

To: Senate Judiciary Committee

From: Chris McMullin, Chief Deputy District Attorney, 10th Judicial District

Date: March 7th, 2012

Re: ***Testimony in support of HB 2468***

Thank you for this opportunity to provide written testimony.

I am writing in support of HB 2468, amendments to K.S.A. 2011 Supp. 22-3212, the criminal discovery statute.

HB 2468 would even the playing field for Kansas prosecutors facing expert testimony from criminal defendants.

I am the Chief Deputy District Attorney for the 10th Judicial District (Johnson County). I have been a prosecutor for 20 years. I have handled hundreds of criminal cases, including numerous cases that involve defense expert witnesses.

The current form of K.S.A. 22-3212 allows defendants to ambush the State by concealing expert conclusions and opinions until the time of trial.

K.S.A. 22-3212(7)(c)(1) states that a defendant who seeks discovery under this section (which is nearly all defendants) shall permit the prosecutor “to inspect and copy...scientific or medical reports...which the defendant intends to produce at any hearing...” This is the reciprocal discovery portion of the statute. Savvy defense attorneys are able to circumvent this provision by instructing their expert witnesses *not to produce reports*. Savvy defense experts in areas as diverse as pathology, auto collision reconstruction and DNA routinely provide testimony without written reports. Prosecutors are thus unable to adequately prepare for cross examination of defense experts, or hire rebuttal experts. They hear the defense expert opinion at the same time as the jury, during the defense case-in-chief. This is trial by ambush.

HB 2468, which is long overdue, solves this dilemma. Under this amendment, criminal defendants must provide the prosecution a “summary or written report” of the expert (including the expert’s qualifications), as well as “tangible papers, objects or exhibits that the defendant intends to produce.” These must be produced “no less than 30 days prior to trial.” HB 2468 (7)(c)(2)(A)-(C).

This is an entirely reasonable requirement. HB 2468 would become part of the Kansas Code of Criminal procedure. The purpose of the Code was set forth by the Legislature in K.S.A. 22-2103: "This code is intended to provide for the just determination of every criminal proceeding. Its provisions shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

HB 2468 fulfills this purpose by injecting greater "fairness" in criminal proceedings, and helping find a "just" determination of criminal proceedings involving defense experts.

As a final note, K.S.A. 22-3219, "Defense of lack of mental state" has contained reciprocal discovery provisions since its amendment in the 1990's. If this defense is used, all parties receive copies of "each mental examination of the defendant." This has led to the smooth operation of complex 'insanity defense' cases. It is uncontroversial.

In summary, I strongly support HB 2468, which will eliminate "trial by ambush" in those cases where defense experts do not prepare written reports.

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