SUBCOMMITTEE OF

SENATE JUDICIARY COMMITTEE

FEBRUARY 6, 1970

ROOM 523

CONSIDERATION OF SB No. 483

The Senate Judiciary Subcommittee composed of Senator Ball, chairman, Senator Tillotson, Vice-chairman, and Senators Rogers, Herd, Winter, Storey and Healy met in Room 523, February 6, 1970, for consideration of Senate Bill No. 483.

All members were present.

Others present were John C. Tillotson,Jr., Lee Hornbaker, Judge Doyle White, Judge Robert Morrison, Richard J. Foth and Professor Paul Wilson.

Senator Ball called the meeting to order and Mr. Foth presented an explanation of the word "particularly" in Sec. 22-2503. Senator Ball read the section and also a citation of the decision of the U. S. Supreme Court.

A discussion was held regarding the desire of some county attorneys and judges to have clerks authorized as magistrates. Professor Paul Wilson made some comments saying that in New Jersey there had been a decision permitting clerks to issue warrants or receive complaints; that in Minnesota there had been a case decided saying only Judicial officers could issue warrants. More discussion was engaged in by Judge Morrison, Senator Ball and John C. Tillotson, Jr. and the meeting recessed to meet at 1:30 P.M.

The meeting was resumed at 1:40 P.M. Senator Ball, Senator Tillotson, John C. Tillotson, Jr., Judge White and Professor Paul Wilson were present.

John C. Tillotson, Jr. suggested some work be done in Article 23. Judge Morrison suggested a change on page 50, line 20 and asked some questions regarding this. Professor Paul Wilson answered saying the complaint had to be definite.

Article 25, Search and Seizure, was discussed at length. Senator Ball stated that 22-2502 and 22-2511 should be rewritten and perhaps some of 22-2510. Professor Paul Wilson wrote a paragraph for the subcommittee for changing 22-2503.

The article on eavesdropping was taken up and John C. Tillotson, Jr. presented his ideas on the changes needed. He stated that he knew of fifteen county attorneys who felt that this article was a serious matter and should be deferred and that the requirements should be set out specifically. Senator Ball read the section and Judge White and Professor Paul Wilson expressed the idea that the section should be reworked.

The meeting adjourned to meet February 9, 1970 at 9 A.M. in Room 523.

Martha P. Welch

Martha P. Welch, Recording Sec.

MINUTES APPROVED:

Steadman Ball

Steadman Ball, Chairman

February 10, 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.

Draft III

KANSAS COUNTY ATTORNEYS ASSOCIATION

RECOMMENDATIONS IN RE SENATE BILL NO. 483:

Pg. 3, line, 15, 16

Pg. 3, line 28: After the word "Kansas", add the following: "And drawn in the language of the statute,"

(Recommendation would comply with present law.)

Pg. 4, line 8:

Following (d), add the following:
(e) The clerk of any court.

Present law, 62-201 is Justices' of the Peace, Mayors, Police Magistrates and Municipal Judges Magisterial authority for the issuance of warrants under present 62-602. The suggested change would allow the Clerk to issue warrants in a magisterial capacity, and conforms to the practice of other states, including Alabama, Mississippi and Wisconsin. See, 22 C.J.S. Sec. 326.)

Pg. 5, lines 9, 10:

On line 9, following the word "magistrate," strike the following: "A copy of the complaint shall forthwith be supplied to the county attorney of the county and ...."

Insert the following: "..... the complaint so filed shall be delivered to the prosecuting attorney for his examination prior to the issuance of a warrant or summons. A copy thereof shall be furnished to the defendant or his attorney upon request.

(Proposed section would give the prosecuting attorney an opportunity to intervene in the proceedings and direct the issuance of a summons rather than a warrant in a proper case.)

Pg. 6, line 8:

Following the word "required", delete the word "shall" and insert in its place the word, "may".

(Changes recommended on the ground that disclosure of the amount of bond to be required in certain cases might hamper the arrest procedure.)

Pg. 6, line 12:

Following the word, "magistrate", delete the following: ".....or the clerk of his court."

(Suggested change would follow adoption of recommendation

Pg. 6, line 14:

Following the word "warrant", insert the following: ". .. .or summons..."

(It is felt that it is inappropriate in a criminal case to have process served by any one other than a law enforcement officer, including zoning, health and other administrative type proceedings.)

