Approved: 3-7-96
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on February 8, 1996 in Room 514-S of the Capitol.

All members were present except: Senator Vancrum (excused)
Senator Brady (excused)
Senator Moran (excused)

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee: Kyle Smith, KBI
Ron Wurtz, Kansas Association of Criminal Defense Lawyers

Others attending: See attached list

The Chair called the meeting to order.

SB 509--Money Laundering severity classification changed to drug severity level 4 felony.

Kyle Smith, KBI testified in support of **SB 509**. The conferee stated that this bill amends the Kansas money laundering statute. The conferee stated that when the sentencing guidelines were passed the crime of laundering drug money was treated as a financial crime. The penalty for this crime was reduced to a level 7 non-person felony. **SB 509** would re-classify a money laundering offense as a level 4 drug grid felony. (Attachment 1)

The conferee stated that this bill was requested at the suggestion of Trego County Attorney Bernie Giefer. Mr. Giefer's written testimony provides an example of a person convicted of laundering over eight-hundred thousand dollars and receiving a twenty-four month unsupervised probation despite the prosecutor's Motion for upward departure. (Attachment 2)

The conferee stated that the Kansas Peace Officers Association also supports **SB 509**.

The Committee and conferee discussed making a distinction in penalties based on the amount of money.

A motion was made by Senator Parkinson, seconded by Senator Bond to recommend **SB 509** favorably for passage. The motion carried.

SB 510--Increased penalties for drug paraphernalia used to manufacture or distribute controlled substances.

Mr. Kyle Smith, KBI, testified in support of **SB 510**. The conferee related information concerning "boxed" methamphetamine labs, and the difficulty of charging or convicting a person with conspiracy or attempt to manufacture. The conferee stated that under current law all drug paraphernalia whether it's a roach clip or the equipment to manufacture fifty pounds of methamphetamine, is treated the same, as a class A misdemeanor. The conferee stated that KBI, Narcotic Strike Force Agent, Dave Hutchings suggested that there was a logical distinction to punish people who possessed paraphernalia for manufacturing drugs or distributing drugs differently than those who possess paraphernalia used in consumption. The conferee stated that under **SB 510**, simulated controlled substances and drug paraphernalia for personal use or consumption remains a class A non-person misdemeanor. However, paraphernalia that is used to manufacture or distribute a controlled substance is treated as a drug severity level 4 felony. (Attachment 3)

Committee discussion with the conferee followed concerning the explosive nature of methamphetamine while

it is cooking, the use of the words "reasonably knew, " and the necessary number of plants cultivated to warrant the penalties under **SB 510**.

The Chair closed the hearing on **SB 510** as there were no opponents to the bill listed.

SB 511--Prosecution does not have to identify informant witness until the time such witness has to testify.

Mr. Kyle Smith, KBI, testified in support of **SB 511**, and stated that this bill will aid in getting people to testify as witnesses. The conferee related incidents where people who have been identified as witnesses were placed in great danger or even murdered by the accused person. The conferee stated that this bill will allow the identity of the witness to remain confidential normally until the preliminary hearing. After the witness' statement is placed on record, the danger to the witness decreases. The conferee stated that this bill would not conflict with a defendant's constitutional right to confront and cross-examine the witness, because the time frame as to when this information is revealed is not constitutionally mandated as long as the defendant is given adequate opportunity to prepare for trial. The conferee stated that he was in agreement with Mr. Ron Wurtz observation that this bill needs a definition section. The conferee stated that he will work on the language and a definition section. The conferee concluded that this bill would provide a useful tool in prosecuting certain cases and provide the witness with some modicum of protection.(Attachment 4)

Mr. Ron Wurtz, Kansas Association of Criminal Defense Lawyers, testified in opposition to **SB 510** as it is drafted. Mr. Wurtz stated that this bill is broader than it needs to be. The conferee referred to the definition in K.S.A. 60-436 referenced in **SB 511** as being confusing because of the different purposes of the two statutes. The conferee stated that a protective order can be issued for the protection of witnesses. Mr. Wurtz stated that if this bill is to be passed, language that would limit the confidentially of the witness to disclosure at the preliminary hearing would remove the majority of his association's objections to this bill. The conferee continued by stating that the way the bill is currently written, it would delay trial by impeding the discovery process. The conferee stated that this bill deals with timing of disclosure, not whether disclosure is necessary. The conferee suggested permitting sealed endorsement of witnesses. The conferee noted that under current practice a party can request a protective order from the Court.(Attachment 5)

Committee discussion with the conferee followed concerning when the identity of the witness would be disclosed to the defendant, and if this bill would increase the number and scope of the preliminary hearing.

