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To: Chairman Susan Humphries and Members of the House Judiciary Committee

Re: House Bill 2131– Opponent Testimony


From: Susan H. Richmeier, KCDA Board Member and Finney County Attorney

Chairman Humphries and Committee Members:

Thank you for the opportunity to offer testimony on behalf of the KCDA in opposition to HB 2131. Examination of proposed HB 2131 reveals a list of discovery requirements already imposed upon the prosecution by statute, case law, rules of professional conduct and court rules. The statutory changes proposed by HB 2131 are unnecessary.

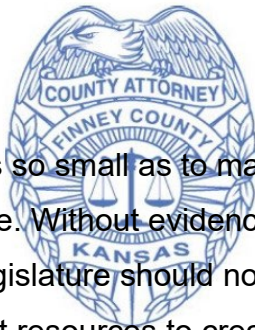
Codification runs the risk of causing confusion between current statutory obligations and well-established precedent, infusing a lack of unpredictability as the new statute and its language is challenged and further interpreted by the courts. Further, it is overly burdensome, especially for our smaller county prosecutors. Our concerns include the following:

- The State is already required to endorse witnesses. K.S.A. 22-3212, which sets out the rules of discovery, which already covers what HB 2131 is proposing to codify.
- The first part of H.B. 2131 largely codifies already existing prosecutorial obligations regarding evidence affecting the credibility of witnesses as constitutionally required pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405



U.S. 150 (1972). The bill takes those requirements steps further and would mandate prosecutors to detail their negotiations with witnesses because of the requirement to disclose “requests for benefits.” A request for a benefit is not itself a benefit. Only when a prosecutor provides a benefit is there evidence that may affect credibility. Potential motivation for a witness to testify is not what they wanted in exchange for testimony but what they received.

- The State is already required by ethical rule to disclose all exculpatory evidence to the defendant, including evidence which would tend to negate the guilt of the accused or mitigate the offense (KRPC 3.8(d)). Decades of Kansas and U.S. Supreme Court caselaw support the proposition the State must disclose exculpatory evidence independent of statute or rule.
- The district court already has the authority to require the State to disclose the listed material upon motion by the defendant. Passage of this new bill will present confusion between statutes and will be litigated in the future.
- It usurps the exclusive role of the jury as the trier of fact in determining the weight and credit of the testimony of each witness. This measure would put the court in the shoes of the jury prior to trial, holding a hearing to determine whether an incarcerated witnesses’ testimony is reliable.
- The courts are currently required to instruct juries in trials involving jailhouse informants pursuant PIK 51.100 which states in pertinent part: “you should consider with *caution* the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence.” (*emphasis added*). This has been the law of the State (and interpreted by the courts) for decades.
- HB 2131 would also create a repository of individuals who have testified as incarcerated informants by the Kansas Bureau of Investigation (KBI). Prosecutors would be obligated to report such witnesses to the KBI. All indications are the



- number of such witnesses is so small as to make the expenditure of state funds for this purpose questionable. Without evidence that jailhouse witness testimony is a problem in Kansas, the legislature should not require Kansas prosecutors and the KBI to expend significant resources to create and maintain a database on jailhouse informants.
- The second part of H.B. 2131 creates a substantial concern for the safety of people who provide information to law enforcement. Creating a database of cooperating witnesses endangers the safety of those witnesses and upon sunset of the confidentiality provision would allow criminal elements to identify and take reprisals against “snitches.” The “snitch” database would simply support criminals in their efforts to root out cooperators and act against them. Once cooperating witnesses start believing there is a database that will identify them statewide cooperation with law enforcement will drop drastically. It does not matter if the bill only relates to jail house witnesses as potential cooperators will not see the distinction.
- Consideration should be given to the fact not all 105 prosecutors within the state have electronic case management systems. Not even our court system has one unified case management system. Before additional requirements for reporting be codified, other, more pressing issues regarding the integrity of the criminal justice system should be considered.

Thank you for taking the concerns of the KCDAAB into consideration as you contemplate the merits of this measure.

I would be happy to answer any questions.

Susan H. Richmeier
Finney County Attorney
KCDAAB Board Member