

SESSION OF 2021

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2366

As Recommended by House Committee on
Judiciary

Brief*

HB 2366 would create law in the Kansas Code of Criminal Procedure (Code) regarding jailhouse witness testimony.

Disclosure Requirements

The bill would require, in any criminal prosecution, the prosecuting attorney (prosecutor) to disclose any intent to introduce testimony of a jailhouse witness, as defined by the bill, regarding statements made by a suspect or defendant, while the jailhouse witness and suspect or defendant were both incarcerated, within the time provided by the section of the Code governing discovery.

The bill would also require the prosecutor to disclose to the defense:

- The criminal history of the jailhouse witness, including pending or dismissed criminal charges;
- The jailhouse witness's cooperation agreement and any benefit, as defined by the bill, that has been requested by, provided to, or will be provided in the future to the witness;
- The contents of any statement allegedly given by the suspect or defendant to the jailhouse witness,

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

and the contents of any statement given by the witness to law enforcement regarding the statements allegedly made by the suspect or defendant, including the time and place such statements were given;

- Any information regarding the jailhouse witness recanting testimony or statements, including the time and place of recantation, the nature of the recantation, and the names of the people present at the recantation; and
- Any information regarding other criminal cases in which the testimony of the jailhouse witness was introduced or was intended to be introduced by a prosecutor regarding statements made by a suspect or defendant, including any cooperation agreement and any benefit the witness received in such case.

The court could allow the prosecutor to comply with these disclosure requirements after the time limit described above if the court finds the jailhouse witness was not known or the information the bill requires to be disclosed could not be discovered or obtained by the prosecutor exercising due diligence within such time period.

If the court finds that disclosure of the above information is likely to cause bodily harm to the jailhouse witness, the bill would allow the court to order that the evidence be viewed only by defense counsel and not by the defendant or others, or issue a protective order.

Pre-Trial Hearing in Certain Cases

In a criminal prosecution for murder or rape in which the prosecutor intends to introduce the testimony of a jailhouse witness, the bill would require, upon the defendant's motion, the court to conduct a pre-trial hearing to determine whether

the witness's testimony exhibits reliability and is admissible based on the following factors:

- Extent to which the witness's testimony is confirmed by other evidence;
- Specificity of the testimony;
- Extent to which the testimony contains details that would be known only by the perpetrator of the offense;
- Extent to which the details of the testimony could be obtained from a source other than the suspect or defendant; and
- Circumstances under which the witness provided the information to the prosecutor or a law enforcement officer, including whether the witness was responding to leading questions.

If the prosecutor fails to show by a preponderance of the evidence that the witness's testimony is reliable, the bill would require the court to exclude the testimony at trial.

Database

The bill would require each prosecutor's office to maintain a central record containing information regarding cases in which jailhouse witness testimony is introduced or is intended to be introduced by a prosecutor regarding statements made by a suspect or defendant, the substance of such testimony, and any benefit requested by, provided to, or to be provided in the future to such witness in connection with testimony provided by the witness.

The bill would require the prosecutor's office to forward this information to the Kansas Bureau of Investigation (KBI), which would be required to maintain a statewide database of such information. The database would be accessible only to

prosecutors and would otherwise remain confidential and not subject to the Kansas Open Records Act (KORA). This confidentiality provision would expire on July 1, 2026, unless the Legislature review and reenacts it before that date.

Victim Notification; Jury Instructions

If a jailhouse witness receives any benefit in connection with offering or providing testimony against a defendant, the bill would require the prosecutor to notify any victim connected to the criminal prosecution.

If the testimony of a jailhouse witness is admitted into evidence, the bill would require the jury be instructed that such testimony was provided by a jailhouse witness and informed of any benefit requested by, provided to, or to be provided to the jailhouse witness in connection with providing the testimony.

Background

The bill was introduced by the House Committee on Judiciary at the request of Representative Patton on behalf of the Innocence Project.

House Committee on Judiciary

In the House Committee hearing on March 16, 2021, representatives of the Innocence Project and the Midwest Innocence Project and three private citizens testified as **proponents**, stating the bill the bill would help prevent wrongful convictions by creating safeguards for the use of jailhouse witness testimony. Representatives of Americans for Prosperity, Kansas Association of Criminal Defense Lawyers, Kansas Coalition Against Sexual and Domestic Violence, and Metro Organization for Racial and Economic Equity; an attorney; and a private citizen provided written-only **proponent** testimony. No other testimony was provided.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, the Office of Judicial Administration states enactment of the bill could increase the length of cases and time spend by district court judicial personnel in researching and hearing cases, but a fiscal effect cannot be estimated.

The KBI estimates a higher level of security would be required due to the confidentiality requirements of the bill, which could incur incidental costs. Prosecuting attorneys accessing the Kansas Criminal Justice Information System (KCJIS) could incur minimal costs if they are not already active users of KCJIS. The KBI indicates it could expand an existing records management system into the KCJIS infrastructure to fulfill the requirements of the bill. The KBI estimates expenditures of \$182,180 from the State General Fund in FY 2022, which would include \$165,000 for concurrent user licensing, \$12,410 for training and installation, and \$4,770 for maintenance for the first year. For future fiscal years, the KBI estimates on-going expenditures for system maintenance of \$29,520.

The Office of the Attorney General states the bill would increase case load and expenditures, but a precise fiscal effect cannot be estimated.

The Department of Corrections indicates enactment of the bill would not have a fiscal effect.

The Kansas Association of Counties states enactment of the bill could increase safety monitoring at jails, but a fiscal effect cannot be estimated. The League of Kansas Municipalities states enactment of the bill would not have a fiscal effect on cities.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2022 Governor's Budget Report*.

Criminal prosecutions; jailhouse witness testimony; disclosures; database