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Testimony In Support of HB 2366
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My name is Tricia Rojo Bushnell and I am the Executive Director of the Midwest Innocence Project, which works to exonerate individuals convicted of crimes they did not commit in Kansas, Missouri, Iowa, Nebraska and Arkansas, and to enact policies to prevent wrongful convictions in the first place. Together with our partners, MIP has represented Floyd Bledsoe, Richard Jones, Lamonte McIntyre, and Olin “Pete” Coones, Jr., in the cases that ultimately resulted in their exonerations. Together, they served over 67 years for crimes they did not commit. I thank the House Judiciary Committee for working so hard to protect against wrongful convictions and, knowing nothing can ever repay what the exonerated have lost, to provide exonerees with compensation.

House Bill 2366 is another important step in preventing wrongful convictions by creating critical safeguards for the use of jailhouse witnesses in court. The risks of using a jailhouse informant are readily apparent: Jailhouse witnesses are incentivized to lie about other incarcerated people for leniency in their own cases, and there is little disincentive for them not to as state witnesses are rarely charged with perjury, even when their testimony is later proved untrue.

The unjust results of those risks are also well documented: jailhouse witnesses have played a role in wrongfully convicting 200 innocent Americans since 1989, including here in Kansas. When I last testified before this committee in 2019, MIP was also fighting to prove the innocence of Kansan Pete Coones. Pete spent 12 years behind bars for a crime he did not commit, in part due to the false testimony of a jailhouse witness who was known to be unreliable. Last November I had the immense privilege of seeing Pete exonerated after years of fighting on his behalf. On the day he walked out, Pete, who had lost so much, was still full of so much hope. Having lost over a decade of his life due to misconduct and unreliable evidence, he was determined not to waste one minute more and had plans to rebuild his life with his family and to provide support to the families of other wrongfully convicted, to give them the love that his family had provided to him during his wrongful conviction.

But Pete’s plans were cut short. Tragically, what none of us knew on that joyous day last November was that when Pete re-entered the free world, he did so in a body riddled with cancer. Cancer that had gone undiagnosed and untreated during his twelve years in prison. And so Pete’s unjust incarceration again reclaimed his life when Pete died last month after having experienced only 108 days of freedom.



Pete's wrongful conviction could have been prevented had the measures outlined in HB 2366 already been implemented. Pete was wrongfully convicted of the death of Kathy Schroll and her husband, Carl Schroll, based in large part on a jailhouse informant. The evidence that the Schrolls had died in a murder suicide was evident at the time of the crime, but the State suppressed much evidence and took Pete to trial anyways. As a result, at the end of trial, Pete was convicted of the murder of Kathy Schroll and acquitted of Carl's. However, Pete's conviction was overturned because the State had failed to turn over exculpatory information at the time of trial.

During his second trial, the State used a jailhouse informant, Robert Rupert, to solidify a case against Pete. Like in Pete's case, jailhouse informants are typically used in cases where the stakes are the highest and the evidence is the weakest. In Pete's case, while incarcerated, Rupert had reached out to the Wyandotte County District Attorney Ed Brancart, stating he had information on Pete's case. Rupert was subsequently moved back into Pete's jail cell for less than 48 hours, after which Brancart emailed the prosecutor in Butler County, where Rupert was awaiting charges, to ask about Rupert. The Butler county prosecutor responded the same day, stating: "[T]he persons here who have handled his cases hate him...The impression I get is that he's not reliable at all." Another prosecutor told Brancart the same, describing Rupert as "a bit nutty" with an "extensive criminal history," including 28 convictions for crimes involving dishonesty or false statements. Brancart met with Rupert anyways, who wanted a deal to testify against Pete, and ultimately presented his unreliable testimony at trial. None of this evidence was provided to the defense and so, despite the inconsistencies between Rupert's testimony and the facts of the crime, the jury credited him and Pete was convicted.

Over a decade later, Pete was ultimately exonerated when a Court found, among other things, that the State withheld evidence that Rupert was unreliable, that he may have had mental health issues, and that he wanted a deal to testify. The State also did not disclose Rupert's full criminal history, all of the letters the Rupert had written the prosecution, the number of interactions it had with the informant, or that it had threatened Rupert with jail time if he did not testify.

No one should be convicted on such evidence. I urge you to pass HB 2366 to regulate the use of unreliable jailhouse witnesses to protect innocent Kansans from the nightmare Pete and his family have endured. I know Pete would be here if he were still alive, and in the short time he was free, he looked forward to testifying before you in support of this bill so that no one else would have to go through the injustice he and his family experienced.

Unique Problems with Jailhouse Witnesses

Jailhouse informants are different from other witnesses who might be motivated to lie--like a family member who offers an alibi for a defendant-- because while the motivation to lie for a loved one is obvious to a jury, a jailhouse witness's motivation to lie is not always apparent. Concerns about this reliability are real and 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, or in cases like Pete's, 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. Without a formal deal, the jailhouse witness can honestly testify he is not getting anything for his cooperation as a deal is not made until after the testimony is received.

A prosecutor can further boost the testimony by telling the jury that the jailhouse witness risked his life to do the right thing-- a claim that Rupert made during his outreach to Brancart. The reality is that the State already puts jailhouse witnesses in administrative segregation before they testify, and as part of their deal these incarcerated people usually get out of jail or prison soon after taking the stand.

Benefits of HB 2366

In short, 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. Indeed, while Brancart learned about some of Rupert's other cases, he may not have learned about all: while Rupert was attempting to make a deal about Pete's case, he had also contacted another ADA to discuss the case of another defendant, who, like Pete, also went on to be convicted of a double murder.

Thus, while a good defense lawyer will hire an investigator to get the full story on a jailhouse witness, 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 and would make it possible for them to disclose a full record if they decide to use the informant at trial. 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. constitution already requires.

Enhanced Disclosure Requirements



The enhanced disclosure requirements would also improve the entire system. HB 2366 spells out exactly what types of “discrediting evidence” and benefits must be disclosed, which will enforce the State’s constitutional obligations under *Giglio*. The bill makes clear what information must be turned over, which may reduce court time spent litigating these issues. In Pete’s case, some, but not all, of Rupert’s deeply troubling history was disclosed. HB 2366 would ensure it would all be turned over and ultimately these disclosures could prevent wrongful convictions and in doing so also prevent the cost of compensating the wrongfully convicted.

Pre-Trial Reliability Hearings

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.

HB 2366 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, like Pete’s, there should be extra screening for the riskiest witnesses.

Jury Instructions

HB 2366 would ensure jurors are provided instruction on what factors they should consider when assessing a jailhouse witnesses testimony.

Victim Notification

The fact that the victim of a crime is living with the understanding that the perpetrator against them or their loved one is being held responsible for their actions when in reality that person is being offered a deal to testify against another - particularly when the person they are being incentivized to testify against is innocent - goes against all basic principles of fairness. HB 2366 smartly alerts crime victims when the perpetrator in their crime is being offered a deal to testify against another incarcerated person.

All of these safeguards would have played a role in Pete’s case, and would have prevented his wrongful conviction. This committee can honor his memory and ensure that other innocent Kansas do not suffer the same fate. HB 2366 would provide prosecutors, defense attorneys, and triers of fact with the full picture of a jailhouse witness and better enable the legal system to meet its promise of revealing the truth. I urge you to pass HB 2366.