SENATE JUDICIARY COMMITTEE

January 26, 1970

HEARING FOR POTENTIAL APPOINTEES FOR WORKMEN'S COMPENSATION DIRECTOR, DIRECTOR OF KANSAS BUREAU OF INVESTIGATION AND MEMBER BOARD OF PROBATION AND PAROLE.

James E. Wells, Richard P. Senecal and Harold Ray Nye appearing in their own interests.

The Senate Judiciary Committee met January 26, 1970 in Room 523 at 11 o'clock A.M. with the chairman, Senator Steadman Ball, presiding. All members were present except Senators Foster, Gaar, Smith and Steineger.

Senator Ball announced that the members had had a request from the county attorneys to be heard on some phases of the Code of Criminal Procedure. Senator Bennett suggested that the chairman appoint a sub-committee to hear the county attorneys' information and present the policy questions back to this committee.

James E. Wells, potential appointee for the position of Workmen's Compensation Director was present to be interviewed for re-appointment to the same position. Senators Ball, Storey and Pomeroy stated that they believed everyone was extremely happy with the work of Mr. Wells as Workmen's Compensation Director.

Richard P. Senecal was present to be interviewed for a member on the Board of Probation and Parole. He was asked a great number of questions. He stated he believed the Board is now better organized regarding its work schedule than in its early stages. He also stated he was not aware of any unethical financial interests among its members. Mr. Senecal said he had some experience in probation with misdemeanors and believes it to be a very delicate problem to know what is the right kind of probation to deal out and also follow the statute. He named the salary of his position, held since January 6, 1970, to be $10.000 per year and said he would give up his three-hundred-dollar- a-month judgeship in Atchison if appointed to the Board of Probation and Parole.

A lengthy discussion followed regarding Mr. Senecal's work. Committee members engaged in this discussion were Senators Winter, Bennett, Rogers, Arvin and Van Sickle.

Mr. Harold Ray Nye was present for interview regarding reappointment to position of Director of Kansas Bureau of Investigation. Senator Ball read a brief summary of Mr. Nye's qualifications and facts concerning him. A few questions were asked and answered very capably by Mr. Nye.

Senator Pomeroy moved and Senator Bell seconded that the committee recommend the confirmation of all three nominees to the positions desired. The motion was unanimously carried.

The committee adjourned to meet January 27, 1970 at 11 o'clock A.M. in Room 523.

Martha P. Welch

Martha P. Welch, Recording Secretary

MINUTES APPROVED:

Steadman Ball

STEADMAN BALL, CHAIRMAN

JANUARY 27, 1970

EXCEPT AS OTHERWISE NOTED, THE INDIVIDUAL REMARKS RECORDED HEREIN HAVE NOT BEEN TRANSCRIBED VERBATIM AND THIS RECORD HAS NOT BEEN APPROVED BY THE COMMITTEE OR BY THE INDIVIDUALS MAKING SUCH REMARKS.

7. What is meant by the provisions of Sec. 22-~~305~~2305(5)? Under what circumstances would a prosecuting attorney request that an unexecuted warrant be returned and "canceled? (P. 7, lines 1 through 4) Under what circumstances would a warrant be returned "unexecuted and not canceled"? (Lines 8 and 9) What is meant by the term "canceled"? If a warrant is returned unexecuted, does the prosecution cease to be a pending action? (See KSA 69 Supp. 21-3106(5))

Regarding Article 24 - Arrest:

1. Is sec. 22-2408 intended to extend the notice to appear provisions to all misdemeanors rather than only violations of the uniform act regulating traffic on highways as is now contained in KSA 69 Supp. 8-5,127c? If the individual fails to appear at the prescribed time, the section fails to prescribe what further action is to be taken or that if a complaint has been filed during the intervening five days, it does not provide that a warrant will not be issued. Is it intended that the matter is to be processed to a plea of guilty or a trial without the commencement of a prosecution, as defined in KSA 69 Supp. 21-3107(5)?

