose of bail is to secure appearance, methods of release which do a poor job of ensuring appearance should not be supported.

There have been studies conducted to compare the appearance rate associated with various types of pre-trial release. The most basic of these studies was conducted by the Bureau of Justice Statistics, which is a branch of the Federal Department of Justice. BJS conducted a study, published in 1992 comparing the various types of release. Defendants released on deposit bonds failed to appear 25% more often than those released on surety bonds. Further, those who absconded on deposit bonds were twice as likely to still be at large after one year, when compared to surety bonds. When this comparison was first conducted, the goal was to demonstrate that surety bonds were not as effective as other types of pre-trial release. In actuality, the results demonstrated that surety bonds were the MOST EFFECTIVE type of pre-trial release. As a result, BJS has never published this comparison data since then.

However, others have been given access to the raw data and have published studies of their own. In April 2004, a study was printed in the Journal of Law and Economics, which is published by the University of Chicago. The study is titled: The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping. In the study, two statisticians have attempted to compare apples to apples with various types of releases by using a propensity matching score for defendants. Their conclusions are stark. The paper indicates:

- The FTA rate for Deposit bonds is 33% higher than for Surety bonds.
- The Fugitive Rate[2] is 47% higher for deposit bonds
- Defendants who abscond on surety bonds are much more likely to be recaptured compared with other forms of release.
- "States which ban commercial bail pay a high price." The fugitive rate in those states is estimated to be 85% higher for deposit bonds than it would be using surety bonds.

Shawnee County Experience

Nine years ago, Johnson County was considering the possibility of a deposit bond program. They contacted the Shawnee County District Court to ask about their experience. Shawnee County officials wrote and indicated that their FTA rate was 4%. This was based upon the number of cases charging the offense of Aggravated Failure to Appear as a percentage of total case filings. (If this is the definition of failure to appear, then this means that I haven't had anybody fail to appear in over five years.) As it happens, the number of failure to appear *warrants* equaled about 34% of case filings. The research I did back then clearly demonstrated that Shawnee County officials were not above manipulating or redefining their data to support their program.

When Johnson County again looked at the prospect of a deposit bond program in 2005, I had to check the performance of the Shawnee County program again.

To determine the true FTA rate on ORCD bonds in Shawnee County, I reviewed 500 criminal cases from 2004. I did this in blocks of 100 sequential cases spread throughout the year[3]. In those 500 cases I found 162 ORCD appearance[4] bonds. Of those 162 bonds, 53 resulted in failures to appear. (My definition of failure to appear is the issuing of a bench warrant for non-appearance.) This is a **failure to appear rate of 32.7% or 1 in 3**. [This is remarkably similar to the FTA rate from 9 years ago.]

The bottom line is that this program does not work, failures to appear are high, and revenue from administrative fees is less than revenue would be from bond forfeitures paid by surety companies.

To summarize the high points of the Shawnee County ORCD program:

- One in three defendants released on an ORCD appearance bond fail to appear;
- Shawnee County generates over $50,000 *less,* annually, in administrative fees than Johnson County generates in bond forfeitures;
- Shawnee County's incarceration rate is almost double that of Johnson County's (3.2 per thousand versus 1.7 per thousand). Put in other terms, if

[2] Fugitive Rate is defined as missing for at least one year following failure to appear

[3] 04CR100-199, 04CR500-599, 04CR1000-1099, 04CR1600-1699, and 04CR2000-2099

[4] Shawnee County allows defendants who have been arrested by the police, but not charged, to post what they refer to as bail, despite the lack of a judicial basis for setting bail. If charges are not filed within 90 days the deposit is refunded (less administrative fee). I have not included these "bonds" unless charges were filed and the bond was utilized to secure appearance in the underlying case.

Johnson County had the same incarceration rate as Shawnee County, the jail would be holding over 1600 inmates right now;

- Shawnee County has the lowest rate of recovery of BIDS money of any county with a public defender's office, despite their claims of increased payments from these ORCD deposits[5];
- Shawnee County has one of the highest crime rates in the state, perhaps because their probation officers are busy supervising pre-trial releases rather than convicted defendants;

Clearly, Shawnee County is not the county to attempt to emulate.

Johnson County Experience

In late 2005, without any public hearings and without any input from the surety industry, the Johnson County District Court implemented a limited version of the Shawnee County program to test its effectiveness and/or viability in Johnson County.