Pg. 6, line 15, 16:

Delete the following: "The summons may be served by any person authorized to serve a summons in a civil action."

Pg. 6, line 26:

Insert immediately following (4): "Unless personal service is required by the county attorney. . .. . "

(Recommendation would allow prosecuting attorney to require personal service.)

Pg. 7, line 11:

Delete the following, ".. ..or other authorized person. . ."

(Would conform with recommended change for pg. 6, line 14,)

Pg. 8, line 4:

Delete the work "view", and insert in its place the word "presence".

(Changes recommended to permit present practice of airplane and radar arrests not in "view".)

Pg. 8, line 15:

Following the word "crime", insert the following: ". . .. or evidence of a crime. . . "

(Recommended change is believed to comport with present constitutional standards following a lawful search and would allow the taking of evidence of crime such as conspiracy, etc.)

Pg. 10, line 10:

Following the word "person", delete the following: ". . . .over the age of eighteen years. . . "

Pg. 11, line 19, 20, 21:

Following the last word on line 19, "appear", delete the rest of

the paragraph as shown on lines 20 and 21, and insert the following:

" . . . the court shall proceed to judgment without further process."

(Suggested change would conform to present 62-1104.)

Pg. 11, line 31 and
Pg. 12, lines 1 through 6:

Delete Sec. 22-2502 in its entirety.

(Paragraph recommendation is based on impracticability and on basis that an inventory may be required in interest of the rights of defendant.)

Pg. 12, lines 12, 13, 14, 15, 16, 17, 18, 19:

On line 12, delete the word "search" preceeding the word "warrant", and delete the words ". . .for the seizure of the following: " and further delete all of lines 14, 15, 16, 17, 18, and 19.

Add the following after the word "warrant" on line 12: " . . . to search for and seize any contraband or any property which constitutes or may be considered a part of the evidence, fruits or instrumentalities of a crime under the laws of this state, any other state or of the United States. The term "fruits" as used in this act shall be interpreted to include any property into which the thing or things unlawfully taken or possessed may have been converted."

(Conforms with present law set out in K.S.A. 62-1829.)

Pg. 12, Lines 20 to 31;
Pg. 13, lines 1 through 17

Delete recommended sections.

(In lieu of recommended sections insert present K.S.A. 62-1830, 62-1831, 62-1832 (first sentence) and add: "Whoever discloses prior to its execution that a warrant has been applied for or issued, except as necessary to its execution, shall be deemed guilty of a class b misdemeanor." Add section 62-1833.

(Recommended sections are for the reason that it is felt present law is up-to-date and entirely adequate; in addition, present 62-1829 permits seizure of fruits which may have been converted.)

Pg. 14, line 9:

Delete the word "for" and insert the word "or", in its place.

Pg. 14, 15, 16:

Sec. 22-2514 through Sec. 22-1515 inclusive

(Eavesdropping statute-See separate recommended eavesdropping provision. The county attorneys association generally feels that the eavesdropping section proposed does not permit eavesdropping for the purpose of combating organized and commercial crime, which is particularly envidious and impervious to other types of normal criminal investigative work. It is felt that the use of eavesdropping for the purpose of saving human life in unnecessary and unworkable. The association feels that the number of authorized applicants is too great and that emergency eavesdropping without the court permission is extremely likely to invade civil rights of all citizens.)

Pg. 17, lines 23, 27:

Delete words "intentionally" and "knowingly".

(Recommendation for the purpose that intent is always required and language is confusing to the jury.)

Pg. 33, lines 9 through 15:

Delete all of subsection (4).

(Recommendation made because right is already available by remedy of Habeas Corpus.)

Pg. 33, line 18, 19, 20:

Delete last sentence.

(Again right of appeal to District Court available by Habeas Corpus or by motion after under the jurisdiction of the District Court.)

Pg. 34;

Delete all of Sec. 22-2803.

(Recommendation is made for the reason it is felt the proposed section would encourage endless applications for review of bail conditions and because right of petition by Habeas Corpus is available for unconstitutional restrictions.)

Pg. 35, line 31: and
Pg. 36, line 1:

Delete the following: ". . .except a corporate surety which is approved as provided by law. . ."

(Recommendation for the reason that the association cannot understand this exception. It is felt that even though a corporate surety may be approved by the insurance commissioner, assets are not necessarily available for execution.)

