

Tricia Bushnell

I want to thank the members of the House Judiciary Committee for working so hard to protect against wrongful convictions and to provide exonerees with compensation. This Tuesday the Attorney General announced that it will agree to compensate Lamonte McIntyre. Our clients Floyd Bledsoe and Richard Jones have also been compensated.

### *Wrongful Convictions*

House Bill 2544 is another important step in preventing wrongful convictions. I want to start by asking—what would you say to get out of jail or prison? Jailhouse witnesses are incentivized to lie about other inmates for leniency in their own cases. There is little disincentive to lie because state witnesses are rarely charged with perjury, even when wrongful convictions reveal that their testimony untrue .

Jailhouse witnesses played a role in wrongfully convicting 167 innocent Americans since 1989. They are typically used in cases where the stakes are the highest and the evidence is the weakest. While this hasn't been a contributing factor in Kansas's small number of exonerations, we expect that to change soon. There are innocence cases going through the Kansas court system right now that involve lying jailhouse witnesses.

### *Unique Problems with Jailhouse Witnesses*

You might ask why a jailhouse witness is different than other witnesses who might be motivated to lie—like a family member who offers an alibi for a defendant. The answer is that the motivation to lie for a loved one is obvious to a jury, while a jailhouse witness's motivation to lie is not always clear.

The prosecution is already constitutionally required to disclose benefits and discrediting evidence on jailhouse witnesses to the defense. The U.S. Supreme Court ruled that failure to turn over this information violates a defendant's due process because he or she cannot prepare an adequate defense that raises reliability issues to the judge and jury. However, in Kansas jailhouse witness evidence is often disclosed late, incompletely or not at all. As a result, cross-examination and other mechanisms for weeding out perjured testimony are useless.

Even more troubling is that prosecutors can dangle the possibility of leniency without formalizing an agreement before the jailhouse witness testifies. In the federal system, the practice is to write formal cooperation agreements before a witness gets on the stand, but that doesn't usually happen on the state level. Without a formal deal, the jailhouse witness can honestly testify he's not getting anything for his cooperation.

The prosecutor can further boost the testimony by telling the jury that the jailhouse witness risked his life to do the right thing. The reality it is that the state already puts jailhouse witnesses in administrative segregation before they testify, and as part of their deal these inmates usually get out of jail or prison soon after taking the stand.

### **Benefits of HB 2455**

More scrutiny and transparency would benefit the entire system.

### *Tracking*

A centralized tracking system would give prosecutors better information on potential jailhouse witnesses before putting them on the stand. Right now, Assistant District Attorneys have to rely on jailhouse witnesses' own accounts of their previous testimony in other cases. To get the full background, the ADA would have to call every County and District Attorney's Office in the state. Without a central record, ADAs might not even know about the jailhouse witness's previous testimony in their own jurisdiction.

A good defense lawyer will hire an investigator to get the full story on a jailhouse witness, and the prosecutor could be caught off guard at trial. Rather than ADAs spending time and resources investigating their own

potential witnesses, the tracking system would give prosecutors access to information from a centralized source. The record would only be accessible to prosecutors, and if the prosecutor decides to use the jailhouse witness's testimony, the information would be disclosed to the defense, as the U.S. constitutional already requires.

It is also important for ADAs to have this information to make good prosecuting decisions. You have a handout and will hear more details about Ronald Rudisill, a prolific jailhouse witness in Kansas. For the past 15 years he has established a pattern of getting arrested in different counties, making deals with the state to testify, and then getting out of prison to commit more crimes.

Rudisill was a jailhouse witness in a case being investigating by University of Kansas Law's Project for Innocence. Alice Craig and her team uncovered that Rudisill had been charged with 16 cases since 2005. Seven of the charges were dismissed and three of his arrests were never charged, likely because he testified for the state.

Right now, Rudisill has four open criminal cases in Sedgewick County including for aggravated robbery and assault with a deadly weapon. The ADA who is prosecuting him had no idea that Rudisill had a long history of getting charges dismissed in exchange for testimony. It would have required him to go to courthouses in every county, and even then, the records do not show WHY charges were dismissed. The KU Project for Innocence had to do extensive, time consuming research to get this information.

### *Enhanced Disclosure Requirements*

The enhanced disclosure requirements would also improve the entire system. HB 2455 spells out exactly what types of "discrediting evidence" and benefits must be disclosed, which will enforce the state's constitutional obligations under *Giglio*. There will be no question about what information must be turned over, which will reduce court time spent litigating these issues. There were also be fewer post-conviction claims alleging the state misused or unconstitutionally withheld jailhouse witness evidence. There is also cost-savings in avoiding wrongful conviction compensation and civil lawsuit payments.

### *Pre-Trial Reliability Hearings*

Finally, pre-trial hearings will allow judges to exercise their gatekeeping role, as they do for expert witnesses and child witnesses in Kansas. Jurors often wrongly assume that a prosecutor has special knowledge that the jailhouse witness is telling the truth. When juries don't know about the deals that jailhouse witnesses are expecting after they testify, that makes their statements even more convincing.

H.B. 2544 would require pre-trial reliability hearings before jailhouse witnesses can testify in rape and murder cases. The impact would be minimal because there are a small number of these cases, and even fewer that go to trial. In high stakes murder and rape cases, there should be extra screening for the riskiest witnesses.

Providing prosecutors, defense attorneys, and triers of fact with the full picture of a jailhouse witness is critical for justice and public safety. These measures better enable the legal system meet its promise of revealing the truth.