Regarding Article 25 - Search and Seizure:

1. Is it intended that search warrants may be served in any county without regard to the venue of the magistrate issuing the warrant? Section 22-2202(12) defines magistrate without reference to geographical boundaries presently contained in KSA 62-201. Section 22-2503 provides that <u>any</u> magistrate may issue a search warrant, and Section 22-2505 provides that such search warrant shall be directed for execution to <u>all</u> law enforcement officers of the state. This suggests that a municipal court judge could issue a search warrant to be executed outside of his city and county and that the judges of the courts of limited jurisdiction could do the same.

2. The word "particularly" has been added to the descriptions required both in the application (Sec. 22-2503) and the search warrant (Sec. 22-2507). Does this variance from the present statutes (KSA 62-1830 and 62-1831) create a requirement for a more definitive description of the items to be seized?

3. Was it intentional that the primary responsibility for the safe keeping of seized property be shifted from the officer (KSA 69 Supp. 62-1834) to the magistrate (Sec. 22-2510 and Sec. 22-2502)? Was it also intended to shift the primary responsibility for getting a receipt to the person from whom property is seized from the officer (KSA 62-1833) to the magistrate (22-2510)? Do these proposed procedures not place the magistrate in the position of having to testify to complete the chain of possession of items introduced as evidence in the prosecution?

4. Was it intended that the officer executing a search warrant be <u>not</u> required to give a receipt for the items seized as now required in KSA 62-1833?

5. Was it intentional that the form for a search warrant now contained in KSA 62-1831 be omitted from the proposed code?

6. The observations regarding the lack of territorial limitation on magistrates in the issuance of search warrants appears to be also applicable to Sec. 22-2514, which provides that

REGARDING SENATE BILL NO. 483, SESSION OF 1970, PROPOSED "KANSAS CODE OF CRIMINAL PROCEDURE"

THE FOLLOWING ARE QUESTIONS, COMMENTS AND RECOMMENDATIONS DEVELOPED AT A MEETING CALLED FOR THE JUDGES OF THE COURTS EXERCISING LIMITED CRIMINAL JURISDICTION IN THE FOUR LARGEST COUNTIES OF THE STATE.

Regarding Article 23 - Preliminary Proceedings:

1. Section 22-2301 provides "...prosecution shall be commenced by filing a complaint with a magistrate." This appears to be inconsistent with KSA 69 Supp. 21-3106(5) which provides "A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution; ..."

2. Does the wording of Section 22-2302 contemplate some hearing and formal finding by the magistrate prior to issuing a warrant based on something more than the filing of a complaint? Attention is invited that this section appears to contain much stronger language than KSA 62-602, which provides "... he shall examine on oath the complainant, ... and if it shall appear that any such offense has been committed, ... shall issue a warrant, ..." Attention is also invited to a provision in Section 22-3201(2) "A complaint shall be signed by some person with knowledge of the facts." (Page 50, Line 28) This last statement seems to overrule the case law of this state found in State vs. Carey, 56 Kan. 84 at p. 87; State vs. King, 71 Kan., p. 287; and In re Merrifield, 175 Kan. p. 889.

3. If the answer to 2 above is in the affirmative, should a magistrate who has conducted a hearing and entered a finding "...that there is probable cause to believe both that a crime has been committed and that the defendant has committed it, ..." then disqualify himself from conducting the trial in the case of a misdemeanor, or the preliminary examination of a felony charge?

4. Should not the magistrate be given some discretion on the issuance of a summons instead of a warrant? Sec. 22-2302 makes it appear that a summons may be used only when requested by the prosecuting attorney.

5. Sections 22-2301 and 22-2302, together with the definitions found in 22-2201(6), (16) and (17) make it appear that it will be necessary for a judge to execute the jurat on every complaint and to personally sign every warrant or summons issued by the court. Is it intended that the clerks of these courts not have any authority in this regard? If the answer to the above question is yes, then how can it can be reconciled with the provisions of 22-2303 which provides "When a prosecution is begun by the filing of an ... information, the clerk of the court shall issue a warrant ..." and "The warrant may be signed by the clerk,..."?

