Approved: May 22, 2009
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:40 a.m. on March 10, 2009, in Room 545-N of the Capitol.

All members were present.

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Rep. Raj Goyle
Kris Ailslieger, Assistant Attorney General
Christine Ladner, Chief Deputy Dist. Atty. (Shawnee) & Kansas County & District Attorneys Assn.
Tom Bartee, Kansas Association of Criminal Defense Lawyers

Others attending:
See attached list.

The Chairman reopened the hearing on **HB 2250 - Rules of evidence; admissibility of prior acts or offenses of sexual misconduct.**

Rep. Raj Goyle testified in support providing case history illustrating the need for clarifying language to K.S.A. 60-455. Enactment of **HB 2250** corrects a loophole by allowing prior acts of sexual misconduct be entered as evidence. (Attachment 1)

Kris Ailslieger spoke in favor stating the language in **HB 2250** is not a sweeping change. The language comes from Federal Rules of Evidence 413 and 414 which has been tested in the courts and upheld. The Attorney General strongly supports enactment of HB 2250 and believes it is an appropriate response to the request for action made by the Kansas Supreme Court in *State v. Prine*.(Attachment 2)

Christine Ladner appeared in support indicating recent appellate decisions have brought attention to a significant deficit in our law relating to the admissibility of evidence. Proposed changes to the statute are aimed at addressing the need for juries to be given all relevant evidence while affording defendants due process. (Attachment 3)

Tom Bartee spoke in opposition stating **HB 2250** provides for a radical change in the rules of evidence. As written the bill allows for a defendants bad character to become an issue in a sex crime case. The court will be faced with a mini-trial before trial modeled after commitment proceedings, requiring extensive expert testimony and examinations of the defendant. This will most likely increase the costs of litigation without increasing the State's ability to win justified convictions. Mr. Bartee indicated the Federal Rule of Evidence 413 upon which this bill is based has been called into question. (Attachment 4)

Written testimony in support of **HB 2250** was submitted by:
Senator Terry Bruce (Attachment 5)

There being no further conferees, the hearing on **HB 2250** was closed.

The Chairman opened the hearing on **HB 2097 - Criminal jury trials, alternate or additional juror selection.**

Melissa Johnson appeared in support and provided a review of the bill. Ms. Johnson stated enactment of the bill would provide the statutory framework for what judges find to be the best practice and often do with the consent of the parties. **HB 2097** codifies the current practice of selecting alternate jurors promoting the efficient use of judicial resources. (Attachment 6)

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.

Minutes of the Senate Judiciary Committee at 9:40 a.m. on March 10, 2009, in Room 545-N of the Capitol.

Written testimony in support of **HB 2097** was submitted by:
Chief Judge Richard Smith, 6th Judicial District (Attachment 7)

There being no further conferees, the hearing on **HB 2097** was closed.

The Chairman opened the hearing on **HB 2099 - Withdrawal of guilty plea, time limitation.**

Melissa Johnson appeared in support and provided a review of the bill. Ms. Johnson provided a case history relating to the subject illustrating the need for the proposed legislation. Ms. Johnson indicated the bill is consistent with the original intent of the legislature that timely requests serve the interests of justice. The failure to include a time limit to requests to withdraw a plea allows for manipulation and abuse of the criminal justice system while causing undue pain and suffering to victims and their families. (Attachment 8)

There being no further conferees, the hearing on **HB 2099** was closed.

The next meeting is scheduled for March 11, 2009.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-10-09

NAME	REPRESENTING
Christine Ladner	KCDAA
Richard Samaniego	Kearney & Assoc.
Sandy Barnett	KCSDV
Patricia Scalia	BIDS
Tom Bartee	KACDL
Joseph Molina	KS Bar Assn.
TK Shively	KS Legal Services
Nancy Zogleman	Polsinelli
Sean Miller	Capitol Strategies

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RAJ GOYLE
87TH DISTRICT

TESTIMONY IN SUPPORT OF HB 2250

SENATE JUDICIARY COMMITTEE

Chairman Owens, Vice Chairman Schmidt, Ranking Member Haley, and Committee Members:

Thank you for allowing me to testify in support of HB 2250, a bill that will help prosecute sexual predators and protect Kansas citizens from these awful crimes.

