House Corrections and Juvenile Justice Committee
Testimony of Kansas Association of Criminal Defense Lawyers
HB 2468 - Opponent
January 26, 2012

KACDL is a 350+ member organization dedicated to justice and due process for people accused of crimes. HB 2468 amends K.S.A. 22-3212, the statute relating to discovery in criminal cases. **This proposal is 1) unnecessary; 2) a violation of the constitutional right to due process; 3) unfair and unrealistic under current conditions; 4) impacts defendant's constitutional rights to counsel and speedy trial; and 5) detrimental to judicial economy.**

HB 2468 is unnecessary

At a time when resources for everyone involved in the Kansas criminal justice system are limited, policy makers should ask "what is the problem with K.S.A. 22-3212 as it is currently written? Do we have a problem in our system that must be remedied by production requirements for defendants?" Kansas does not have the resources – money, people, and time, to name a few – to make changes just because other states or the federal system have certain requirements. K.S.A. 22-3212 already requires defendants to allow the prosecution access to certain discovery. As another example, current law requires a defendant to give notice to the State if he is going to present an alibi or argue a defense of mental disease or defect.

HB 2468 violates due process

This chart illustrates the basis of this argument:

Defendant (under HB 2468)	State (under HB 2468)
Must provide (1) expert reports that the defendant intends to produce at a hearing; (2) a summary of the expert's qualifications; and (3) a summary of anticipated expert testimony, as well as bases and reasons for his/her opinions.	Must provide only (1) results of examinations, tests or experiments. There is no obligation to provide a summary of expert qualifications or a summary of anticipated expert testimony.
Must provide names of all prospective witnesses.	No obligation in the discovery statute to provide witness names. The State is obligated to endorse "the names of all witnesses known to the prosecuting attorney" on the complaint. K.S.A. 22-3201(g).
Must provide addresses of all prospective witnesses.	No obligation in the discovery statute or elsewhere to provide witness addresses; in fact, the discovery statute prohibits disclosure to the defendant of witness addresses.
No provision for late disclosure.	The State is allowed to endorse additional witnesses at any time "that the court may by rule or otherwise prescribe." K.S.A. 22-3201(g). In practice, the State routinely endorses additional witnesses fewer than 30 days before trial, and such tardy endorsements are never viewed by the appellate courts as reversible error.

The unequal nature of these discovery obligations violates due process as defined in *Wardius v. Oregon*, 412 U.S. 470 (1973). In *Wardius*, the Supreme Court held that a statute that imposed discovery obligations on a criminal defendant, but did not impose those same obligations on the State, violated due process and could not be enforced against the defendant. *Id.* at 472. The statute at issue in *Wardius* was an alibi notice statute, but the same due process principles apply here: "[I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street . . . . Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Id.* at 475 & 475 n.9.

HB 2468 is unfair and unrealistic

As proposed, the defendant has greater discovery requirements than the State. But *even if* HB 2468 was amended to equalize discovery obligations between the State and the defendant, it would still be unfair given the nature of system. Discovery imbalances in the defendant's favor make sense not only because of the State's information-gathering advantages, but also because the State bears the burden of proof at trial. It thus makes sense to expect the State to marshal and disclose its evidence ahead of trial. The defendant, on the other hand, is not required to produce any evidence at trial, and may not decide until after the State has rested its case whether he or she will produce any evidence, much less which evidence. Obligating the defendant to disclose witness lists and testimonial summaries unfairly puts the defendant in a position of disclosing evidence that he or she may yet choose never to present.

Even if HB 2468 equalized discovery obligations, it would still be unrealistic. A majority of Kansas state criminal cases – felonies and misdemeanors – are handled by public defenders and appointed counsel. (And the person writing this is one!) With current caseloads, lack of resources, lack of support staff, lack of funds, etc., it would be difficult (if not impossible at times) to meet these proposed requirements.

One last comment on this point. Even some of the resources relied on by the State are suffering, which in turn would affect defendants' ability to comply with HB 2468. For example, the KBI lab has so much work that lab results sometimes come back on the eve of trial. A defendant could not comply with a 30-day requirement if she doesn't know about this evidence until days before the trial.

HB 2468 impacts defendants' constitutional rights to counsel and speedy trial

Unlike K.S.A. 22-3201(g) – which permits the State late endorsement of witnesses (even during trial) – HB 2468 does not provide a process for defendants to make a disclosure after the 30-day time period. If a defendant does not or cannot comply in time, what is the consequence? One concern is the consequences will impact a defendant's right to counsel under the U.S. and Kansas Constitutions. We can expect an increase in ineffective assistance of counsel (IAC) claims. If the consequence of noncompliance is a continuance of a defendant's jury trial, that impacts his/her right to a speedy trial.

HB 2468 hurts judicial economy

HB 2468 presents two possible paths, both ending in clogged court calendars, retrials, lawsuits, etc.

First, if defense counsel wants to avoid the burden of discovery requirements, she may not "seek discovery and inspection" pursuant to K.S.A. 22-3212. Instead, she may take more cases to preliminary hearing (instead of waiving those hearings). Under K.S.A. 22-3213, the State is required to turn over statements of witnesses after they testify. Trial attorneys could just rely on this, which could cause

delays in hearings or trials (example: stopping after every witness so defendant's attorney can review reports before cross-examining the witness). Also, the State is constitutionally required to turn over all exculpatory evidence. But the more defense attorneys rely only on the constitutional discovery requirements (which means they don't have all of the police reports, witness interviews, lists of evidence seized, etc.), the more likely it is the State fails to turn over exculpatory evidence. Not to say the State would be doing this intentionally – but two sets of lawyer eyes are more likely to discover things missing than one set of eyes. The failure to turn over exculpatory evidence could result in wrongful convictions and lawsuits against the State – because it is more likely the wrong people are convicted because of said failure.

Second, if defendant's counsel does seek discovery under K.S.A. 22-3112 but cannot comply with the 30-day requirement – either because of something she has to investigate/write/test/receive from an expert or because of some discovery received from the State within 30 days of trial that necessitated follow-up by defense counsel – she may have to request a continuance of hearings and/or trial. This will also impact the calendars of those involved in a criminal case.

For all of these reasons, we ask you to reject HB 2468.

Thank you for your consideration,

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Note: In the event the proponents of HB 2468 argue this proposal is akin to the federal rule, I have attached a copy of Rule 16 of the Federal Rules of Criminal Procedure. It *does not* contain all of the requirements HB 2468 does.

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) Use as Evidence. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) Objections. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) Depositions by Agreement Permitted. The parties may by agreement take and use a deposition with the court's consent.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Oct. 12, 1984; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) ***Information Subject to Disclosure.***

(A) *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's

position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects.* Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests.* Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses.* At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure.* Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the

discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) ***Grand Jury Transcripts.*** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) ***Information Subject to Disclosure.***

(A) *Documents and Objects.* If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) *Reports of Examinations and Tests.* If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert Witnesses.* The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

(2) ***Information Not Subject to Disclosure.*** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or
(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) ***Protective and Modifying Orders.*** At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) ***Failure to Comply.*** If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Dec. 12, 1975; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 29, 2002, eff. Dec. 1, 2002; Nov. 2, 2002, eff. Dec. 1, 2002.)

Rule 17. Subpoena

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) Producing Documents and Objects.

(1) ***In General.*** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may