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Thomas R. Stanton
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TO: The Honorable Senators of the Senate Judiciary Committee

FROM: Thomas R. Stanton
Reno County District Attorney

RE: Senate Bill 116

DATE: March 17, 2024

Chairman Warren and Members of the Committee:

Thank you for allowing me to submit testimony regarding Senate Bill 116.

SB 116 addresses discovery procedures regarding the use of witnesses who are incarcerated and provide testimony in the prosecution of another person who is not a codefendant in that witness' own case. The bill seeks to establish discovery requirements for this singular class of witnesses and then seeks to collect information on all such witnesses, placing that information in a statewide database.

Criminal investigations never end with the arrest of a suspect and the filing of charges by a Kansas prosecutor. Investigations continue with law enforcement agencies responding to new leads and possible witness testimony. Post-charging investigations often identify new and/or previously unknown witnesses who may provide important, relevant information for the trier of fact. Occasionally, these witnesses take the form of a person who is currently incarcerated. It may be that the information a jailed witness can provide comes from knowledge obtained before the witness was incarcerated. In other instances, the relevant information is gleaned by the incarcerated witness while in custody in the presence of another defendant. Proponents of Senate Bill 116 are apparently suggesting to this Committee that such evidence is inherently unreliable and requires additional legislation to protect the interests of incarcerated defendants. This legislation is entirely unnecessary, is not good public policy, and should not be passed into law by the Kansas Legislature.

Subsection (a) of the legislation contains provisions currently codified by Kansas statute, addressed by the ethical rules that apply to all prosecutors, and interpreted by multiple appellate court decisions. The provisions of K.S.A. 22-3212 and amendments thereto describe the discovery requirements for all criminal cases in Kansas. Subsections (a)(1)(A) through (a)(1)(E) of Senate Bill 116 describe discovery procedures already encompassed by K.S.A. 22-3212. There is no legal or structural need for an additional statute repeating these discovery procedures.

Prosecutors are held to the highest ethical standards in the legal profession. Kansas Rules of Professional Conduct 3.8(d) enumerates special responsibilities of prosecutor in the conduct of his or her criminal case. The Rule includes the responsibility to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . ." This responsibility encompasses all the suggested discovery requirements contained in subsection (a) of Senate Bill 116.

The discovery procedures used by a prosecutor in Kansas are also subject to appellate court precedent. *Brady v. Maryland*, 373 U.S.83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Kansas appellate court decisions adopting these cases, giving prosecutors specific directions regarding the requirement to provide available discovery in a criminal case, including any impeachment information regarding its witnesses, to the defense in advance of trial. Again, the provisions of subsection (a) are a redundant attempt to apply long-established requirements for discovery to a certain class of witnesses. There is no need to do so.

Additionally, it must be understood that all defendants in criminal cases have the ability to attack the credibility of any witness through the use of cross-examination at trial. If a defendant wants to paint the testimony of any witness as unreliable, cross-examination is the vehicle by which this is accomplished.

I have been a prosecutor in Kansas for 34 years. I held the position of First Assistant Saline County Attorney for nearly 10 years and have worked as the Deputy District Attorney and District Attorney in Reno County for more than 24 years. In that time, I can remember fewer than five occasions upon which a prosecutor used in incarcerated witness who had gleaned information from another defendant while incarcerated. The last such occasion occurred in 2003 in a homicide trial. Immediately prior to trial in that case, the prosecution team was informed that an incarcerated individual had information regarding admissions that had been made by the defendant in the presence of the incarcerated witness regarding specific details of the murder of the defendant's ex-wife. The information provided by the incarcerated witness was information that was not available to the public, and that only the person committing the crime could have known. A decision was made to call that incarcerated witness at trial. The defense was provided with the content of the expected testimony and all other required discovery before the incarcerated witness took the stand to testify. No deals were extended to the incarcerated witness in exchange for his testimony at trial. The incarcerated witness testified sporting a black eye he received from other inmates after they discovered he would be testifying in the case. The only reward for this witness coming forth to help the victims in the case get justice for the deceased victim was a beating.

The threat of physical harm is present anytime an incarcerated individual agrees to testify against

another inmate. The Hutchinson Correctional Facility of the Kansas Department of Corrections is located in Reno County. The prosecution of crimes committed against inmates in the institution is very difficult because, more often than not, even the victim refuses to testify because of the possibility of physical harm that may be endured because of such testimony.

The two prior paragraphs are relevant to your analysis of Senate Bill 116 because of the provisions laid out in subsection (b) of the bill. It is difficult in the current climate to get an incarcerated witness with relevant, reliable testimony to risk almost certain physical harm in coming forward, and subsection (b) would have a chilling effect on the willingness of incarcerated witnesses to assist in the administration of justice for the victims of crime in Kansas. Subsection (b) seeks to develop a database of incarcerated witnesses, apparently based on an unsupported assertion that all incarcerated witnesses are somehow inherently unreliable. Most prosecutors with whom I am acquainted go to extra measures to ensure the integrity and reliability of any information that might be supplied by an incarcerated witness and are very hesitant to obtain such testimony through some sort of benefit. If such benefit is offered, for example allowing for a reduced bond in hopes of keeping the incarcerated witness safe, these benefits are reported to defense counsel prior to trial. The fact that proponents of this bill are suggesting the need for a statewide database that is designed to lose any aspect of confidentiality suggests an underlying intent to chill the possibility that any incarcerated witness would be willing to come forward and testify in the interests of justice for the victims of crime in Kansas

Subsection (b) also creates an unfunded mandate for county governments and prosecutors in the state by requiring the development of new programs in each office to maintain a central record of incarcerated witnesses. The bill also requires that the system be set up to transmit this information to a centralized state database. Subsection (b)(2) suggests that the database would be accessible only to prosecutors. Prosecutors have not requested access to such a database. The only purpose I can see for this provision is an attempt by the proponents of the bill to set up a duty that prosecutors affirm the database has been reviewed to determine if the incarcerated witness they are calling in a specific case has ever provided similar information. I see no relevance in inventing a duty to provide information on previous cases in which any witness may have testified. This information does not meet the definition of impeachment evidence.

I also object to the bill on the grounds that the cost of the bill for prosecutors and county governments is not justified by the goals of this bill. There have been no studies to determine what it would cost county government and prosecutor's offices to implement this database, and the number of persons that might be entered into this database based on my experience does not justify expending the funds required to implement the bill on either the state or the local level.

Please also consider the fact that this bill applies to all prosecutors and their offices without consideration of the size of the office or the full-time or part-time nature of the prosecutors employed by those offices. The bill would impose upon District Attorneys and County Attorneys alike a duty to perform an act that may occur once or twice in the entire career of the prosecutor. County Attorneys, who represent a majority of the 105 counties in the state of Kansas, often have no or little staff and rely on antiquated records management systems. The consequences of an oversight in putting the identity of an incarcerated witness into a database when required by statute to be so could result in unintended consequences the prosecutor or

issues with cases on appeal.

I agree with prior testimony submitted by Marc Bennett, the District Attorney in Sedgwick County, on a similar bill that the money spent to implement this legislation would be better used to provide the Board of Indigent Defense Services with funds to allow their attorneys to keep track of any witnesses, incarcerated or not, that they believe other defense attorneys should be aware of based on the receipt of benefits for testimony. Prosecuting attorneys should not be tasked with the duties proposed by this legislation.

I urge this committee to defeat this piece of legislation.

Respectfully submitted,

/s/ Thomas R. Stanton .
Thomas R. Stanton
Reno County District Attorney