The current laws of evidence make it too easy for sexual perpetrators to successfully appeal their convictions. Under K.S.A. 60-455, evidence of a defendant's prior acts of sexual misconduct is susceptible to being excluded from court. The Kansas Supreme Court recognized this flaw in our evidentiary laws last month in *State v. Prine* (2009 Kan. LEXIS 1) and explicitly invited the Legislature to take action to close this loophole. HB 2250 addresses the Court's concern and will help the Attorney General and local law enforcement prosecute sex crimes.

Under HB 2250, evidence of prior sex crimes would be allowed as evidence in a prosecution if the judge finds the evidence relevant to the defendant's propensity to commit these types of crimes. In *Prine*, the Court justified this by stating, in the context of child sex crimes, "modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child. In short, sexual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness."

Simply put, prior bad acts of sexual misconduct should be allowed to be entered as evidence. HB 2250 does just that while providing adequate due process to the defendant.

We on the House Judiciary Committee discussed this bill at length and passed it unanimously to the House floor where it was approved 122-1. I hope you will give prosecutors in Kansas every tool possible to prosecute sex crimes by passing HB 2250 favorably to the Senate floor.

I welcome your questions. Thank you very much.

Rep. Raj Goyle

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

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Senate Judiciary Committee
House Bill 2250
Assistant Solicitor General Kris Ailslieger
March 9, 2009

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony in support of House Bill 2250. I am the Assistant Solicitor General responsible for appellate activity in the office of Attorney General Steve Six.

House Bill 2250 would allow for propensity evidence to be admitted at trial by the prosecution regarding crimes of a sexual nature.

The impetus for this proposed change came from the Kansas Supreme Court's recent suggestion in *State v. Prine*, ___ Kan. ___, No. 93,345 (Jan. 16, 2009), that K.S.A. 60-455 needs modification. Specifically, the Court stated:

> We are compelled to make one final set of brief comments on the K.S.A. 60-455 issues raised by this case.
>
> Extrapolating from the ever-expanding universe of cases that have come before us and our Court of Appeals, it appears that evidence of prior sexual abuse of children is peculiarly susceptible to characterization as propensity evidence forbidden under K.S.A. 60-455 and, thus, that convictions of such crimes are especially vulnerable to successful attack on appeal. This is disturbing because the modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child. In short, sexual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, pp. 527-28 (4th ed. 1994) (302.2- Pedophilia). And our legislature and our United States Supreme Court have decided that a diagnosis of pedophilia can be among the justifications for indefinite restriction of an offender's liberty to ensure the provision of treatment to him or her and the protection of others who could become victims. See

Senate Judiciary
3-10-09
Attachment 2

> K.S.A. 59-29a01 *et seq.*; *Kansas v. Crane*, 534 U.S. 407, 409-10, 151 L. Ed. 2d 856, 122 S. Ct. 867 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 356-60, 371, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997) (Kansas' Sexually Violent Predator Act narrows the class of persons eligible for confinement to those who find it difficult, if not impossible, to control their dangerousness.). It is at least ironic that propensity evidence can be part of the support for an indefinite civil commitment, but cannot be part of the support for an initial criminal conviction in a child sex crime prosecution.
>
> Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make K.S.A. 60-455 more workable in such cases, without doing unconstitutional violence to the rights of criminal defendants. It may be time for the legislature to examine the advisability of amendment to K.S.A. 60-455 or some other appropriate adjustment to the statutory scheme.

While in *Prine*, the Court spoke only of changes to 60-455 as it pertains to sex crimes against children, it makes little sense to so limit any modification of the statute because the same issues are relevant to cases involving sex crimes against adults.

For guidance, we looked at Federal Rules of Evidence 413 (Evidence of Similar Crimes in Sexual Assault Cases) and 414 (Evidence of Similar Crimes in Child Molestation Cases), and California Evidence Code § 1108 and Arizona Revised Statutes Annotated § 13-1420. Both the California and Arizona rules incorporate language from the federal rules. The language in House Bill 2250 came primarily from the federal rules. The advantage of using this language is that it has already been tested in the courts and upheld.

As the chief prosecutorial agency responsible for appeals in the state of Kansas, the Attorney General's office strongly supports HB 2250 and believes that it is an appropriate response to the request for action made by the Kansas Supreme Court in State v. Prine. Thank you for your consideration.

