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February 3, 2023

Testimony Regarding HB 2121
Submitted by Marc Bennett, District Attorney, 18th Judicial District
and on behalf of the Kansas County and District Attorneys Association

Honorable Chairman Patton and Members of the House Judiciary Committee:

Thank you for the opportunity to address you regarding House Bill 2121. On behalf of the Kansas County and District Attorneys Association, I come to ask you to clarify how our state will resume statutory speedy trial rights once the current moratorium ends on May 1, 2023.

As a brief reminder, the legislature took timely and forward-thinking action in 2020 and 2021 to provide an opportunity for courts, prosecutors, and defense counsel to address the unprecedented disruptions that accompanied the COVID pandemic. The shutdowns, social distancing, and unexpected absences due to illness, etc. put tremendous strain on the criminal justice system. Without these prior amendments to K.S.A. 22-3402, the well-documented increase in violent crime that occurred in the wake of the pandemic (particularly gun and domestic violence) would have overwhelmed the statutory speedy trial framework that existed pre-COVID, resulting in the release of countless violent offenders into our communities.

It also bears noting the speedy trial rights afforded every defendant under the Constitution of the United States and the State of Kansas have remained in full effect in Kansas throughout the intervening three years, and neither the prior amendments nor this bill seeks to (or could) abridge or interfere with those rights.

Rather, the proposed amendments to K.S.A. 22-3402 reinstitute the time limitations that existed prior to 2020 while maintaining some of the current statute's innovations and adding others needed to face the growing challenges facing our criminal justice system:

- The time limitations between arraignment and jury trial will again be 150 days for those in-custody and 180 days for those on bond awaiting trial.
- Defendants will need to timely assert these rights, expediting the resolution of their cases and lessening the chance of inadvertent violations that endanger the public by causing defendants to be released for reasons unrelated to the nature of their conduct or the strength of the evidence against them. An example of a worst case scenario under the old statutory scheme is found in *State v. Queen*, 313 Kan. 12 (2021), in which a convicted murderer was released because he was brought to trial 153 days after arraignment (instead of 150). This occurred due to a misunderstanding of when the clock would run apparently shared by at least the court and prosecutor. The defendant did not object to the

scheduling of this date months in advance and had no duty to show how the additional 3 days interfered with his ability to present a defense in order to get relief. The case was simply dismissed because an additional 3 days had passed.

- Clarifies current points of confusion, such as what to do with defendants arraigned before or after March 2020 and what to do when a defendant absconds.
- Assists courts and counsel for both sides in balancing the desires of an individual defendant against the needs of all other defendants awaiting trial.

This last point is one that has come into sharper focus in recent years as the number of attorneys available to handle criminal cases has declined (on both sides). Whether due to smaller class sizes at law schools, the "Great Retirement" of recent years, or other factors, the number of lawyers in criminal law has diminished. BIDS reports having lost 1 in 5 public defenders in FY2022.

As a result, the remaining defense attorneys carry increasingly higher caseloads. Some public defender offices have repeatedly "shutdown" or stopped taking cases for weeks or months at a time due to expanded caseloads. These shut downs in turn overload the limited remaining private defense bar. Many prosecutor's offices across the State have vacancies that remain open for months awaiting applicants. All this makes it more difficult to avoid attorneys with multiple jury trial settings on a given week. The proposed amendments set forth in HB 2121 permit courts to consider the availability of attorneys, the unique needs of each defendant on their docket, and other relevant factors when prioritizing cases for trial. Ultimately, whether by statute or constitutional right, defendants who want a timely trial who articulate how further delay would harm their ability to present an effective defense will continue to be afforded that opportunity.

And lest anyone fear this bill will slow the resolution of cases or give courts and counsel free rein to indefinitely delay trials, I'd like to share a few statistics from Sedgwick County as an indication of how hard the criminal justice system has continued to work even while statutory speedy trial rights have been suspended over the past three years.

As of January 25, 2023, just under 99% of cases filed in 2018 and 2019 (the vast majority of cases pending in March 2020) are now resolved. Amidst shuttered jury rooms, plexiglass barriers and zoom calls, over 92 % of cases filed in 2020 and 79% of cases filed in 2021 have also been resolved. It also bears pointing out that rather than ignoring the wholly unique context in which we found ourselves, we filed roughly one third fewer cases in 2020 and 2021 by focusing solely the most violent and repeat offenders--which tend to face longer sentences and take more time to resolve. The less serious cases are now being filed in a special docket implemented to resolve lower level cases. This docket is the product of a cooperative effort between BIDS, my office and our courts to process the backlog of cases left uncharged in the past two years -- and those moving forward -- by expediting discovery and plea negotiations. In short, the record reflects that our courts, prosecutors, and defense counsel are more than capable of resolving cases efficiently despite unprecedented hurdles. HB 2121 will allow us to continue this work without the inflexible provisions that existed in K.S.A. 22-3402 before 2020.

As we did when the 2021 amendment to speedy trial was passed, the KCDAA and BIDS, have been in communication in recent days in a working dialogue regarding HB 2121. As a result, we have identified certain areas of agreement and now better understand our areas of disagreement. As adversaries in the law, we are unlikely to ever come to complete consensus, but it is my hope

that some friendly amendments could lead to a bill that serves both victims and defendants, leaving only a small number of policy decisions for this body to resolve.

Substantial Prejudice

While the Kansas and U.S. Constitution have been interpreted to require a defendant demonstrate substantial prejudice to establish a speedy trial violation, K.S.A. 22-3402 does not. This language remains a point of ongoing discussion.

Limiting the State's ability to continue cases awaiting trial

As mentioned above, attorneys are an increasingly scarce commodity in the criminal law, and their ability to prioritize cases for trial is essential to their ability to prepare and effectively serve their clients and the community. That said, we recognize that implicit in any statutory limit on the State's time to prosecute a case should include some clear limit on their ability to seek further delays, as opposed to delays attributable to courts, defense counsel, or defendants themselves. Whether that be a cap on the number or cumulative duration of State's continuances which may be granted for good cause under subsection (e)(4), further discussion of language in that regard is reasonable.

Cases in judgment before March 19, 2020

While recognizing the practical benefit of resuming statutory speedy trial rights uniformly on a given date, the defense bar rightfully has noted the HB2121 doesn't clarify what becomes of cases in judgment prior to the suspension of statutory speedy trial on March 19, 2020. We would accept an amendment clarifying that subsection (k) would not apply to defendants whose cases were in judgment prior to that date, as they may be actively pursuing appeals or other remedies to address pre-existing violations of K.S.A. 22-3402.

Restarting the clock

One thing both sides can agree on is there is a need for urgent action to pass a bill which can be enrolled prior to May 1, 2023. As this body deliberates in the coming weeks, cases are being charged and trial dates are being set in courtrooms across the State… including dates beyond May 1st. In most jurisdictions, trials are currently set well into the fall. Further, in some jurisdictions, a backlog of cases set for trial remains as a result of long-term closures throughout 2020 and 2021.

As a result, we welcome a discussion and amendment to subsection (k) to provide some additional "grace" period for courts and counsel to adjust to changes made to K.S.A. 22-3402 is in effect on or after May 1, 2023. How long that should be is a point for honest discussion, but the authors of this bill are asking for the clock to resume on or after January 1, 2024 to allow the courts and practitioners the opportunity to make appropriate records and set schedules with the new law in place.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennet
District Attorney