KANSAS STATE BOARD OF INDIGENTS' DEFENSE SERVICES

House Judiciary Committee
February 8, 2023

House Bill 2121
Testimony of the BIDS Legislative Committee
Presented by Clayton J. Perkins
Opponent

Chairman Patton and Members of the Committee:

Since we became a state, our speedy trial statute has protected Kansans' right to a speedy trial through a simple and effective mechanism that requires the prosecution bring the defendant to trial within a specific, reasonable period of time or the case will be discharged. HB 2121, as currently drafted, would eliminate that core function of the speedy trial statute, which the BIDS Legislative Committee and the BIDS Board opposes.

However, if this committee moves forward with this bill, we do believe it is possible to achieve the goals of this bill without sacrificing those core functions. As such, this testimony proposes several changes to HB 2121, and we appreciate the input of this committee, and opportunity to continue working with the proponents of this bill on these suggestions.

Why we have a right to a speedy trial, and need to protect it.

The Sixth Amendment of the Federal Bill of Rights and Section 10 of Kansas' Bill of Rights both guarantee an accused the right to a speedy trial. Since our earliest days of statehood, the Kansas Legislature has provided a statute for the purpose of guaranteeing and guarding those Constitutional rights.[1] We, like the vast majority of states[2], have consistently had these statutory protections throughout Kansas' history for many reasons.

[1] The statutory right was first codified at statehood and required a case be discharged if not brought to trial before the end of the second term of the district court following indictment. See Ch. 32, Sec. 199, pg 265, of the General Laws of the State of Kansas (1862). The provision was subsequently codified at Sec. 62-1432 of the Revised Statutes, before taking its present form in the 1970s at K.S.A. 22-3402. See also *In re McMicken*, 39 Kan. 406 (1888) ("Section 10, of the bill of rights in the constitution of the state declares that, in all prosecutions, the accused shall be allowed a speedy public trial. The statute is intended practically to carry out that right by prescribing a definite and uniform rule for the government of courts in their practice.").

[2] In preparing this testimony, the BIDS Legislative Committee identified speedy trial statutes present in 44 states.

First and foremost, is protecting our Constitutional rights that were enacted by our founders to prevent the harm of long trial delays both to the accused and to the public. The accused, of course, is in the unique position to be harmed by excessive pretrial incarceration should they be unable to make bail, or have their liberty infringed by pretrial release conditions if they do make bail. These are people who have not yet had the ability to exercise their right to a jury trial that could determine their innocence or guilt. These are people who are presumed innocent under our system of laws, who will be harmed by excessive pretrial delays our speedy trial rules have historically prevented.

Just as importantly, both the accused and the public, share many interests in maintaining the orderly and speedy processing of our court system. As time passes, evidence stales, and the memories of witnesses gets cloudy. This weakens both the prosecution's potential evidence of guilt as well as the accused's potential evidence of innocence. It weakens the reliability of our jury trials. Even further, excessive delays extend the anxiety felt by witnesses, and especially crime victims, who may have to re-live trauma at trial. The interest of crime victims in prompt results is also recognized in the Kansas bill of rights for victims of crime. Ensuring speedy trials helps prevent those harms.

This brings us to why the Kansas legislature has always protected the right to a speedy trial through our statute. The statute is there to ***prevent*** the right to a speedy trial from being violated by establishing timelines that, practically speaking, are safe harbors. Constitutional rights do not provide these clear instructions on how not to violate them, they only provide a remedy of dismissal once the right is violated.

The constitutional analysis explained in *Barker v. Wingo*, 407 U.S. 514 (1972), examines whether the right to a speedy trial has been violated by directing courts to analyze four factors: 1) The length of the delay; 2) the reasons for the delay; 3) the defendant's assertion of his or her speedy trial rights; and 4) the degree of prejudice to the defendant. This analysis is complex, case specific, and difficult to apply. Moreover, because it examines the prejudice to the defendant at trial, it primarily comes up after a conviction has already occurred. The courts are left to evaluate only whether the right has been ***violated***, and the only cure is the uniquely harsh remedy of dismissal of the case.

In contrast, the speedy trial statute is meant to set clear bright-line standards for bringing the accused to trial in a reasonable time, and ***prevent*** the Constitutional violations, and subsequent dismissals, from ever occurring. Throughout our state's history our speedy trial statute has always set a specific and reasonable period of time in

which the prosecution has to bring the accused to trial or it will be dismissed. The statutory standards are easy to understand, and easy for the prosecution to comply with. Dismissals due to violations of the speedy trial statute are already extraordinarily rare, and easily avoidable by the standard practice of checking a calendar. The statute prevents the Constitutional speedy trial right from being violated, and it works. Without that core mechanism of the statute, we are at risk of more convictions being dismissed due to Constitutional violations.