Defendants were screened by court services officers on a daily basis. Those who successfully passed through several filters, including residency, criminal history, offense severity, prior failure to appear were afforded the opportunity to post a deposit bond.

In order to assist in measuring the efficacy of these deposit bonds, I have tracked these bonds. The first ORCD bond was posted on October 14, 2005 and I have the numbers through October 14, 2006. They are as follows:

From 10/14/05 through 10/14/06 there were been 123 ORCD bonds whose cases were successfully resolved. They were resolved as follows:

74 Sentenced
27 Diversion
18 Dismissed
2 Acquitted
1 Stay Order
1 Probation Revoked[6]

For this same time period there were 41 failures to appear. This gives us a working total of 164 bonds. Of those 41 failures to appear, 15 are still missing. **This means that – after one year of this test program – the failure to appear rate of the ORCD program is exactly 25%. With 36 % of those who missed court, still being at large.** This number is particularly appalling given that those defendants who were granted these bonds were screened, at great expense, and were considered to be the best risk to reappear.

Additionally, there are 11 other cases which I did not include in this total. These cases were resolved, but there were problems. These cases were resolved as follows:

1 – ORCD bond changed to PR after posting.

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[5] Indigent Defense in Kansas, A Report on State Policy and Management. H.Edward Flentje, Jay P. Newton. September 1995.

[6] Obviously, this bond was posted in violation of the local rules regarding ORCD bonds.

10-5

1 – Defendant committed suicide.
1 – Case was dismissed prior to any court appearances.
8 – ORCD bonds were revoked for bond condition violations.

I did not include these in the overall numbers because of the confusion as to where to place them. In theory, the revocations could be placed with the failures to appear, because there were violations of the bonds, however they were not failures to appear. The other three could have been placed with the successfully completed cases, except that the bond did not last the duration of the case. If these 11 cases were included in the totals, the forfeiture rate would be bumped up to 28%.

Even at 25%, it would seem hard to argue that the program is a success. A program which allows 1 in 4 accused criminals to abscond with little or no repercussions would be difficult to justify.

Johnson County Revenue/Costs

As I noted, 41 ORCD bonds resulted in failures to appear. Of those, 15 are still at large. Of those 15 cases, 8 have had Motions for Judgment on Bond granted. [The use of the Motion for Judgment on bond process brings up another problem. A Motion for Judgment on Bond is a special procedural matter which is allowed only for bonds posted under KSA 22-2802. KSA 22-2807 allows for a hearing to occur on a motion (rather than a separate lawsuit) and it allows service to be made upon the Clerk of the District Court, rather than the principal to the contract. ORCD bonds are an extra-statutory creation of the Supreme Court and as such would have to be treated like ordinary contracts. I.E. a separate lawsuit would need to be filed against the defendant to enforce them.]

Notwithstanding their legality, judgments in the amount of $10,250.00 have been granted. Deposits of $922.50 have been applied toward those forfeitures [$1,025.00 CD - $102.50 administrative fee]. This means that there is an outstanding uncollected (*and uncollectible*) balance of $9,322.50 in unpaid ORCD bond forfeiture judgments. Additionally, the ORCD bonds for the remaining missing defendants total $6,550.00. If one factors the amount deposited less the administrative fees on those bonds, this means the State is out an additional $5,960.50 for those defendants.

Therefore it is easy to conclude that the test program in Johnson County has generated red ink in the amount of $15, 283.00 in unpaid bond forfeitures alone. This is to say nothing of the cost of administering the program [The man hours spent accounting for the funds, the cost of rearresting the individuals who fail to appear, the cost of screening dozens of defendants each week, etc.] While these costs are buried elsewhere, they are real costs and should be factored when considering the efficacy of this program.

I would note that over the same period of time, my company alone has paid $27,750.00 in bond forfeitures to the Clerk of the District Court. $11,100.00 of that total has been transferred into the General Fund of Johnson County and the remaining $16,650.00 has been paid to the General Fund of the State of Kansas. I'm sure that the

District Attorney has or can acquire a grand total for the year for all surety companies. However, I cannot imagine that I would represent more than a quarter of all forfeitures paid. As such I am assuming total surety bond forfeitures collected to be in excess of $100,000.00. This means that the Johnson County General Fund has received at least $40,000.00 in surety bond forfeiture payments. This is more than ten times the total administrative fees generated from ORCD bonds. When one compares the revenue generated for the State, you find $60,000.00 in bond forfeiture judgments paid to the State versus nothing in administrative fees and about $550.00 in collected forfeitures. Also, over the past year, I have also spent over $30,000.00 in apprehension expenses to return my wayward clients back to custody. While it is hard to quantify the savings to the government, it is clear that there is absolutely no savings with ORCD bonds.