6. Section 22-2304 reiterates that the warrant must be signed by the magistrate and provides that the amount of appearance bond shall be stated in the warrant. This latter provision appears to be most inconsistent with the provisions of 22-2802. This section contains another inconsistency in that it authorizes the summons to be signed by the magistrate or the clerk of the court.

an order authorizing eavesdropping "... may be issued by any magistrate of this state." "The order shall be directed to any law enforcement officer of the state... or one of its governmental subdivisions..." If an officer from Topeka appears in the magistrate court of Wyandotte County and presents sufficient evidence and information for an order authorizing eavesdropping in Johnson County, is that court authorized to issue such an order and is that officer authorized to obtain such an order?

7. Section 22-2514(2) provides "All testimony given on such examination shall be reduced to writing." Does this provision anticipate the necessity for a court reporter to be present, take and transcribe an interrogation type proceeding prior to the issuance of the order?

8. It would appear advisable to place some restriction on the disclosure of any information obtained by authorized eavesdropping. The only present provision concerning disclosure appears to be in Sec. 22-2514(4), which provides that such shall be made available to the defendant.

Regarding Article 26- Jurisdiction and Venue:

1. Should not the definition of "Courts of Limited Jurisdiction" contained in Sec. 22-2601 be included as an additional definition contained in Sec. 22-2202? Section 22-2202(12)(c) in defining the term "magistrate" makes reference to courts exercising limited criminal jurisdiction, whereas the term Courts of Limited Jurisdiction is used in many other cases throughout the proposed code.

2. Section 22-2605 should be modified to make reference to a boundary line between two or more counties as is contained in 22-2604.

3. Do the provisions of Sec. 22-2616 regarding change of venue apply to Courts of Limited Jurisdiction? If not, what provision is there for a change of venue in such courts of limited jurisdiction?

Regarding Article 27 - Uniform Criminal Extradition Act:

1. What is meant by the term "Court of Record" as used in Sec. 22-2710 and 22-2726? There is no Kansas statute defining a "Court of Record" and inquiry of attorneys and judges will produce a variety of definitions of the term. Various courts are designated as Courts of Record, i.e., the supreme court(KSA 20-101), district courts (KSA 20-301), county courts (KSA 20-802), certain magistrate courts (KSA 20-2501 for Johnson and KSA 20-2541 for Reno and Saline Counties), and probate courts (KSA 59-301).

2. Is there intended a distinction between the term "judge or magistrate" used in Sections 22-2713, 22-2714, 22-2715, 22-2716, 22-2717, 22-2718, and 22-2723(3) and the term "magistrate" as used in the articles preceding Article 27 and defined in Sec. 22-2202(12)?

Regarding Article 28 - Pre-trial release:

1. The title of the article appears to be a misnomer since it contains other items relating to the posting of appearance bonds; i.e., Sec. 22-2804. *Release after conviction*, Sec.22-2805. *Release of Material Witness*, and Sec. 22-2806. *Justification and approval of sureties.*

2. Section 22-2802 has been materially modified since its appearance in the October issue of the Judicial Council Bulletin. It appears that this modification is intended to give the court more discretion in determining the terms of release prior to trial. It is suggested that the provisions of Sec. 22-2802(1) be reversed and that the magistrate be first directed to release the defendant on one of the conditions contained in subsections (a) through (d), unless the magistrate determines in the exercise of his discretion that an unsecured appearance bond will assure the appearance of the defendant at the time specified.

3. As presently drawn does Sec. 22-2802(2) contemplate an adversary type hearing before there may be a determination that anything other than an unsecured appearance bond may be required?

4. Section 22-2202(1) and (4) use the term "security," while Section 22-2802(1)(c) uses the term "sureties." In the case of Appelgate vs. Young, 62 Kan. 100, the court found that justices of the peace were not authorized to accept money as bail. Is it intended that Courts of Limited Jurisdiction will now be authorized to accept deposits of cash in lieu of the execution of an appearance bond? Should not Section 22-2804 be divided into two sections, since subsections (1) and (2) appear to refer to conviction in the district court, and subsection (3) clearly refers to a conviction in a Court of Limited Jurisdiction?