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March 9, 2009

Testimony Regarding HB 2250
Submitted by Christine Ladner, Chief Deputy District Attorney
On Behalf of Chadwick J. Taylor, District Attorney, Third Judicial District
And the Kansas County and District Attorneys Association

Honorable Chairman Owens and Members of the Senate Judiciary Committee:

Thank you for the opportunity to address you regarding House Bill 2250. On behalf of Chad Taylor, District Attorney, Third Judicial District, and the Kansas County and District Attorneys Association, I would like to call your attention to a significant deficit in our law relating to the admissibility of evidence of prior sexual misconduct. Recent appellate decisions have severely limited the ability of prosecutors to introduce such evidence in trial.

Under K.S.A. 60-455 as currently written and interpreted by our appellate courts, prosecutors are limited in our ability to present all relevant evidence to a jury. ***State v. Prine,*** ___ Kan. ___, No. 93,345 Jan. 16, 2009) reversed convictions for rape, aggravated criminal sodomy and aggravated indecent liberties with a child where the victim was a six-year-old girl. In ***Prine***, the Supreme Court found that evidence of the defendant's prior criminal sexual conduct with other children was not so "strikingly similar" to the conduct in the case at bar so as to constitute a "signature," thereby finding that it was error to admit such evidence under the "plan" prong of the statute.

The ***Prine*** case creates a new standard, a more stringent barrier, for the admission of relevant evidence of prior sexual bad acts. The "so strikingly similar so as to constitute a signature" language is not in the statute and deprives a jury of the opportunity to consider all relevant evidence. Jurors should have all relevant evidence, balanced by the idea that the probative value of such evidence substantially outweighs any prejudicial effect. The proposed change in HB 2250 to K.S.A. 60-455 achieves this goal.

The Supreme Court in ***Prine*** recognized that "propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child." By so stating, the court gave us a large hint that the proposed changes

to the statute should be considered and adopted. "It may be time for the legislature to examine the advisability of amendment to K.S.A. 60-455 or some other appropriate adjustment to the statutory scheme."

Over the years, K.S.A. 60-455 has been subject to much analysis, particularly in the area of sex crimes, with conflicting interpretations. It is a flashpoint on appeal in many sex cases because it seems that prior bad acts evidence of sexual misconduct is often present. The claim by defendants that this evidence is unfairly prejudicial arises out of facts where the same evidence is probative. Simply stated, such evidence may be prejudicial precisely because it is so powerfully probative. All evidence introduced by the State is by design going to be prejudicial. The question is whether the probative value outweighs prejudice. The proposed changes allow a trial court by motion practice in advance to make a measured decision whether such evidence should be allowed and the appropriate contours of how much should be allowed. K.S.A. 60-455 needs consistency in the area of sex crimes, an explicit rule that propensity evidence is appropriate in certain cases, so that prosecutors, the bench and defense lawyers can rely with more certainty on firmer rules of admissibility. Reversal of convictions for improper admission of prior evidence of sexual misconduct is heart wrenching for all concerned.

The ***Prine*** opinion has created a crisis in K.S.A. 60-455 for the prosecution if sex crimes. The proposed changes to the statute are aimed at addressing the need for juries to be given all relevant evidence while affording defendants due process by way of notice and motion practice in advance.

The Kansas County and District Attorneys Association, its sex crimes prosecutors in particular, respectfully urge the committee to recommend HB 2250 favorable for passage. Thank you for all attention and consideration to this critical issue in the prosecution of sex crimes.

Senate Judiciary Committee
March 9, 2009

Testimony of the Kansas Association of Criminal Defense Lawyers
in Opposition to HB 2250

The Kansas Association of Criminal Defense Lawyers is a 300-person organization dedicated to justice and due process for those accused of crimes. For the reasons set forth below, KACDL is **opposed** to the House Bill 2250, which would amend K.S.A. 60-455 to allow the admission of prior sexual misconduct to prove the defendant's propensity to commit a charged sex offense.

1. **The admission of propensity evidence in sex cases will not increase the state's ability to win justified convictions**. HB 2250 is modeled on Federal Rule of Evidence 413 and its state counterparts. In the interest of increasing rape and other sex convictions, these rules "[c]ast[] aside the standard distrust of propensity evidence, and the standard reluctance to open criminal trials to extensive proof of collateral matters." Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 966 (2008). But, as one criminal-procedure scholar has observed, "**[s]adly, these departures from basic principles of both criminal law and the law of evidence have done little to increase the prosecution's ability to win justified convictions**." *Id*. (citing studies).