In short the deposit bond test program can be summed up at follows:
A failure to appear rate of at least 25%.
36% of those fugitives are still at large.
Over $15,000.00 in uncollectible judgments.

I have provided this information to the local courts and while Johnson County has not formally abolished this "test" program, the number of defendants who have been offered this type of release has dropped off substantially.

Increased costs

Deposit bond systems cause the state to incur substantial additional costs. These include:

Costs of Recapture – The government has to bear the expenses of recapturing all absconding defendants. This is a difficult cost to determine. A study in Illinois in the late 1980s indicated that the cost to return a fugitive to custody was $1,161.00 per fugitive. Kansas recently completed Operation Padloc III, which was a program to locate and recapture parole absconders and check on the status of registered sex offenders. The program was operated on a Federal Grant of $28,000.00. Operation Padloc III returned 12 individuals to custody. This is slightly more than $2,300.00 per fugitive. My company alone returned 162 fugitives to custody in 2006. This represents a savings of at least $188,000 and as much as $372,000 (using Operation Padloc II figures) to the various jurisdictions of the State of Kansas. And this is from just one surety company. Absent a healthy surety industry, the State will have to bear those costs itself.

Every jurisdiction, including Shawnee County, which has effectively done away with surety bail and replaced it with deposit bonds has had to establish large government agencies or staffs to run these programs. In Cook County, Illinois, and Marion County, Indiana, for example, the pre-trial services offices have staff dedicated solely to resolving failures to appear – in essence they have had to establish their own warrants division (or in bonding terms, their own bounty hunters or fugitive apprehension staff). Cook County Pre-trial has established a Failure to Appear "booth" in the lobby of the courthouse. Defendants who have missed court can simply reschedule at the booth. A few years ago,

Shawnee County (despite supposedly not having a FTA problem) attempted to get funds for a "private marshal" answerable to the court for purposes of apprehending fugitives. The money was not provided.

Costs of incarceration – Obviously, if more people fail to appear on deposit bonds – and the studies show that they do – those people are less likely to get back out once they are recaptured. As I noted earlier, Shawnee County has an incarceration rate almost double that of Johnson County. If Johnson County was forced to hold even an additional 300 inmates in custody at $75 per inmate, per day, the county would incur $8.2 Million in additional annual incarceration costs for Johnson County alone.

The BJS study further indicates that defendants on deposit bonds also take longer to secure their initial release than surety bonds. After one month only 82% of defendants who were to be released on deposit bonds had gained their release, versus 89% for surety bonds. Given the statewide jail population, any increase in pre-trial incarceration (say 7%) will increase incarceration costs dramatically.

Intangible costs – Justice Denied, Eroding Respect for the Criminal Justice System

If police officers are forced to deal with an increase in the number of fugitives, then they will be taken away from their primary function of protecting the citizenry. Or, if police officers are not retasked to this purpose, then criminal defendants will quickly learn that justice can be avoided by simply absconding. They will quickly deduce that their risk of recapture is simply a function of random bad luck (from their perspective).

This will help foster a "revolving door mentality" among charged defendants. The defendant is caught, he pays a "toll" in the form of a deposit bond, then he is gone again until, by a stroke of luck, he crosses paths with the police again. Since the jails have become overcrowded, he is released on yet another deposit bond and the cycle begins anew. All the while, justice is delayed and denied, and the victim of the crime is left to wonder about the futility of the criminal justice system. Police officers become embittered and frustrated about the increasing futility of *their* work, and the door opens for ambivalence and corruption.

These are real costs to society, although it would be difficult to attach a dollar figure to them.

It is quite easy to look at places that have adopted deposit bond programs. Life has not become better in those places. Crime has not gone down. The costs of running the criminal justice system have not gone down or even stabilized. Rather these locations have seen large jumps in their crime rates, enormous expenses in housing criminal defendants and increases in official corruption. Quality of life and property values have gone down. Obviously, the world has not come to an end in these places, but the taxpayers *have* suffered the burden of subsidizing the release of criminal defendants.

