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March 14, 2025

To: Chairman and Members of the Senate Committee on the Judiciary
Re: Senate Bill 116– Opponent Testimony
From: Susan H. Richmeier, KCDAA Board Member and Finney County Attorney

Chairman and Committee Members:

Thank you for the opportunity to offer testimony on behalf of the KCDAA in opposition to SB 116. Examination of proposed SB 116 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 SB 116 are unnecessary. Codification runs the risk of causing confusion between current statutory obligations and well-established precedents, 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.

Many of these concerns will or have been outlined by my colleagues. However, some are unique to the counties outside the “Big 5”. Small county concerns run the gamut of issues, those which should really concern everyone are as follows:

Rural concerns:

- Not all County Attorney’s offices work off an electronic database case management system. Many still work “old school”. This means new filings and case management are essentially generated from a template which is manually prepared and kept in a paper file. I can personally think of multiple counties which function like this in not only my judicial district but those surrounding us.

- Because of the attorney shortage in Kansas, many small rural counties don’t have one practicing attorney. This forces many rural county attorneys to be elected in more than one county and have private practice at the same time. This doesn’t make it cost efficient for these counties to invest in costly software and technology infrastructure. I haven’t done the math, but how many counties have cities under 20,000?

- Due to size and coverage needs, not all County Attorney's offices have access to CJIS systems. Most prosecutors depend on their local law enforcement to run criminal history checks and Triple I for them. If the intent is for access to be prosecutor access only, the statute does not work on its face for most of our state.

- To obtain KCJIS access, a county or district attorney must meet KCJIS and FBI minimum standards for access, training and security. To meet these demands can be costly and time-consuming.

  > *Ex.: My office is currently undergoing our KCJIS audit. Just to purchase and install badge access locks to what needs to be secured per policy was a cost of $45,000. This does not include the security standards and mapping our IT department must meet or the time and training to ensure the security measures are met day-to-day.*

  Imagine the cost for each individual county across the state. This cost will not be borne by the state, but by the individual counties. The cost is more than negligible when the total budget for the county attorney's office is less than $100,000 annually.

- I am also aware criminal history is not accurate across the state. We have had instances where we know a suspect/defendant has convictions which have not been reported due to our relationship with counties surrounding us. We then must obtain certified journal entries from the court of record to be presented to the sentencing court for a more accurate criminal history and sentencing. This issue should concern everyone more than the random jailhouse snitch.

- Realistically, there are probably 10-20 counties in our state of 105 who would/will be able to follow a statute such as this. No internal electronic case management system, no access to KCJIS, no one reporting dispositions of cases, part-time county attorneys with part-time practices being expected to perform like those of us with a staff of multiple attorneys and assistants. It's just not practical or reasonable. It sets 90% of prosecutors up for failure and we have a hard enough time recruiting/electing prosecutors to start with.

Additional concerns:

- The State is already required to endorse witnesses. K.S.A. 22-3212, which sets out the rules of discovery, which already covers what SB 116 is proposing to codify.

- The first part of SB 116 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." plea negotiations, mediation negotiations are not disclosable to the court. 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.

- Prosecutors are already required by ethical rules 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 witness' 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.
- SB 116 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 SB 116 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 KCDAA into consideration as you contemplate the merits of this measure.

I would be happy to answer any questions.

Susan H Richmeier

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KCDAA Board Member