2. **The amendment will increase the costs of litigation and shift the focus away from the charged acts truly at issue in sex cases**. The statute will create the need for extensive pre-trial litigation on the question of relevance. Evidence of prior behavior will only be relevant (if not for any of the traditional K.S.A. 60-455 reasons) if it *in fact* establishes the defendant's propensity to commit the charged crime. The likelihood that any defendant's prior behavior indicates a propensity for future criminal sexual behavior depends on myriad factors, including but not limited to (1) the nature of the prior behavior; (2) the nature of the charged crime; and (3) whether or not the defendant completed treatment between the prior behavior and the charged crime. *See* Dennis M. Doren, EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND at 148-50 (Sage Pub. Inc. 2002). Dr. Doren points out that many factors affect sex-offender recidivism base rates; for instance, "incest offenders are consistently found to have lower sexual recidivism rates than the other listed types of [sex] offenders," with recidivism rates as low as 14% in one study—far

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Senate Judiciary
3-10-09
Attachment 4

lower than general recidivism rates. With all of these variables in play, any particular defendant may wish to challenge admissibility of the state's proffered prior behavior on grounds that it does not in fact establish propensity in his case. Thus, **the court will be faced with a mini-trial before trial that will be modeled after commitment proceedings, requiring extensive expert testimony and perhaps multiple examinations of the defendant.**

If the court decides in a given case that the state's proffered evidence of prior behavior is relevant to prove the defendant's propensity to commit the charged crime, the defendant will then have the right to confront the conclusion that it does in fact prove propensity at trial. **Thus, the trial itself will turn into an even greater battle of experts than already exists in some sex cases.** The defendant will have a right to present evidence that (1) the prior behavior didn't happen; (2) if it did, that behavior doesn't, as a statistical or behavioral matter, indicate any meaningful propensity to commit the charged behavior; and/or (3) if it did, the defendant has reformed since the prior behavior. **The real focus of the trial will quickly be lost in this battle over the existence and the meaning of the prior behavior.** Defense evidence that was not relevant before will now be relevant and admissible. For instance, in child sex cases, propensity evidence suggests that the defendant is a pedophile. Thus, the defendant will now have a right to present expert testimony that he is not a pedophile. Such evidence has been prohibited as irrelevant to date, but the proposed amendment renders it quite relevant. *See State v. Price*, 30 Kan. App. 2d 569 (2002), *rev'd on other grounds*, 275 Kan. 78 (2003). In *Price*, the Court of Appeals held that the defendant was properly prohibited from presenting the testimony of a qualified expert that "after evaluating Price, [the expert] did not believe [Price] exhibited characteristics typically found in sex offenders." *Id.* at 577. The Court explained:

> (1) evidence that defendant lacks the characteristics of a typical offender is not relevant to whether defendant committed the crime in question; and (2) the only inference which can be drawn from such evidence, namely that the defendant who does not match the child sexual abuser profile must be innocent, is an impermissible one.

Id. at 581. **HB 2250 significantly broadens the landscape of relevant evidence.** If the state may offer propensity evidence, then the defendant must be allowed to rebut that evidence with anti-propensity evidence.

3. **The federal rule upon which this amendment is modeled has been called into question.** Federal Rule of Evidence 413 was passed fifteen years ago. Last year,

scientific-evidence guru Edward J. Imwinkelried asked what light new psychological research sheds on the advisability of Rule 413 and its counterparts. *Reshaping the "Grotesque" Doctrine of Character Evidence: the Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008). In *Reshaping the "Grotesque,"* Professor Imwinkelried revisits the psychological underpinnings of Rule 413, and asks whether the rule's assumptions stand up given today's professional understanding of character and predictability. Importantly, he concludes that **"the [psychological] literature continues to raise doubts about the wisdom of Rules 413-15** at least when they are invoked to permit a trier of fact to infer an accused's prior character trait from a single instance of previous conduct. **The statutes authorize lay triers of fact to perform an inferential task that all serious psychological researchers have seemingly abandoned**." *Id.* at 767-68.

4. Finally, if the amendment is adopted, it should be clarified within the amendment that:

   a. The admission of propensity evidence is subject to other evidentiary rules, such as the constitutional and statutory rules against hearsay, and the "rule of necessity that the trial court may exclude any evidence which may unfairly prejudice a jury." *State v. Davis*, 213 Kan. 54, 57-58 (1973); *State v. Gunby*, 282 Kan. 39, 63 (2006) ("relevance must still be measured against any applicable exclusionary rules"); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) ("without the safeguards embodied in Rule 403 [authorizing exclusion of unfairly prejudicial evidence] we would hold the rule [413] unconstitutional"). It took years of litigation to establish this simple point as to the original K.S.A. 60-455, *see Gunby*; the amendment should make the point explicit.

   b. The admission of propensity evidence must be accompanied by a cautionary instruction to ensure that jurors convict the defendant *for the crime charged*, and not for being a sexual miscreant. *See Robinson v. California*, 370 U.S. 660 (1962) (criminally punishing defendant for status as drug addict rather than for particular behavior involving drugs violates Eighth Amendment); Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 Syracuse L. Rev. 1125 (1993) (discussing need for limiting instruction regarding propensity evidence).