Pg. 38, line 2:

Following the words "unnecessary delay or" insert the following: . . . . .in the case of misdemeanor, and . . . .:

(Recommendation for the reason that it is felt that a felon should not have the right to bail in a county other than that in which the offense is charged, thereby leaving only misdemeanor defendants the privilege of making bail with the nearest available magistrate.)

Pg. 38, line 25:

Change "lo" to "5".

Pg. 39, line 11:

Following the word "magistrate" insert the following: ". . . except a fugitive from justice. . . "

Pg. 39, line 15:

Following the word "after the" delete the word "arrest" and insert in its place the words "personal appearance".

Pg. 56, line 12:

After the words "nolo contendere" insert the following: " . . .for good cause shown and within the discretion of the court. . ."

(Recommendation for the reason it is felt that present law permits withdrawal of a plea only to prevent constitutional affimity from arising upon appeal or collateral attack and recommended language would help preserve that exception.

Pg. 63, lines 24, 25:

Following the word "motion" on line 24, delete the remainder of the sentence, ". . .and the burden of proving that the search and seizure were lawful shall be on the prosecution."

(Recommendationfor the reason that deletionshould remove implication that defendant need proceed on bare allegations and without going forward with the burden of producing some evidence.)

Pg. 87, line 7:

Add additional subsection (d): ". .from an order prior to or during a trial quashing a warrant or search warrant, suppressing evidence and suppressing confessions or admissions.

Pg. 87, lines 8 and 9:

Delete the word "district" preceeding the word "judge".

Pg. 87, line 11 through 21:

Following the word "admission" on line 11, delete the remainder of the paragraph though line 21. Insert therein the following: "When a judge prior to the commencement of trial of a criminal action makes an order quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution from such order if application is made to the court havingjurisdiction of appeals within ten days after entry of the order under such terms and conditions as the court may fix. Further proceedings in the trial court shall be stayed pending determination of the appeal."

(Recommendation for the reason it is felt the Supreme Court or any judge may summarily determine the propriety of an appeal.)

Pg. 87, lines 22 -25:

Delete proposed Section 22-3604 in its entirety.

(Recommendation for the reason that no valid reason appears why the State should be prejudiced by an appeal permitted to be taken by the Supreme Court.)

Pg. 87, lines 27-29:

Delete subparagraph (1) and insert in its place:

"(1) Whether defendant shall be held in jail or subject to an appearance bond during the pendency of an appeal by the prosecution shall be in the sound discretion of the court."

Pg. 89, lines 8 and 14:

The word "magistrate" should be changed to read "judge".

PROPOSED CHANGES, CRIMINAL PROCEDURE CODE

22-1204 When two or more defendants are charged with any felony, the Court may order a separate trial for any one defendant when requested, in order to avoid prejudice to any defendant or the State by such joinder.

Adoption of Federal Rule 14 allowing severance to avoid prejudice.

22-1402 (1) If any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within niney days after his arraignment on the charge, he shall be entitled to be discharged from further liability to be tried for the current charge, unless the delay shall happen as the result of the application or fault of the defendant, or a continuance shall be ordered by the Court.

22-1402 (3) The time for trial may be extended beyond the limitations of sub-sections (1), (2), (this section) for any of the following reasons:

(c) There is material evidence which is unavailabe; that reasonable efforts have been made to procure such evidence; and that there are reasonable grounds to believe that such evidence can be obtained and trial commenced within the next succeeding ninety days. Not more than one continuance may be granted the State on this ground, unless for good cause shown.

(Suggestion in 22-1402 (1) would obviate question of speedy trial where person was incarcerated for another offense. Suggestion with regard to 22-1402 (3) c would allow the State more than one continuance for unavailable material evidence for cause.)

22-1501 (1) The Court, on its own motion, or on motion of a defendant for a new trial or for a judgment of acquittal may grant a new trial to him if required in the interests of justice.

(Suggested language would allow the Court to order a new trial instead of acquitting defendant, where a new trial is indicated without a defendant's request. This would avoid the question of double jeopardy where no request is made. For example, where motion for judgment of acquittal is made and the Court feels a new trial should be granted for incompetence of counsel, section would provide it.)

22-1425 (4) The Court before which any person shall be convicted of any criminal offense shall have the power, in addition to the sentence prescribed or authorized by law, to require such person to give security to keep peace, be of good behavior, abide by the conditions of probation, if any, for the term of probation or for a term not exceeding two years, or to stand committed until such security be given.

(Suggested change incorporates present Section 62-1504, with slight modification, providing for a peace bond after conviction.