The Chair adjourned the meeting at 11:00 a.m.

The next meeting is scheduled for February 12, 1996.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-8-96

NAME	REPRESENTING
Ronald E. Wurtz	Ks Assn Criminal Def. Lawyers
Rev. Edith K. Funk	Mainstream Coalition of Shawnee Cty.
Kyle Smith	KBI
DWAYNE WORLEY	KBI
BRUCE COFFMAN	KBI
Julie Meyer	Ks Sentencing Commission
Rebecca Woodman	Ks Sentencing Commission
Kelli Irwin	KSNA here to observe
Amy Preseger	Sen. Moran
Jay Rigdway	Intern
David Toland	Intern/Ernst
Maria Deckert	Bethel College Nursing
Sarah Hutchison	Bethe College Nursing
Roger Hoagland SR.	BETHEL COLLEGE NURSING
Janis Hon	Mary Thimes School of Nursing Chanute
Susan Bumsted	Southwestern College - Nsg
Kelly Kultala	KTLA
Amanda E. Esping	Jr. Intern for Sen Hawk Brownback
George Byers	Research College of Nursing
Mark Barrett	Research College of Nursing

#1

KANSAS BUREAU OF INVESTIGATION
DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS

LARRY WELCH
DIRECTOR

CARLA J. STOVALL
ATTORNEY GENERAL

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL 509
FEBRUARY 8, 1996

Chairman Emert and Members of the Committee:

It is a pleasure to appear today in support of Senate Bill 509. Technically, this bill amends the Kansas money laundering statute, but in a very real sense it merely repairs it.

In 1992, the Kansas legislature passed a statute prohibiting the laundering of drug money as a level C felony with a minimum sentence of 3-5 years, a maximum of 10-20 years in the state penal system. The penalty was much higher than other financial crimes, as this is a drug trafficking crime; it applies only to proceeds from violations of the Uniform Controlled Substances Act. However, in the following years the sentencing guidelines were passed and then the penalty for this crime was reduced to a level 7 non-person felony. If a defendant has no record it means a sentence of less than a year and is presumptive probation for the first seven categories. Indeed, you would need more than three prior non-person felonies on a defendant's record to reach presumptive incarceration.

This bill would re-classify this offense as a level 4 drug grid felony, which while still presumptive probation for someone with no record, would provide for presumptive incarceration for persons with more than one non-person felony.

I requested this bill at the suggestion of Trego County Attorney Bernie Giefer, who is present here today to testify. Mr. Giefer's testimony will illustrate how current penalties would appear to be totally inadequate if we are serious about fighting drug dealers.

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Sen. Jud. 2-8-96 Attach 1

I would like to note that money launderers are in a unique situation within drug organizations. Unlike the mere "mule" carrying the dope, a money launderer will frequently know the entire organization, how it operates and the heads of the organization. Further, they may be involved with several different networks, not just work for one organization. Given those facts, they are a very desirable target for a criminal investigation to try to focus on. If we can turn a money launderer we can take down an entire organization, not just remove one or two replaceable members. However, to get a money launderer to see the advisability of cooperating with the government against his, frequently violent, associates, it is necessary and appropriate that there be sufficient penalties to provide incentive. Persons who are this deeply involved in a drug distribution organization deserve a felony record. If they cooperate, or if they have no record, probation is fine. However, without the potential for prison being somewhat real, the opportunity to gain their cooperation is lost.