Last month, Kansas Supreme Court Chief Justice Davis pointed out that the courts of Kansas

are best guided in their interpretation of the Code of Criminal Procedure by K.S.A. 22-2103, which instructs the courts "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." *See* Hon. Robert E. Davis, State of the Judiciary at 2 (Feb. 10, 2009). This legislative body should likewise be guided by that goal. HB 2250 complicates procedure, does nothing to guarantee fairness, and adds unjustifiable expense and delay to an already difficult area of law.

Respectfully submitted,

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on behalf of KACDL

STATE OF KANSAS

TERRY BRUCE
STATE SENATOR
34TH DISTRICT
RENO COUNTY

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
VICE CHAIR: JUDICIARY
MEMBER: JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE
AGRICULTURE
ASSESSMENT & TAXATION
NATURAL RESOURCES

RE - Testimony on SB 2250

Chairman Owens and Committee Members,

KSA 60-455 must be changed to allow for the successful prosecution of heinous cases.

For no apparent reason, the Kansas Supreme Court decided to elevate the standard for admissibility of prior crimes or prior bad acts from reasonably similar to strikingly similar. In this same case, State v Prine, the court found the acts in question to be so horrible that intent was no longer appropriate.

Proposed SB 2250 attempts to allow for the introduction of prior bad acts or prior crimes to infer the defendant committed a crime charged under article 35 of chapter 21. This is an admirable goal and a good step forward. However, the court could still apply the strikingly similar standard.

I have attached a draft of a Senate bill I have worked on to address the elevated standard issue created in State v. Prine. I do not have any objection to having a specific statutory subsection for sex crimes, but I would ask that you set out a lower standard for introducing any prior crimes or prior bad acts evidence than that created by the court. Perhaps the attached draft could be used to help address this concern.

Terry Bruce

Terry Bruce
Reno County State Senator

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Senate Judiciary
3-10-09
Attachment 5

COPY

2009 9rs0635

SENATE BILL NO. ____

By

AN ACT concerning evidence; relating to other crimes or civil wrongs; amending K.S.A. 60-455 and repealing the existing section.

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

Section 1. K.S.A. 60-455 is hereby amended to read as follows: 60-455. (a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion ~~but,~~.

(b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(c) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts.

Sec. 2. K.S.A. 60-455 is hereby repealed.

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

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Testimony in Support of HB 2097

Senate Judiciary Committee
March 10, 2009

Submitted by Melissa Johnson
Board Member, Kansas County and District Attorneys Association

Chairman Owens and Members of the Committee, thank you for the opportunity to present testimony on House Bill 2097. My name is Melissa Johnson and I am here on behalf of the Kansas County and District Attorney Association to express our support of House Bill 2097.

House Bill 2097 seeks to amend K.S.A. § 22-3412(c), relating to the selection of alternate or additional jurors by codifying a preferred and more efficient method of selecting alternate jurors. The current law states that alternate jurors may be selected "after the jury is empaneled and sworn." Selecting alternate jurors "after the jury is empaneled and sworn" is impractical and inefficient.

The current method identifies the alternate or additional jurors. Prosecutors and defense attorneys, in my experience, prefer the nondisclosure of the status of a juror as an alternate juror. Nondisclosure of the status of an alternate juror will negate the argument that the juror failed to pay close attention to the evidence because of his or her status as an alternate.

The current method requires the Court to practice an inefficient method of selecting alternate jurors. A second panel of jurors is necessary. A more efficient method, as contemplated by HB 2097, is to allow for the qualification of a sufficient number of potential jurors for the jury and the desired number of alternates. Preemptive strikes are first exercised from the jury pool. For example, in a first degree murder prosecution, the jury of twelve would be chosen from the first thirty-six (36) qualified individuals. The alternate or additional jurors are then chosen from the remaining qualified individuals.

