



Kansas County & District Attorneys Association

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RE: HB 2468 -- Reciprocal Discovery Committee on Corrections and Juvenile Justice

Dear Representative Pat Colloton and Members of the Committee:

I come before this committee as an attorney who has primarily handled criminal cases for over twelve years; nine as a criminal defense attorney and three as a prosecutor. It is time for the Kansas legislature to adopt a more comprehensive approach as it relates to discovery in criminal cases. Enacting HB 2468 will require defense attorney's to provide to the State a witness and exhibit list and a summary or written report of an expert witness within 30 days of trial.

The federal courts and 34 States currently require such information be provided to the prosecution.¹ There are 3 States that allow the disclosure of witness and exhibit lists at the discretion of the Court,² while 6 States mandate the disclosure of exhibit lists.³

Currently, under Kansas criminal procedure, there is no reciprocal statutory requirement that a defendant disclose the names of defense witnesses prior to trial; alibi witnesses are the only exception.⁴ There is no statutory requirement that a defendant disclose its exhibit list; other than scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof.⁵ Strictly construed, this limited disclosure by defendants only applies to scientific or medical exhibits, not expert reports or summaries.

There is currently no uniformity as to how jurisdictions within the State deal with the issue of criminal discovery. Some jurisdictions will require during pretrial hearings that the defense disclose witness and exhibit lists. In Crawford County, and the majority of other counties,

¹ Federal Rule 16; Alabama (R. 16.2); Arizona (R. 15.2); Arkansas (R. 18.3); California (§ 1054.3); Colorado (R. 16); Connecticut (R. 40-13); District of Columbia (R. 16); Florida (R. 3.220); Georgia (§ 17-16-4); Hawaii (R. 16); Illinois (R. 413); Indiana (*State ex rel. Keller v. Criminal Court of Marion Co.*, 262 Ind. 420, 317 N.E.2d 433 (1974)); Iowa (R. 2.14); Kentucky (R. 7.24); Maine (R. 16A); Massachusetts (R. 14); Michigan (§ 767.94a); Minnesota (R. 9.02); Mississippi (R. 9.04); Missouri (R. 25.05); Montana (§ 46-15-323); Nevada (§ 174.234); New Hampshire (R. 2.10); New Jersey (R. 3:13-3); New Mexico (R. 5-502); North Carolina (§ 15A-905); Ohio (R. 16); Oklahoma (22 Okla. St. § 2002); Oregon (§ 135.835); Rhode Island (R. 16); Vermont (R. 16.1); Washington (R.4.7); West Virginia (R. 32.03); Wisconsin (§ 971.23).

² Nebraska (§ 174.234); Texas (Art. 39.14); Utah (R. 16).

³ Maryland (R. 4-262); New York (CPL 240.30); South Carolina (R. 5); South Dakota (§ 23A-13-12); Tennessee (R. 16); Wyoming (R.16).

⁴ K.S.A. 22-3218

⁵ K.S.A. 22-3212(c)

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judges are of the firm belief that they cannot order this as it is not statutorily mandated. Enacting HB 2468 will provide for greater uniformity and a better understanding among the courts and attorney's as to their responsibilities and duties.

Mr. Steven J. Anderson, Director of the Budget, reports in his January 23, 2012 letter to this committee, that passage of HB 2468 will result in a 10% increase to the budget of the Board of Indigents Defense Services (BIDS), or roughly \$94,462, according to BIDS. I take exception to this finding for several reasons. First, a defense attorney will know who their expert is and have them review all relevant information well before 30 days prior to trial. Second, it is my experience that negotiations between the defendant and the State are ongoing up to and even during trial. Third, mandating that a copy of the expert report be provided to the State 30 days prior to trial considering that the defense has already procured an expert should have no additional economic impact to the budget of BIDS other than perhaps having an expert prepare a written report; although under HB 2468, a summary would also suffice.

I understand that it is the State which carries the great burden of proof during criminal trials, and typically the State may have greater resources available than a defendant. I further appreciate a defense attorney's sacrosanct mentality of keeping evidence close to them and to reveal nothing unless mandated. However, the purpose of a criminal trial is to ascertain the truth or falsehood of the charges against the defendant.⁶ Moreover, the United States Supreme Court has found reciprocal discovery statutes constitutional, even to the point of precluding defense evidence or witnesses in the event of non-compliance.⁷

In closing, by enacting HB 2468, the legislature will ensure fundamental fairness by preventing "trial by ambush" in avoiding surprise; by improving judicial economy in avoiding interruptions and postponements; by allowing for better well-reasoned decisions by the district court prior to trial; and by ascertaining the truth in criminal trials.

Sincerely,

Michael Gayoso, Jr.
Crawford County Attorney

⁶ *State v. Norwood*, 217 Kan. 150, 152 (1975).

⁷ *Taylor v Illinois*, 98 L Ed 2d 798, 108 S Ct 646 (1988).