Pg. 44, 45

22-3007 (2) (Line 31, 1, 62) strike language "if the grand jury deems it necessary."

Pg. 46

22-3009 (1) Any person called to testify before a grand jury must be informed that he may not be required to make any statement which will incriminate him.

(Counsel for any witness may be present while the witness is testifying and may interpose objections on behalf of the witness on the ground of self-incrimination. He shall not be permitted to examine or cross-examine his client or any other witness before the grand jury.)

Pg. 46, line 29:

After the word "foreman", add the following sentence:

"No indictment may be filed unless signed by the prosecuting attorney." (Sec. 62-927.)

Pg. 47, line 16, 17:

Delete the following sentence:

"No obligation of secrecy may be imposed upon any person except in accordance with this rule."

Insert the following:

"No member of a grand jury, attorney, interpreter, reporter, typist, or witness shall be obliged or allowed to testidy or declare in whatcmanner he or any other member voted, or what opinions were expressed in relation to any matter considered. No grand juror shall disclose any evidence given nor the name of any witness appearing before the grand jury, except when lawfully required to testify as a witness in relation thereto; and any such disclosure shall be deemed a Class B misdemeanor." (Sec. 62-924, 925.)

Pg. 48, line 16:

Change the word "a" immediately preceeding the word "judge" to "any" and delete the words "of the district court", found immediately following the word "judge".

Pg. 48, line 18:

Immediately following "violation of law" add the following:

". . . .which application and process and hearings pursuant thereto shall remain confidential."

Pg. 49, following line 2:

Add: (3) If the attorney general, assistant attorney general or county attorney of any county is informed or has knowledge of any alleged ciolation of any law of this state pertaining to gambling, intoxicating liquors, organized crime, or any violation of any law where the accused is a fugitive from justice, he shall be authorized to issue subpoena for such persons as he shall have any reason to believe have any information relating thereto or knowledge thereof, to appear before him at a time and place to be designated in the subpoena andtestify concerning any such violation. For such purposes any prosecuting attorney shall be authorized to administer oaths.

The testimony of each witness shall be reduced to writing and signed by the witness, and any refusal to answer proper questions propounded by a prosecuting attorney, refusal to sign the testimony, refusal to be sworn, or refusal to obey the subpoena, shall be a Class C misdemeanor.

If the testimony so taken shall disclose the fact that an offense has been committed, such prosecuting attorney shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the prosecuting attorney, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued for the arrest of such person or persons as in other criminal cases. (Sec. 62-301.)

Pg. 14, line 11;
Pg. 15
Pg. 16, lines 1 through 19

Please refer to previous written recommendations regarding eavesdropping set out herein.

(It is the recommendation of the association that eavesdropping be permitted with relation to the following crimes only: Crimes against national security, treason, sedition, criminal syndicalisn, commercial gambling, racketering, commercial bribery, sports bribery or tampering.)

Other observations of deficiencies in proposed Sections 22-2514, 22-2515 and present sections 21-4001 and 21-4002:

(a) Surreptious listening without the use of an amplifying or other illegal device would be prohibited.

(b) Consent eavesdropping, such as listening on a telephone extension would be prohibited.

(c) The court is not required to make and reduce t o writings specific findings prior to issuance generally, and special findings for eavesdropping on public facilities and privileged communications otherwise provided by law.

(d) Recommended section does not provide for periodic reports on progress of eavesdropping to the court.

(e) Recommended section does not provide for the right of appeal by the State from a denial of a eavesdropping order.

(f) Proposed section does not make the recording of eavesdropping compulsory as well as the preservation of such recordings.

(g) Proposed section does not provide for the discovery of eavesdropping recordings by persons whose communications are intercepted.

(h) The proposal does not provide for an inventory of intercepted communications to the person affected.

(i) The proposal does not provide for grounds for suppression of intercepted communications.

(j) The proposal does not provide for civil damages for illegal eavesdropping.

(k) The proposal does not provide for the central reporting of eavesdropping experience and maintenance of statistics thereon.

The association members discussing this matter are of a general feeling that a proposal following public law 90-315 of the Omnibus Crime Control Act should be enacted, so that uniformity of practice and definition could be achieved. The association additionally feels that, as a matter of policy, the eavesdropping provision should be deleted from the criminal procedure code and reproposed as a separate bill in the interest of the general public.

18 U.S.C. 3251