CLOSING

The bottom line is this: From a cost standpoint, a State should choose a system of pre-trial release that produces the lowest instance of failures to appear. That is the

purpose of pre-trial release. The criminal justice system cannot legitimately function when large percentages of charged defendants do not appear to address the charges against them. All the studies have shown that a pre-trial system utilizing surety bail bonds produces the lowest rate of failure to appear of all the various methods of pre-trial release. Further, it is the most inexpensive method of pre-trial release available to the State. All other forms of pre-trial release, including deposit bonds, involve some degree of State subsidy in the form of increased costs borne by the taxpayers.

In short, someone *has* to do the job that we do. It can be us – at our expense – or it can be a government agency at the taxpayers' expense.

Thank you for your time and consideration in this matter.

Constitutional issues:

This bill would fundamentally alter the manner by which bail is posted in this state. The bill mandates that the Court may allow or require a defendant to post a cash deposit with the Court in an amount less than the full bail to secure his future appearance before the Court.

The bill alters the concept of bail as guaranteed by the Kansas Constitution in that it would not allow a defendant to use a surety to secure this lesser amount, but would require a deposit of cash.

> **The Kansas Constitution, Bill of Rights,** § 9. Bail. All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

This bill would deny a defendant his Constitutional right to use a surety, rahter than cash, on a bail, unless he was willing to secure a surety at a far greater bond amount.

Senate Judiciary Committee
Testimony in Opposition to Senate Bill 203

Wednesday, February 14, 2007

Hon. Stephen Tatum
Chief Judge, 10th Judicial District

The 10th Judicial District opposes the proposed amendments to KSA 22-2802, paragraphs 4 through 7, as reflected in Senate Bill 203.

Judges of the judicial district in which bondsmen post bonds should approve and monitor the bondsmen. The Insurance Commissioner, besides having plenty to do, is not in the best position to observe the behavior and conduct of the bondsmen in a particular district. For example, would the Insurance Commissioner know how diligent the bondsman is in pursuing a defendant who fails to appear in court? Would the Insurance Commissioner know how promptly the bondsman pays off judgments on bond forfeitures for defendants who fail to appear in court? What if the bondsman has a habit of surrendering the defendant on the slightest pretext and pocketing the fee the defendant has paid to the bondsman? The courts are in the best position to monitor the bondsmen.

Paragraph 7 is designed to keep courts from allowing defendants to post bonds with the courts. Currently, Johnson County allows Own Recognizance Cash Deposit Bonds (ORCD) for certain low risk defendants. The defendant posts 10% of the amount of the bond. (Example – Defendant would post $100 on a $1,000 bond. If the defendant makes all appearances, the defendant receives all of the $100 back except for 10% ($10), which the court receives as an administrative fee).

The benefit to the defendant is that they have motivation to come to court so they will get their money back when the case is concluded.

The bondsmen are opposed to this. They know that, generally, a defendant (or defendant's family) will post the bond first before hiring an attorney. The defendant or their family will not get their money back. That leaves less money for the defendant (or their family) to have to afford to hire an attorney, and may lead to a court appointed attorney for the defendant at the state's expense.

The court bonding program is a good program. I ask that the law not be changed to preclude a good program just to benefit bondsmen.

Thank you for your consideration.

Sincerely,

Stephen R. Tatum

KPBBA

1508 SW Topeka Boulevard
Topeka, Kansas 66612

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Christopher Joseph,
Joseph & Hollander P.A.

Kansas Professional Bail Bond Association, Inc.

TO: House Federal-State Committee

FROM: Darrel Manning, Recovery Agent

DATE: February 14, 2007

RE: Support for SB 203

Good morning Chairman and members of the Committee. My name is Darrel Manning and I am a bail bond recovery agent. I am here today to speak in support of SB 203.

I was in law enforcement for 14 years, including being Osage County Undersheriff for two years, before I went to work in the bail bond industry in 2000. I work for various Kansas Bail Bond companies and specialize in the recovery of defendants who fail to appear in court. I have been asked to testify about recovery efforts when a defendant fails to appear in court.