When alternate jurors are desired, I have obtained a waiver of the statute by defendant. Defense attorneys routinely advise their clients to waive the statute and agree to the selection of alternate jurors in the manner described above. HB 2097 codifies the current practice of selecting alternates and promotes the efficient use of judicial resources.

We urge your full support and favorable recommendation of SB 2097. I would be happy to stand for questions.

The Kansas District Judges' Association

Senate Judiciary Committee

Tuesday, March 10, 2009

Testimony in Support of HB 2097
Chief Judge Richard Smith, 6th Judicial District (Bourbon, Linn, and Miami Counties)

The Kansas District Judges Association Executive Committee voted unanimously to support HB 2097.

The bill, if enacted, would provide a statutory framework for what judges are finding to be the best practice. With the consent of the parties, judges generally proceed in a manner in accord with the process outlined in HB 2097. To select alternate jurors in another manner would unnecessarily prolong the juror selection process, resulting in additional cost for the state, the counties, and the parties.

Thank you for the opportunity to provide this written testimony in support of HB 2097.

Senate Judiciary
3-10-09
Attachment 7

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Testimony in Support of HB 2099

Senate Judiciary Committee
March 10, 2009

Submitted by Melissa Johnson
Board Member, Kansas County and District Attorneys Association

Chairman Owens and Members of the Committee, thank you for the opportunity to present testimony on House Bill 2099. My name is Melissa Johnson and I am here on behalf of the Kansas County and District Attorney Association to express our support of this legislation.

House Bill 2099 seeks to amend K.S.A. § 22-3210(d), relating to the withdrawal of a guilty plea by including a reasonable time limitation on requests to withdraw a plea after sentencing. The current law has been interpreted to allow a defendant to move for the withdrawal of a plea at any time. The ability of a defendant to move for the withdrawal of a plea years after the entry of plea runs contrary to the interest of finality of criminal judgments. The amendment is consistent with the original intent of the statute and similarly situated post-convictions motions.

The desirability of finality was stated to have "special force with respect to convictions based on guilty pleas." Easterwood v. Kansas, 273 Kan. 361 (2002). Finality is very important to the criminal justice system and impacts vital societal interests. Victims and/or victims' families are entitled to finality. Finality promotes the most efficient use of finite resources. A defendant's ability to move for a withdrawal of plea at any time is contrary to the well-established and important interest of finality in criminal judgments, particularly guilty pleas.

The amendment is consistent with the original intent of the legislature. In 1970, the legislature amended the statute in response to ever increasing questions concerning pleas of guilty. In an effort to promote the timely filing of requests to withdraw pleas, the legislature established one standard for withdrawal of plea requests made before sentencing and a much more difficult standard for requests made after sentencing. A defendant need only show good cause prior to sentencing. After sentencing, a defendant is burdened with showing manifest injustice. Timely requests to withdraw plea were the goal. Timely requests serve the interests of justice. The Legislature clearly did not intend to allow for requests made years after the plea.

Time bars exist in all appellate matters. The lack of a time bar in the statute is counter intuitive.

Why should a defendant that enters a plea be treated differently than a defendant that is convicted after trial and appeals his conviction? A defendant convicted after a trial will face time bars throughout the appellate process. K.S.A. 60-1507 motions have a one year time limitation. The language in the amendment mirrors the recent amendment to K.S.A 60-1507.

The failure to include a time bar to requests to withdraw plea allows for manipulation and abuse of the criminal justice system and the important desire for finality. Case preparation and preservation are fundamentally different in cases that result in pleas than cases that proceed to trial. A dissenting opinion in a recent appellate case frustratingly recognized that "[w]hen viewing charges of aggravated criminal sodomy, attempted rape, and aggravated burglary that took place in 1986, I agree with the State that it would be difficult to reconstruct the evidence, and the doctrine of laches should be applied." Laches is similar to 'statute of limitations' and is based upon the maxim that equity aids the vigilant and not those who procrastinate regarding their rights. The doctrine of laches recognizes that neglect to assert a right or claim, together with the lapse of time, prejudices an adverse party. Neglecting to do what should or could be done to assert a claim for an unreasonable and unjustified amount of time causes an unnecessary and unfair disadvantage to an opposing party.

The lack of a time bar in the statute causes undue pain and suffering to victims and/or their families; places an undue burden on law enforcement; wastes limited resources; and runs contrary to the vital societal interest in finality in criminal judgments, particularly guilty pleas.

We urge your full support and favorable recommendation of SB 2097. I would be happy to stand for questions.