I don't believe this will have a major impact on our prison over-crowding situation as there are, unfortunately, a very limited number of money laundering cases discovered each year, only two or three. Most go federal, and as mentioned, we try to turn them into witnesses through plea bargains. However, passage would repair this tool against drug dealers and make it more effective. Thank you for your attention and I would be happy to stand for questions.

STATE OF KANSAS
OFFICE OF THE TREGO COUNTY ATTORNEY
207 North Main Street
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WaKeeney, Kansas 67672

Bernard T. Giefer
Trego County Attorney

Telephone: (913) 743-5458
Facsimile: (913) 743-5388

TESTIMONY PRESENTED ON BEHALF OF BERNARD T. GIEFER, TREGO COUNTY ATTORNEY, BEFORE THE SENATE JUDICIARY COMMITTEE ON FEBRUARY 8, 1996, IN SUPPORT OF SENATE BILL 509

Chairman Emert and Members of the Committee,

I am pleased to have the opportunity to present this testimony to the Senate Judiciary Committee regarding a proposed change in the classification of a violation of K.S.A. 65-4142 from a severity level 7, nonperson felony, to a drug level 4 felony. I regret that I cannot deliver this testimony personally, but I had a conflicting court proceeding on a pending drug case that I could not reschedule.

On October 30, 1995, a Trego County jury convicted a person involved in the transportation of $813,786.00 of drug proceeds - the largest drug related cash seizure in the history of the State of Kansas. The conviction was the result of the coordinated efforts between the Trego County Attorney's Office and the Kansas Highway Patrol that have led to numerous drug or drug related interdiction cases in Trego County over the last year and a half.

A brief factual background of this case: The cash discovered was divided among two bags. In one small bag, approximately $14,000.00 of cash was discovered in bundles of $1 and $5 bills. In a suitcase, the balance of the cash was discovered in bundles of currency, separated by denomination, in $100, $50, $20, $10, $5, $1 denominations. A canine alert and other circumstances about the defendant's "trip" were the link between the currency and its drug tainted past.

Sen Jud.
2-8-96
Attach 2

Needless to say, $813,786.00 is the proceeds from a substantial quantity of illegal narcotics or drugs. While a person convicted of possessing illegal narcotics and drugs with the intent to sell, deliver, or distribute, faces mandatory jail time under the Kansas Sentencing Guidelines Act, such is not currently the case with respect to transporting proceeds of the sale of illegal narcotics or drugs. K.S.A. 65-4142 is classified as a severity level 7, nonperson felony; for whatever reason, the statute is not even listed as a drug offense. Prior to sentencing, I did file a Motion for Upward Departure, in which I converted $813,786.00 into illegal narcotic or drug quantities based upon "typical" prices in the Kansas City market. The particular illegal narcotic or drugs chosen were the seven drugs that the canine utilized at the stop was trained to detect. I enclose a copy of the Motion for Upward Departure that was filed with the court. The quantities of illegal narcotics or drugs is substantial. In this particular case, the District Judge refused to grant the Motion for Upward Departure, and sentenced McGrath strictly in accordance with the sentencing guidelines act. Therefore, the defendant was sentenced to twelve months in the state penitentiary, which was suspended in lieu of 24 months probation. In arguing for an upward departure, I suggested to the District Court that if an upward departure was not to be granted, that the defendant at least be placed with community corrections for a term of probation, preferably five years. Not only did the District Court deny the Motion for an Upward Departure, but it also denied the State's attempt to have the defendant placed on supervised probation. The defendant is now residing in California on 24 months unsupervised probation. I strongly question the deterrent effect of the conviction, considering the defendant was not even required to pay a fine.

My concern with the current classification of K.S.A. 65-4142 is that we do not have consistent penalties for those who actually possess the drugs as compared to those who possess the proceeds from the sales of those drugs. It is not atypical that a drug dealer will hire persons (called "mules" in the trade) who happen to be down on their luck and are willing to take a chance to be a drug runner in return for a substantial payment; on the other hand, drug dealers are not so willing to entrust currency with just anyone, and it is not uncommon that the currency is collected and transported by those persons that are well connected to the drug distribution "cartel." I actually think that a person convicted of transporting drug proceeds should be dealt with harsher than a person who is caught transporting the illegal narcotics or drugs, but the proposed reclassification of K.S.A. 65-4142 will at least bring the penalty more in line with the severity of the crime.