When a professional surety posts a bond, the organization tracks the defendant's progress in court. Generally, the defendant is required to check in with the surety weekly. The defendant is constantly reminded about court dates. When a court date comes, the surety checks to make sure that the defendant appeared. Methods for such "court-checks" include sending an agent to court to verify appearance or calling the court clerk to verify appearance.

If a defendant is released on bond through a surety and fails to appear in court, a recovery agent immediately attempts to locate the defendant. We contact all of the persons who have agreed to payment of the bond, guaranteeing payment of the bond should the defendant fail to appear, as well as employers, family and friends. All of this information is obtained and verified when the bond is posted. In most cases, we are able to quickly locate and surrender the defendant to custody. Occasionally, a defendant will make a genuine effort to "run from the law" and head to another state. In such situations, if it does not make financial sense to travel to the other state, we contact a recovery agent in the other state and hire that agent to recover the defendant. The standard fee for such work is 15% of the face value of the bond plus expenses, but the fee is negotiable.

In contrast, when a defendant bonds out on cash and fails to appear in court, a warrant is issued by the judge and the local sheriff notified. Sometimes the warrant is entered into the national database, NCIC, allowing officers in other states to "see" that there is an active warrant. There is a fee for entering a warrant into this database, so only the more serious warrants are entered. Because law enforcement does not have funding for a dedicated staff of officers to actively track defendants who missed court, only the most serious cases are actively pursued. Even then, the warrants often must take a backseat to other law enforcement duties. The vast majority of warrants never have an officer actively seeking to enforce it.

KPBBA

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Joseph & Hollander P.A.

There simply are not enough officers to do this.

Thank you for the opportunity to speak in support of SB 203 and I encourage the committee to pass this bill. I am available for any questions that any members of the committee may have.

TO: Senate Judiciary Committee

FROM: David Stuckman, American Bail Coalition

DATE: February 14, 2007

RE: Support for SB 203

Good morning, Mr. Chairman, members of the committee, I am David Stuckman and I am speaking on behalf of the American Bail Coalition. We bail agents are dedicated men and women who serve the communities in which we live. We guarantee that defendants appear in court to defend charges, and that victims of crime have their day in court.

We provide this service without cost to the taxpayers. The fee that we charge a defendant pays for us to track the defendant through court, making sure that they appear each time. If a defendant does not appear in court, the fee is used to pay for a recovery agent to find and arrest the defendant. We use many methods to find a defendant who has skipped court. We contact friends and family of the defendant, who usually are co-signers guaranteeing the defendant's appearance. We check the defendant's residence, with employers, and interview known associates. Eventually we find the defendant and bring him back to the jurisdiction at no cost to the taxpayers.

SB 203 ensures that bondsmen remain in business in the state of Kansas and are able to provide this vital service without raising taxes to pay for police to do the job.

Randall J. Kahler

Mannie's Bonding Company
302 E. Santa Fe
Olathe, Ks. 66061

Phone 913.782.0670
toll free 866.782.2245
Fax 913.780.6696

Testimony

SENATE JUDICIARY COMMITTEE
SENATE BILL NO. 203
FEBUARY 14, 2007

Mr. Chairman Vratil, Committee Members;

My name is Randall Kahler I have been the General Manager of Mannie's Bonding Company in Olathe, Kansas, for over 10 years, and a bondsman for over 14 years.

I appear here today in support of Senate Bill 203 and hope the Committee will passes the proposals put forth in this measure.

The 10%cash deposit bonding programs in effect today are a big black hole that **costs the State of Kansas and its taxpayers millions of dollars**. Every defendant released on this program who fails appear ties up 2 to 6 Sheriff's Officers in an attempt to apprehend them. And that's only if they can be found.

How many of these 10% bonding program defendants don't show up? To date the ORCD program in Johnson County has resulted **in a 25% failure to appear rate with 36% still at large**. This magnifies the overcrowding problem already in our incarceration system. In 1995, the Johnson County Jail handled on the average of 285-325 inmates. By 2006, the same jail had doubled in size average 860-950 inmate's on a daily bases. County Sheriffs simply aren't equipped with the funding or manpower to manage the influx ORCD programs create.

When a defendant has been released from jail on an ORCD bond and they jump bond, the judge is highly unlikely to give them a new 10% ORCD bond. So they end up staying in jail until plea or trial date – which can take as long as a year.