The statute also ensures that cases proceed in an orderly manner, without a backlog of cases awaiting jury trial building up. This is clearly illustrated by our present situation. In 2020, statutory speedy trial was suspended due to the unprecedented Covid-19 pandemic. When that happened, trials stopped happening, cases stopped proceeding in an orderly manner, and a backlog of cases awaiting trial has built up. This buildup of cases exacerbated by speedy trial delays has also significantly contributed to the overloading of the capacity of the criminal defense system to handle the volume of cases charged by local prosecutors, contributing to shortages of counsel throughout the state. The fix to the backlog is to get back to trials and the orderly processing of cases as quickly and safely as possible. The end of the suspension of the speedy trial statute provides an incentive to work through those backlogs. In contrast, eliminating the enforcement mechanisms of speedy trial will just let the backlog build up further.

This Legislature has provided a speedy trial statute, protecting the rights guaranteed in the Sixth Amendment of the Federal Bill of Rights and Section 10 of Kansas' Bill of Rights, throughout our State's history. This Legislature should maintain that tradition and ensure that speedy trial returns to Kansas in a way that preserves the core function of the statute.

Suggested changes to HB 2121 to preserve the core protections of a speedy trial and encourage the efficient resolution of cases.

Any changes to how our statutory speedy trial system works that increase the time people spend awaiting their constitutionally protected rights to a jury trial is something the BIDS Legislative Committee and the BIDS Board cannot support.

However, we acknowledge it is likely possible to preserve the core functions of statutory speedy trial, while providing more flexibility to the State in scheduling trials, which we understand as the intent behind HB 2121. As such, we suggest the following changes to HB 2121 that would 1) preserve the core mechanism of statutory speedy trial; 2) speed up the resolution of some cases; and 3) limit the scope of HB 2121 to pre-trial cases.

Change 1: Preserve Speedy Trial's Core Function with a Clear and Unmistakable Deadline.

As written, HB 2121 would eliminate the core function of statutory speedy trial by replacing the specific and clear period of time the prosecution has to bring a case to trial with a system that allows the prosecution to continue the trial indefinitely, and requires a showing of prejudice to the defense at trial before a case is discharged. Those changes are contained on Page 1, Lines 30-34 and Page 2-3, Lines 31-4 of HB 2121. We suggest this committee first consider amendments to two areas that would provide a limit to the number of continuances allowed to the prosecution, and preserve the violation of a clear deadline as the reason for discharge. These would preserve the clear and unmistakable mechanisms that makes speedy trial work, protects the rights of those standing accused, and encourages the orderly administration of justice in Kansas.

The first amendment would be to Page 2-3, Lines 31-4, to limit the number of 90 day continuances for good cause allowed to the prosecution, such as limiting it to two continuances by making the following changes that are in bold and highlighted:

> (4) ~~because of other cases pending for trial, the court does not have sufficient time to commence the trial of the case within the time fixed for trial by this section. Not more than one continuance of not more than 30 days may be ordered upon this ground~~ *at the request of either party or as otherwise necessary, the court finds good cause to reschedule trial within the succeeding 90 days.* ***Not more than two continuances may be granted to the state on this ground.*** *When determining whether good cause exists, the court may consider any relevant factors, including, but not limited to:*
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> > *(A) The trial court's availability;*
> >
> > *(B) any* ~~***relative***~~ *prejudice asserted by the defendant caused by such delay;*
> >
> > *(C) the availability of trial counsel;*
> >
> > *(D) the time needed for* ~~***recently appointed***~~ *counsel to prepare for trial;*
> >
> > *(E) the availability of witnesses; and*
> >
> > *(F) the relative safety of the proceedings or participants as a result of a public health emergency, natural disaster or any other emergency that prevents the court from proceeding.*

This change would limit the prosecution to two new continuances of 90 days for good cause shown. Even allowing these two new continuances would, functionally, increase the time granted to the prosecution by 180 days as this time would add to the existing time limits of 150 and 180 days. However, that would still significantly limit the scope of HB 2121 which, as drafted, allows for unlimited continuances by the prosecution, and would end any firm deadlines in the statute. I also included two minor changes to the language of relevant factors, which I believe makes them clearer.