We in Trego County are committed to doing whatever it takes to stem the flow of illegal narcotics and drugs. I enclose a synopsis of drug interdiction in Trego County for the period July 1, 1994 to June 30, 1995. I want to especially thank the close cooperation and support received from the Attorney General's Office, and particularly Assistant Attorney General Kyle Smith. Those of us who are down in the "trenches" need every bit of help that we can get, and the efforts of Kyle Smith have been very critical to the continued success of

the criminal interdiction program in Trego County, and have certainly been very much appreciated by myself.

I urge this committee to report this bill to the full Senate with a strong and favorable recommendation.

Sincerely,

TREGO COUNTY ATTORNEY

Bernard T. Giefer

Bernard T. Giefer

BTG:sn

IN THE DISTRICT COURT OF TREGO COUNTY, KANSAS

THE STATE OF KANSAS, *Plaintiff,*	)	
v.	)	Case No. 95-CR-5
MARSI J. MCGRATH, *Defendant.*	)	

MOTION FOR UPWARD DEPARTURE

The State of Kansas, by Bernard T. Giefer, pursuant to K.S.A. 21-4716, moves the Court for an upward departure from the presumptive sentence provided by the sentencing guidelines, K.S.A. 21-4701 *et seq.*

In support of this Motion, the State of Kansas alleges as follows:

1. In this case, evidence was admitted at trial that a dog trained to detect the presence of illegal narcotics and drugs alerted to the presence of illegal narcotics or drugs.

2. Evidence admitted at trial was that the dog, Canine Trooper, had been trained to detect the following illegal narcotics or drugs:

a. Marijuana.

b. Cocaine.

c. Crack cocaine.

d. Methamphetamine.

e. Opium.

f. Hashish.

g. Heroine.

3. The street value of the above illegal narcotice or drugs (based upon typical prices in Kansas City) is:

a.	Marijuana:	$1,000.00 per pound
b.	Cocaine:	$15,000.00 per pound
c.	Crack cocaine:	$12,000.00 per pound
d.	Methamphetamine:	$26,000.00 per pound
e.	Opium:	$40,000.00 per pound
f.	Hashish:	$4,000.00 per pound
g.	Heroine:	$40,000.00 per pound

4. Based upon the street value of the above illegal narcotics or drugs, $813,786 would be derived from the sale of the following amount of the stated illegal narcotic or drug:

a.	Marijuana.	813.79 pounds
b.	Cocaine	54.25 pounds
c.	Crack cocaine	67.82 pounds
d.	Methamphetamine	31.30 pounds
e.	Opium	20.34 pounds
f.	Hashish	203.45 pounds
g.	Heroine	20.34 pounds

5. Had the convicted charge been categorized a drug crime, an agravating factor considered a substantial and compelling reason for upward sentencing departure, pursuant to K.S.A. 21-4717(a)(1), would be that "[t]he crime was comitted as part of a major organized drug . . . delivery activity" a factor of which, pursuant to K.S.A. 21-4717(a)(1)(A), would be that "[t]he offender derived a substantial amount of money . . from the illegal drug sale activity."

Therefore, the State of Kansas contends that there are aggravating factors present in this case that are substantial and compelling reasons to impose an upward departure from the sentencing guidelines; under the facts of this case, probation is inappropriate.

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TREGO COUNTY ATTORNEY
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2-6

NOTICE OF HEARING

PLEASE TAKE NOTICE that the hearing in the above referenced matter will be heard in the District Courtroom of the Trego County Courthouse, on January 9, 1996 at 1:00 p.m. or as soon thereafter as the same may be heard.

Bernard T. Giefer
TREGO COUNTY ATTORNEY
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Motion for Upward Departure and Notice of Hearing was served by facsimile transmission to the person and at the number stated below. That the transmission was reported as complete and without error and that the facsimile machine complies with Supreme Court Rule 119(b)(3).