As you all are well aware, our jails are expensive and they're overcrowded. Simply put, they will not be able to handle the extra load the ORCD program will force upon them. Currently, Johnson County farms out an average of three hundred fifty prisoners a day with the 10% ORCD Program. Similarly, Wyandotte County farms their people out to Missouri. This is with the existing Programs in place today. I'm not sure how many hundreds of millions of dollars it will cost to build the new jails to facilitate what the ORCD programs generates, but I'm sure it will be tough to find the funds to do so.

Senate Judiciary
2 - 14 - 07
Attachment 14

The largest problem, however, is that local Sheriff's Offices in Kansas will have to depend on other agencies to apprehend the defendants, some of which may lack the manpower to do so. Then you will have to transport them back to Kansas through Security Transport Systems, or by sending Deputies to transport them themselves. The result is the same – local law enforcement will be forced to pull officers off the streets as a result of ORCD programs, and their already tight budgets will be stressed even further. As a result, pulling deputies off the streets to deal with the ORCD problem will likely lead to more crime.

The ORCD Program is also a huge problem for the courts, as it further stresses an already burdened system. When defendants fail to appear, it necessitates at least one and as many as three extra court appearances which crowds dockets that are already at maximum capacity. No one wants Kansas Courts to resemble those in Jackson County, Missouri, where the courts are gridlocked.

Alternatively, when using a bail bondsman, you have a surety that signs for the defendant to get out, and **if the defendant fails to appear the surety will go where ever he/she is and return them back to the jurisdiction they are wanted in at absolutely no cost to the taxpayers of Kansas**. If the defendant is not recovered then the surety has to pay the state the full bond amount – this insures that we **will** bring them back to the Court they're wanted in. A county sheriff cannot travel to Florida to pick up a defendant who fails to appear unless they're already in custody – a surety can. How many thousands of dollars it would have cost the State to do the same? I personally have been everywhere in the country to catch defendants and bring them back to Kansas and as of this time I have over 5,000 recovered defendants and it has not cost the State of Kansas or taxpayers a dime.

<u>Facts:</u>

Kansas Bill of Rights:
Section 9

All persons shall be bail able by SUFFICIENT SURETIES except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

<u>Supreme Court Rule 114</u>
<u>SURETIES ON BONDS</u>

Whenever any bond is permitted or required to be taken by the clerk or sheriff in accordance with the provisions of Chapter 60 without being approved by the court. It shall be sufficient if the surety thereon is a surety company admitted to do business in the state of Kansas. No corporation other than a surety company may be accepted as a surety unless ordered and approved by the judge. Whenever a natural person is accepted and approved as a surety by a clerk or sheriff, the surety shall be required to attach the bond a worn financial statement which reasonably identifies the assets relied upon to qualify the person as a surety and the total amount of any liabilities, contingent or otherwise, which may affect the persons qualifications as surety. No attorney or the attorney's spouse may act as a surety on a bond in any casein which the attorney is counsel. **The principal on any bond may at his option, in lieu of providing a surety, deposit with the clerk of the district court cash money in the full amount of the bond.** The clerk shall retain the deposit until the bond is fully discharged and released or the court orders the disposition of the deposit.
(History: Am effective September 8 2006)

Statutory Pretrial Release and the ORCD Bond

Our Order No. 96 (issued January 17, 1995) gives all judicial districts discretion to adopt a pretrial release procedure similar to DCR 3.311. Paragraph 2 of Order No. 96 clearly says that any local rule dealing with pretrial release is "[i]n addition to the current statutory pretrial release system."

The legislature has addressed pretrial release procedures. Under K.S.A. 22-2802(1), persons charged with crimes "shall . . . be ordered released pending . . . trial upon the execution of an appearance bond in an amount specified by the magistrate and sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety." Under paragraphs (3) and (4), 22-2802 contemplates three types of appearance bonds: own recognizance, surety, or a cash deposit instead of the bond. The bond is to have sufficient sureties, unless the magistrate decides that requiring sureties is not necessary to assure appearance. In lieu of a surety bond, cash may be deposited for the bond.