5. Section 22-2804(3) is inconsistent with the provisions of Section 22-3610 (2). The first cited section deals with the terms of release pending an appeal from a Court of Limited Jurisdiction to the district court and says, "If the application is made after the transcript of proceedings has been certified to the district court ..." while the latter section provides "An appeal to the district court shall be taken by the filing of a notice of appeal ... and by supplying an appearance bond ..." It is obvious that a transcript of proceedings would not be prepared until an appearance bond is filed.

6. What is meant by the term relating to sureties "corporations authorized to do business in Kansas" as used in Section 22-2802 (1)(c) and the term "corporate surety which is approved as provided by law" used in Section 22-2806? There is no provision in the present law or in the proposed code that clarifies how a corporation qualifies to act as a surety on an appearance bond. A corporation may be authorized to do business in Kansas and still have no authority to execute such bonds. The certificate presently issued by the Secretary of State merely certifies that corporations are authorized to execute "surety bonds". It would appear that there should be some further definitive guidance concerning how a corporation qualifies to write appearance bonds and proves its solvency.

7. Section 22-2806 contains provisions that appear to apply to the professional bondsman. It is suggested that the professional bondsman should be recognized in the statutes and adequate provisions be made for the licensing and supervision of such activities. There does not appear to be any provision for a surety on an appearance bond to be authorized to arrest his principal by merely producing a certified copy of the bond as is now contained in KSA 62-1220. Section 22-2809 indicates a method for releasing the surety from further obligation and the recommitment of the defendant to custody which is not really very workable, and which should be done by journal entry.

Regarding Article 29 - Procedure after Arrest:

1. Section 22-901(2) relating to an arrest made in a county other than where the crime is alleged to have been committed, makes several material changes in the present law on such subject contained in KSA 62-605 and 62-606. Is it intended that the procedure of posting bond in the county of arrest for appearance in the county of venue be enlarged to apply to felony cases as well as misdemeanors where it is now available? Is it intended that an officer may now pursue a defendant in to another county on a misdemeanor charge and make an arrest without a warrant?

2. What is meant by the term "bench warrant" used in Section 22-901(6)? There appears to be no statutory definition of this term and inquiry of lawyers will produce a variety of definitions. Black's Law Dictionary defines bench warrant as "Process issued by the court itself, or 'from the bench,' for the attachment or arrest of a person; either in case of contempt, or where an indictment has been found, or to bring in a witness who does not obey the *subpoena*. So called to distinguish it from a warrant, issued by a justice of the peace, alderman, or commissioner. Oxford v. Berry, 204 Mich. 197, 170 N.W.83,87." Since the earlier sections of this code indicate that all warrants are to be signed by judges, it is difficult to understand the meaning of this subsection.

3. An addition has been made to Section 22-2902(3) since it appeared in the Judicial Council Bulletin. The sentence commencing at line 25 on page 39 should be further revised, since the addition of the phrase "a felony has been committed". It is suggested that this sentence should commence "If, from the evidence, it appears that a felony has been committed and there is probable cause to believe the defendant committed such offense, the magistrate shall ..."

4. What offenses are not bailable under the proposed code? Section 22-2901(5) contains the phrase "If the crime is not bailable" and Section 22-2905(3) contains the phrase "...if the offense is not bailable." Section 22-2802 provides for the release of a person charged with a crime "other than a crime punishable by death where the proof is evident or the presumption great", but nowhere does the proposed code seem to include an affirmative statement that in such instances the defendant shall not be admitted to bail. Such a provision is presently contained in KSA 62-619.

Regarding Article 32 - Proceedings Before Trial:

1. In felony cases, how much of this entire article applies to the Court of Limited Jurisdiction prior to the preliminary examination and how much of it applies only to the time between the preliminary examination and the trial in district court? It should be noted that in this article the common term is "the court", whereas in prior articles the judicial process and proceedings have been described as being conducted by "the magistrate."