Steven P. Flood
P.O. Box 998
Hays, Kansas 67601
FAX NO. 913-625-2434

2-7

Clerk of the District Court
Trego County Courthouse
WaKeeney, Kansas 67672
FAX NO. 913-743-2726

on this 5th day of January, 1996.

Bernard T. Giefer
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2-8

STATE OF KANSAS
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February 6, 1996

THE WAR ON DRUGS IN TREGO COUNTY

July 1, 1994 through June 30, 1995

The war on drugs came in earnest to Trego County in 1994. All tolled, 1,668 pounds of marijuana, 1,869 pounds of cocaine, 4 pounds of methamphetamine, 3 pounds of crack cocaine, $1,076,430 dollars in cash, and other items were seized in Trego County between July 1, 1994, and June 30, 1995. These seizures are but one aspect of a coordinated effort between the office of the Trego County Attorney and the Kansas Highway Patrol.

Trego County is well suited for deployment of the Kansas Highway Patrol's criminal interdiction unit. Interstate 70 is a known drug pipeline for persons transporting cocaine, marijuana, and other illegal narcotics to distribution points in the larger metropolitan centers of the eastern United States. It is believed that most marijuana transported into this country originates in Mexico, and that most cocaine that is distributed in the United States originates in Columbia. The thinly populated areas of western Kansas lends itself to a successful criminal interdiction program because of lessened traffic density and fewer primary routes of travel, as contrasted with larger metropolitan areas. Criminal interdiction on the traffic ways in the State of Kansas is premised upon vigorous traffic enforcement followed by thorough investigation. Drug interdiction is typically successful because of specially trained law enforcement personnel such as those in the Kansas Highway Patrol criminal interdiction unit and the utilization of other investigatory tools suited, in general, for the broader criminal interdiction program.

The drug interdiction effort in Trego County began in earnest with the arrest on April 18, 1993, of Jose Valenzuela. The evidentiary admissibility of the 58 pounds of marijuana seized in that stop was suppressed by the District Court of Trego County. Though the Trego County Attorney unsuccessfully appealed that suppression order to the Kansas Supreme Court and to the United States Supreme Court, it signaled the beginning of Trego County's willingness to step up the war on illegal drugs. A summation of all drug related arrests in Trego County between July 1, 1994 and June 30, 1995 is as follows:

TREGO COUNTY DRUG OR DRUG RELATED INTERDICTION
JULY 1, 1994 - JUNE 30, 1995

State (S)/Federal (F) Adoption	Date	Item Seized	Persons Detained
F	07/10/94	45 lbs. cocaine	Clark, Williams
	*Result of Controlled Delivery: 11 additional arrests - $190,000.00 seized + 20 KG Coke Houston		
S	07/29/94	108 lbs. marijuana $450.00 cash	Walkowski
F	07/22/94	600 lbs. marijuana	Madrid, Perez
F/S	07/27/94	21 lbs. marijuana 3 lbs. crack $1,050.00 cash 1986 Ford Taurus	Oldfield
S	08-14-94	2 lbs. methamphetamine	McCandless
F	08/22/94	232 lbs. cocaine	Guzman
	*Result of Controlled Delivery: 1 additional arrest (NY)		
S	09/09/94	$7,000.00 cash	Jenkins
F	09/13/94	112 lbs.cocaine	Renault
F/S	10/__/94	18 lbs. cocaine	McCray, McCray