Under DCR 3.311, besides the statutory bonds described in 22-2802, the ORCD bond, a hybrid type of bond, is created. Paragraph 16 of DCR 3.311 provides that ORCD bond participation is on a voluntary basis and the statutory methods of providing bail are not to be limited or restricted. With the ORCD bond, the judge sets a bond amount (for example, $1,000). The accused is required to deposit 10 percent of that amount with the clerk of the district court ($100). The accused receives 90% of that deposit back upon completion of all obligations to the court--unless the accused has other financial obligations such as back child support or outstanding fines. If there are outstanding financial obligations, the $90 will be applied to those. Ten percent of the deposit ($10 in the example) will be kept as an administrative fee. Another key provision is Paragraph 15. This paragraph provides that when the court has specified the bond as cash or ORCD but the accused wants a professional surety bond, "the deputy clerk shall contact the judge authorizing the bond for modification of the bond."

22-2806
Chapter 22.--CRIMINAL PROCEDURE
KANSAS CODE OF CRIMINAL PROCEDURE
Article 28.--CONDITIONS OF RELEASE

22-2806. Justification and approval of sureties. Every surety, except an insurance company authorized to transact business pursuant to subsection (d) of K.S.A. 40-1102, and amendments thereto, shall justify by affidavit and may be required to describe in the affidavit the property by which such surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by such surety and remaining undischarged and all such surety's other liabilities. No bond shall be approved unless the surety appears to be qualified. The appearance bond and the sureties may be approved and accepted by a judge of the court where the action is pending or by the sheriff of the county.
History: L. 1970, ch. 129, § 22-2806; L. 1992, ch. 314, § 3; July 1.

Licensing Requirements for Agents.

There do not appear to be any specific licensing requirement for bail recovery agents or anything of the exact equivalent. The Kansas statutes do provide, however, approval procedures for a "surety." In addition, the Kansas Attorney General Opinion, given below, provides further clarification on what a "surety" is. According to the opinion, non-insurance company bail bonds, or "pocket-bonds," may only be issued by an individual and not a company. 22-2806's requirements for surety approval, therefore, may have application and be limited to individuals.

Office of the Attorney General, State of Kansas. Opinion No. 87-11.

January 20, 1987.

Re: Insurance--General Provisions Relative to Casualty, Surety and Fidelity Companies--Bail Bonding Companies

Synopsis: There are generally two types of bonds accepted by courts in criminal proceedings. Insurance bail bonds are issued by a licensed surety under the authority of K.S.A. 40-1102. Non-insurance company bail bonds (commonly referred to as 'pocket bonds') are issued under the authority of K.S.A. 22-2806. Only a natural person may write 'pocket bonds' under the authority and regulation of K.S.A. 22-2806. A company may not write 'pocket bonds' under the purported authority of K.S.A. 22-2806 as such action would be in violation of K.S.A. 40-214 and the Uniform Unauthorized Insurers Act, K.S.A. 40-2701 et seq.

Cited herein: K.S.A. 22-2806; 40-201; 40-214;) 40-1101; 40-1102; 40-2701 et seq.

State of Kansas or Rules of the Supreme Court

Rule 303
PROFESSIONAL SURETIES AND BONDSMEN

Every professional bondsman and surety, and their agent, shall be approved by the Court prior to the Sheriff and/or the Clerk of the District Court accepting them as sureties. Professional bondsmen and their agents must provide a "qualification for surety" with each bond and shall not exceed the limit established by the Court. Appointments of agents must be filed in the Court.

Every professional bondsman authorized by the Court, except an insurance company authorized to transact business in the State of Kansas, shall file with the Clerk of the District Court on or before January 10th of each calendar year a complete listing of their assets, including encumbrances and liabilities thereon, the net valuation of their assets and a complete listing of the total amount of outstanding bond obligations in each jurisdiction, all sworn to under oath.

Any change in said list of assets and/or net valuation by sale, transfer, exchange, additional encumbrances or otherwise shall be reported to the Court under oath on or before the 10th day of the next calendar month.

Said professional bondsmen and surety shall also file an itemized report of any of their outstanding bonds that have been declared forfeited on or before the 10th day of each calendar month covering the preceding month, sworn to under oath. This report shall state the case number, name of defendant, amount of bond and date forfeiture was declared.

Bondsmen are authorized to write bonds in the amount of ten times that of their net valuation as listed, provided however, bondsmen shall not be authorized to write any one bond in excess of 20% of their net valuation.

Any professional bondsman or surety failing to satisfy a bond forfeiture within thirty days after judgment has been entered by the Court may be prohibited from writing any additional bonds.