2. Section 22-3201(2) says, "The complaint, information or indictment shall be a plain, concise and definite written statement of the essential facts constituting the crime charged." The present law requires "... a statement of the facts constituting the offense, in plain and concise language, without repetition." (KSA 62-1004 and 62-1010) Is it intended

that this deviation from the prior wording create a requirement for a more detailed statement of facts in the complaint, information or indictment?

3. Is it intended by Section 22-3208 that the pleas of not guilty, guilty and nolo contendere be in the form of written pleadings?

Regarding Article 34- Trials and Incidents Thereto:

1. Since Chapter 63 would be repealed, it is assumed that the provisions of this article will apply to the trial of a misdemeanor charge in a Court of Limited Jurisdiction. On the other hand, is it intended that the provisions of Section 22-3424(5) be applicable to such a situation, since the preparing and filing of a notice of appeal does not perfect an appeal from a Court of Limited Jurisdiction? (See Sec. 22-3610)

2. Are the provisions of Sec. 22-3426 regarding the detailed journal entry applicable to Courts of Limited Jurisdiction in the handling of misdemeanors?

3. Is it intended by Section 22-3427 that on a sentence to the county jail following a misdemeanor conviction the sheriff should be furnished with a certified copy of the journal entry of the trial, conviction and sentence, instead of the present procedure of furnishing an order of commitment?

4. Is it intended that the mental examination prior to sentencing and the commitment to state institutions contained in Sections 22-3429 and 22-3430 will be available to the Courts of Limited Jurisdiction on misdemeanor convictions?

5. Was it intended that there be no requirement for the defendant to appear personally for sentencing on a misdemeanor conviction, such as is now contained in KSA 62-1507? Section 22-3210(6) provides "In misdemeanor cases the court may allow the defendant to appear and plead by counsel" and Sec. 22-3405(2) provides, "The defendant must be present, either personally or by counsel, at every stage of the trial in a misdemeanor case." Nowhere does there appear to be an affirmative statement that the court may require the appearance of the defendant, even for sentencing, in a misdemeanor case.

Regarding Article 38 - Costs in Criminal Cases:

1. What portions of this article are intended to apply to Courts of Limited Jurisdiction in the handling of misdemeanor cases?

2. If this article is applicable to the Court of Limited Jurisdiction, how can the provisions of Sec. 22-3803 be reconciled with the provisions of Sec. 22-3425, which provides that a person adjudged to pay the costs shall be committed to the county jail until such time as the costs are paid?

Miscellaneous Items of Inquiry:

1. What is the intent of the new provision contained in Sec. 22-4603(3)? Is it intended that this provision may be applied to defendants in custody awaiting trial on felony charges? If this provision allows for the employment of defendants awaiting felony trial, should it not contain a provision allowing that the money earned be applied to court costs or the expenses of providing

counsel, if such defendant is indigent?

2. Since the charge of an alleged traffic violation is a crime under KSA 69 Supp. 21-3105, can these cases be handled with any less formality under the proposed code than any other criminal case? While KSA 69 Supp. 8-5,127a through 8-5,127e seems to contemplate some less formal method of processing these cases, it appears that the new Kansas Criminal Code and the proposed Kansas Code of Criminal Procedure does not make provision for such.

3. KSA 69 Supp. 8-5,127c contains the only thing approaching a definition of a "written traffic citation." KSA 69 Supp 8-5, 127e provides that "In the event the ... citation ... includes information, and is sworn to as required under the laws of this state, ... such citation ... shall be deemed to be a lawful complaint ...". Will such a "traffic citation" suffice as a complaint or must the charge be stated in the manner required by Sec. 22-3201(2)?

4. If a "traffic citation" is treated as a complaint, must it be sworn to before a judge or can the clerk of the court administer the oath and receive the complaint? (Sec. 22-2301)