State (S)/Federal (F) Adoption	Date	Item Seized	Persons Detained
F	10/24/94	67 lbs. cocaine	Bonsall, Gonzales
	*Result of Controlled Delivery: 1 additional arrest (PA)		
F	11/29/94	$36,000.00 cash	Robles, Caballero
F/S	11/02/94	107 lbs. marijuana 1989 Ford Pickup Miscellaneous Property	Robles
F	11/22/94	20 lbs. cocaine	
	*Result of Controlled Delivery: 1 additional arrest (OH)		
F/S	12/08/94	340 lbs. marijuana $879.00 cash Miscellaneous Property	Boisvert
	*Result of Controlled Delivery: 2 additional arrests (NH)		
F/S	12/10/94	472 lbs. cocaine $123.00 cash 1980 Chevrolet Pickup	Toro
F/S	02/09/95	$813,786.00 cash	McGrath, Jimenez
F/S	02/27/95	$190,000.00 cash 1989 Chevy Pickup	Brancart
S	02/05/95	20 lbs. marijuana	Bock, Jack
F/S	02/06/95	94 lbs. cocaine $2,046.00 cash	Cook, Walker
S	02-19-95	17 lbs. marijuana 1980 Cadillac Miscellaneous Property	Acuna, Rodriguez, Munoz

State (S)/Federal (F) Adoption	Date	Item Seized	Persons Detained
F	02/25/95	441 lbs. cocaine	Recko
F/S	03/31/95	2 lbs. methamphetamine $610.00 cash	Wood
S	03/15/95	154 lbs marijuana	Whitehead, Gilman
	*Result of Controlled Delivery: 4 additional arrests (TN) + $13,000.00 cash		
S	5/14/95	$24,000.00 cash	Crohan
S	05/03/95	120 lbs. marijuana 1983 Buick Century	Chapman
F/S	05/23/95	368 lbs. cocaine 1988 Chevrolet Suburban Miscellaneous Property	Nelson, Peppers
	*Result of Controlled Delivery: 6 additional arrests (NY) - warehouse in LA identified. - ½ KG heroin in Chicago seized		
S	05-29-95	57 lbs. marijuana 1978 Lanier Motor Home $486.00 cash Miscellaneous Property	Mota, Dominguez
S	06/17/95	124 lbs. marijuana	Peet

The Trego County Attorney is committed to the societal war on drugs. The devastating impact of drugs on the health of individuals, the huge financial losses suffered nationwide by crime that is directly attributable to the drug trade, and the paralyzing fear of escalating drug induced violence demands nothing less.

If you have any questions about the criminal interdiction program in Trego County, please contact me.

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BTG:dh

#3

KANSAS BUREAU OF INVESTIGATION
DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS

LARRY WELCH
DIRECTOR

CARLA J. STOVALL
ATTORNEY GENERAL

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL 510
FEBRUARY 8, 1996

Chairman Emert and Members of the Committee:

It is a pleasure to appear today in behalf of passage of Senate Bill 510, amending the Kansas drug paraphernalia laws.

Currently, all drug paraphernalia, whether it's a roach clip or the equipment to manufacture 50 pounds of methamphetamine, is treated the same, as a class A misdemeanor. One of the Narcotic Strike Force Agents at the KBI, Dave Hutchings, expressed his frustration with this and suggested that there was a logical distinction to punish people who possessed paraphernalia for manufacturing drugs or distributing drugs differently than those who possess paraphernalia used in consumption. SB 510 is the outgrowth of that conversation.

Under SB 510, simulated controlled substances and drug paraphernalia for personal use or consumption remains a class A non-person misdemeanor. However, paraphernalia that is used to manufacture or distribute a controlled substance is treated as a drug severity level 4 felony. I should quickly point out that drug paraphernalia is extensively defined in K.S.A. 65-4150 and 65-4151. Further, under 65-4150 the state would still have to prove beyond any reasonable doubt that the paraphernalia was to be knowingly used in violation of the Controlled Substances Act.

We believe there is a logical distinction that should be drawn between a person who has almost all the chemicals and equipment necessary to manufacture 50 pounds of methamphetamine and the person who has a roach clip or hypodermic for personal consumption. A drug severity level 4 felony still allows

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Sen. Jud.
2-8-96
Attach 3

presumptive probation for a person with no prior record or, indeed, up to one non-person record. It would allow us to appropriately deal with those persons who are in possession of equipment that we can prove is used to manufacture or distribute narcotics or other controlled substances.