The Sheriff shall accord all approved bondsmen and sureties' equality in exposure. The Administrative Judge shall furnish the Clerk of the District Court and the Sheriff a list of approved professional bondsmen and sureties.

Nothing in this rule shall negate K.S.A. 22-2806 which provides that the appearance bond may be approved and accepted by the Clerk of the District Court wherein the action is pending or by the Sheriff of the said county, according to law.

In Closing:

The judicial system is overwhelmed and the inmate population continues to grow. With the ORCD program in effect this will only increase the population of inmates, as to the studies in states where they currently existing. This too will increase the sheriff duties in having to put more warrant officers on the street to apprehend the defendants.

Thank you for your Time

R.J. Kahler

Law Offices of N. Trey Pettlon, III
111 South Kansas Avenue
Olathe, Kansas 66061
(913) 393-2100 Tel
(913) 393-0210 Fax

N. Trey Pettlon * Ryan S. Ginie*

* Licensed in Kansas & Missouri

February 12, 2007

Re: Testimony before Judiciary Committee
Concerning Senate Bill No. 203

Dear Mr. Chairman Vratil and Committee Members:

After reviewing Senate Bill No. 203, I wanted to offer my testimony in support of this bill. I have been a criminal defense attorney since I left the Johnson County District Attorneys Office in March of 1994. I appear in court in various counties in Kansas on criminal cases generally five days a week.

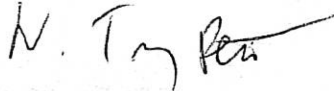
In my experience, it is important to have a bondsman available to insure the appearance of the Defendant in most cases. I am not a proponent of the ORCD program which has replaced the bondsman in a significant number of cases so that the bond is posted to the court. I believe that bondsmen play a vital role in the criminal justice system. Their value is great no matter what the severity level of the crime is, but particularly in cases where a Defendant has a mental health problem or a drug problem, which is, of course, a large percentage of the criminal cases.

The value of the bondsman cannot be overstated. Without a bondsman assigned to the case, the likelihood of a failure to appear undoubtedly increases. It is not a coincidence that the system of bail bondsman has been used as an effective tool that both insures appearances of defendants and effectively recaptures them and brings them back to face the charges on their failure to appear. I have witnessed numerous cases over the years where a Defendant misses court, attempts to flee the jurisdiction and then is promptly brought back by the bondsman before the State's witnesses disappear or lose their recollection or the evidence otherwise becomes stale. In some cases, when a warrant for a failure to appear is not executed in a timely manner a criminal case is oftentimes dismissed altogether. See State v. Washington, 12 Kan. App.2d 634 (1988). I have had this happen in cases of mine and have seen it happen in cases of my colleagues. This result, which thwarts the interest of law enforcement and sabotages the ability of the State to protect victims of crime, is much less likely to happen with a bondsman who has an active and important financial stake in the prompt capture of the Defendant.

In the case of an ORCD bond, the Defendants are typically without the means to pay the entire bond, have bad credit, value their liberty more than their money and simply do not care about the possibility of a worthless judgment against them. As mentioned before, they oftentimes have a drug problem and consequently they mismanage their lives and their calendar. These defendants need much more structure and encouragement to make their court appearances. The ORCD program, where the court is essentially replacing the bondsman, does not provide the level of supervision or the ability to find and arrest an absconder that a bondsman does.

I believe the bill would return the law to the time-tested tradition of using bondsman to supplement the resources of the court and improve the expeditious administration of criminal justice. Thank you for your consideration in this important matter.

Best Regards,



N. Trey Pettlon

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ABOGADOS
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ATTORNEYS AT LAW

Hablamos Español

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February 2, 2007

John Vatril
300 SW 10th Avenue
Room: 281E
Topeka, KS 66612-1504

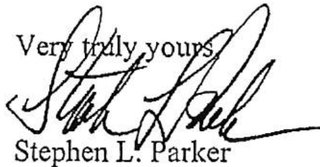
RE: Senate Bill No. 203

Dear Senator Vatril:

I am writing in support of Senate Bill No. 203. Our law office handles criminal law cases in Wyandotte and Johnson County and I believe this bill would benefit of our clients.

I thank you for your kind consideration of this matter.

Very truly yours,



Stephen L. Parker

SLP/eg

Senate Judiciary
2-14-07
Attachment 16