OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT

MARC BENNETT
District Attorney

AARON BREITENBACH
Deputy District Attorney

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Testimony Regarding SB 116
Submitted by Marc Bennett, District Attorney
Eighteenth Judicial District

Honorable Chairwoman Warren and Members of the Senate Committee on Judiciary, thank you for the opportunity to offer opposition to Senate Bill 116 on behalf of the KCDAA.

Proposed SB 116(a)(1) seeks to require prosecutors to provide the defense with (A) the criminal history of a "jailhouse witness"; (B) any written agreement between the prosecutor and the witness; (C) the contents of the statement made by the defendant to the witness; (D) information of any recantation by the witness; and (E) information concerning other cases in which the witness testified (not expressly limited to other "jailhouse witness" scenarios).

To be clear, each of these proposed requirements are already mandated by established statutes, binding case law and ethics rules of professional conduct:

- The State is already required to endorse any witnesses it intends to call at trial.

- K.S.A. 22-3212, re discovery and inspection, requires the state to provide to the defense: (a)(1) "Written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney."

- The Kansas Rules of Professional Conduct 3.8(d), Special Responsibilities of a Prosecutor, requires the prosecution to, "make timely disclosure to the defense of all or information that tends to negate the guilt of the accused or mitigates the offense . . ."

- Pursuant to *Giglio v. U.S.*, 405 U.S. 150 (1972), impeachment information about any witness – including promises from the prosecution to that witness -- are discoverable and must be turned over in discovery.

- Prosecutors have an unqualified obligation under *Brady v. Maryland*, 373 U.S.

83, 87 (1963), to turn over all evidence favorable to the accused when the evidence may be "*material either to guilt or punishment*." See *State v. Warrior*, 294 Kan. 484, 505-506 (2012).

- Kansas trial judges have for decades utilizes P.I.K. 51.100 to instruct juries: " . . .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).*

In addition to requiring prosecutors to do what we are already required to do, SB 116 seeks to add additional responsibilities. Subsection (b)(1) would require prosecuting attorneys to maintain "a central record" containing information regarding "jailhouse witnesses," and details of any benefits they have ever received. Pursuant to (b)(2), this information is then to be sent to the Kansas bureau of investigation where the bureau will then be required to maintain a "statewide database containing the information."

Three concerns are raised by this specific section. First, is the expense. Has a cost analysis been conducted? In my experience, "jailhouse witnesses" are so rarely used, that any expense incurred would not be worth standing up and maintaining this database. The money would be far better spent providing BIDS (the Kansas Board of Indigent Defense Services) a new records management system—one in which defense attorneys paid by BIDS (roughly 84% of all criminal cases in Kansas are defended by BIDS lawyers) could enter any information they chose about any witness and share the same with all defense attorneys statewide, while also benefiting their ranks with a new, modernized RMS.

The second concern is that making this repository the responsibility of the state risks infusing error into prosecutions. The vast majority of prosecutors in the 105 counties in the state are part time officials with little to no support staff and often antiquated records management systems. If the part time prosecutor in a small jurisdiction fails to properly enter the material, and the witness later testifies for any reason – jailhouse witness or not – the state's failure to provide the information that was to have been entered into the state's database, will cause appellate issues.

Third, the KBI database will be "confidential and not subject to the open records act, K.S.A. 45-215 et seq.," only until 2029. After that, what will inevitably be called the "snitch list" will be an open record absent future (and ostensibly recurring) legislative effort. Jailhouse witnesses are not all cut from the same cloth. The rarified times we have considered using their testimony, the witness has been in jail for a short time on a minor offense and overheard the defendant bragging to someone else about his crimes. Often the witness doesn't want anything, they just wanted someone to know. Does the guy in on the DUI deserve to have his name publicly accessible on such a list?

Finally, the definition of "jailhouse witness" is problematic. The reality is that defense attorneys often approach prosecutors and tell us that a client knows something to see if it would make a difference in negotiations. We may have the detective de-brief with the client with the understanding that the statement will be turned over to the defendant

about whom they are providing information. We may never use that "jailhouse witness" but we share the information. If we never actually call the witness, is that scenario covered by the law?

The responsibility of providing discovery is one that any professional prosecutor's offices takes very seriously. In 2023 (final 2024 numbers are not yet compiled), the Office of the District Attorney in Sedgwick County employed 6 people whose only job is to provide discovery to defense council. Our discovery unit responded to 2542 requests for initial discovery packets and 3411 times for supplemental discovery in our criminal cases alone (not JO, CINC, TR and C&T). The volume of discovery that we provided amounted to **14 Terabytes** of information **--** not including officer's body camera footage which is provided to defense counsel by a separate cloud-based discovery portal.

A law that recodifies what we are already required to do and seeks an expenditure of funds to stand up and support a new database without evidence that such an expenditure would accomplish the goal sought by this legislation is unnecessary.

Thank you for taking the concerns of the KCDAA into consideration.

Respectfully submitted,

Marc Bennett
District Attorney
Eighteenth Judicial District