The second amendment would be to Page 1, Lines 30-34, and would restore the existing rule that a defendant be discharged if the speedy trial deadline is not met:

> (c) ~~If any trial scheduled within the time limitation prescribed by subsection (a) or (b) is delayed by the application of or at the request of the defendant, the trial shall be rescheduled within 90 days of the original trial deadline.~~ *A request to be discharged from further liability to be tried for the crime charged pursuant to subsection (a) or (b) shall be made before trial commences or before the applicable time limitation is set to expire, whichever date is earlier. Failure to make such request in a timely manner shall constitute a waiver of the rights provided in this section. Such request shall be granted if the court finds* ~~***that the defendant has established by a preponderance of the evidence that any excessive delay attributed to the state will result in substantial prejudice to the defendant's ability to present a defense at trial.***~~ ***that trial cannot commence within the time limitations provided in subsection (a) or (b), or the continuances provided to the prosecution or court in subsection (e).***

This change would keep Kansas' existing system that only allows discharge of the case when the prosecution fails to meet the exceptionally clear deadlines provided by the statute. It would also eliminate the addition in HB 2121 of a test requiring a showing of prejudice to a defendant's defense at trial prior to discharge that raises numerous concerns. For example, because the prejudice showing would have to occur before trial, it is both purely hypothetical and also puts defendants in the unfair position of either exercising their right to a speedy trial or previewing their defense to the prosecution. Moreover, it muddies the clear deadlines that the speedy trial statute has always relied upon. Right now, the speedy trial deadlines are clear and prosecutors understand the need to avoid any violations because the consequences are severe. Adding any type of prejudice test weakens the strength of those deadlines, and opens up the possibility of a prosecutor being willing to violate them because they don't believe the defendant can show that prejudice. Keeping the existing system of discharge upon violation of the clear

speedy trial deadlines keeps the bright line rules that have served Kansans and protected the right to a speedy trial since statehood.

Change 2: Adjust the Initial Timeframe to Speed up the Resolution of Some Cases

We also suggest this Committee consider pairing any new continuances allowed to the prosecution, discussed above, with a slight reduction in the initial speedy trial deadlines on Page 1, Lines 8-22, such as:

> Section 1. K.S.A. 2022 Supp. 22-3402 is hereby amended to read as follows: 22-3402. (a) If any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within ~~**150**~~ ***120*** days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged *in accordance with subsection (c)*, unless the delay shall happen as a result of the application or fault of the defendant or a continuance shall be ordered by the court under subsection (e).
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> (b) If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within ~~**180**~~ ***150*** days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged in accordance with subsection (c), unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (e).

A reduction of 30 days from the initial deadline is a reasonable modification in light of the reality that by receiving even just two continuances for good cause, the prosecution would increase the speedy trial deadlines by 180 additional days. Functionally speaking, reducing the initial deadline for someone held in jail from 150 to 120 days, when combined with the new continuances, would still double the amount of time the law currently provides the prosecution (*i.e.* 120 + 90 + 90 = 300).

This change would also aid the speedier resolution of some cases because it is frequently the pressure of the trial deadline that provides the inflection point for both parties to come to the table and resolve a case through a plea or otherwise. Moving up the initial trial deadline slightly provides that inflection point sooner and could help the prosecution prioritize whether a case can be resolved at that initial deadline, or requires a continuance and additional review. Such a change could help limit the impact of the additional time HB 2121 allows the prosecution on the orderly administration of justice.

Change 3: Limit HB 2121 to Cases Currently Pending Trial

Finally, we suggest a change on Page 4, Lines 23-28 to limit the impact of HB 2121 to cases currently pending trial:

> ~~(4) the number of new criminal cases filed in fiscal years 2021 and 2022, respectively~~ *No time between March 19, 2020, and May 1, 2023, shall be assessed against the state for any reason. Any person arraigned before May 1, 2023,* ***and pending trial on May 1, 2023,*** *shall be deemed to have been arraigned on May 1, 2023, for the application of the time limitations provided in subsection (a) or (b).*

This change would clarify that HB 2121 is meant to address only cases currently pending trial, and not other, peripheral situations. For example, there are likely some cases still on appeal from before the Covid-19 pandemic that have raised statutory speedy trial issues. It is our understanding that HB 2121 is not intended to impact those cases, and this change would make that clear. Moreover, we are concerned that without this clarification any such appellate cases would get mired down with appellate litigation regarding the retroactive impact of this bill, and slow down the orderly administration of justice.

Conclusion

It is critical to the rights of Kansans currently awaiting trial, and the orderly administration of justice, that the suspension of speedy trial due to the Covid-19 pandemic ends, and an enforceable statutory speedy trial right resumes. It is our understanding that the intent behind HB 2121 is to resolve remaining questions of how that can happen in an orderly manner. As such, while we may never support a bill that lengthens the speedy trial deadlines, and strongly disagree with components of HB 2121 as currently drafted, we appreciate the opportunity from this committee and the proponents to provide input on ways HB 2121 can be tailored to meet those concerns and preserve an enforceable statutory speedy trial right.

Thank you for your time.

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