This bill would be particularly helpful in dealing with "boxed" methamphetamine labs. It takes approximately 10-14 hours to cook a batch of methamphetamine. For security reasons the "crankster gangsters" frequently move or hide their manufacturing equipment in these boxes, hence the term "boxed lab". Unless we happen to execute a search warrant during those 10-14 hours that they are cooking, we frequently just find boxes with only some of the equipment and chemicals necessary to manufacture. Frequently, it is difficult or impossible to charge, let alone convict, a person with conspiracy or attempt to manufacture. So this ultimate producer of a dangerous drug, the highest person on the ladder, gets charged with a class A misdemeanor, paraphernalia.

Most of you will remember the testimony in previous years from law enforcement on the horrendous dangers these methamphetamine labs pose to the public, and the result being that you set the manufacturing of controlled substances as a level 2 drug severity felony and a level 1 if done within 1,000 feet of a school. Illustrative is the news article last month where three children were killed in an explosion and fire in California, resulting from the illegal manufacture of methamphetamine. However, the danger and deterrent factors are not enough. On January 26, 1996, law enforcement raided a methamphetamine lab in southeast Kansas, which resulted in the seizure of twelve pounds of methamphetamine, the largest such lab raid in the history of Kansas. We still have these dangerous clandestine laboratories operating in Kansas and this bill would help law enforcement deal appropriately with those knowingly in possession or selling the equipment to manufacture and sell illegal drugs.

Thank you.

#4

KANSAS BUREAU OF INVESTIGATION
DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS

LARRY WELCH
DIRECTOR

CARLA J. STOVALL
ATTORNEY GENERAL

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL 511
FEBRUARY 8, 1996

Chairman Emert and Members of the Committee:

I am pleased to appear on behalf of Senate Bill 511, which I view as an effective anti-gang legislation with no fiscal note.

Prosecutors and law enforcement officers throughout Kansas would love to see this legislature fund a witness protection program modeled after the federal system. In dealing with violent street gangs and indeed a number of violent criminals, it is becoming increasingly difficult to get even good-intentioned citizens to come forward and testify given the risk of repercussions by either the defendants out on bond or gang members and associates. It would be nice to be able to offer these people the opportunity to be set up in another community, under another identity, with a new home and job. Such legislation has been requested in the past by both the Attorney General's Office and the County and District Attorneys Association, as well as other law enforcement agencies. However, the fiscal note has always prevented it from being passed.

SB 511 attacks this problem in another way. Witnesses must be endorsed on the complaint. Constitutionally a defendant must have the right to confront and cross-examine the witness which means identification. The time frame as to when this information is revealed, however, is <u>not</u> constitutionally mandated as long as the defendant is given the adequate opportunity to prepare for trial. *U.S. v. Pennick*, 500 F.2d 184 (10th Cir. 1974).

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Sen. Jud.
2-8-96
Attach 4

SB 511 proposes that when a confidential informant is going to be used to testify and the county attorney thinks it is worth the effort, that the identifiers of that informant/witness may be withheld until the witness actually testifies, normally at preliminary hearing. Once a person's testimony is preserved in the preliminary hearing transcript it can be used at trial if the witness disappears or is killed. The incentive for a defendant or his associates to intimidate or kill a witness is removed.

As a practical matter I don't expect this to be utilized often as cross-examination may necessitate delays for a defendant to receive and investigate the identifying information requested.

However, there are cases where if we are not given the means to protect a witness' identity until the testimony is preserved, those witnesses will not be available for trial and violent criminals will go free. The KBI was involved in a case here in Topeka where the evening before the preliminary hearing twenty-three 9mm bullets were fired into the front of the apartment of one of our informants while he was sleeping there with his girlfriend and child. That witness still testified, but you can understand how your average citizen or witness may decide that kind of message is hard to ignore.

The bottom line is that SB 511 does not affect a defendant's rights other than as to the time which information is provided. In exchange for this inconvenience, we will be able to offer witnesses, in the appropriate case, some modicum of protection by assuring their anonymity until they testify at preliminary hearing. Thank you.

#5

KANSAS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Testimony before the Kansas Senate
Committee on the Judiciary
by

Ronald E. Wurtz
112 SW 6th St, Suite 302
Topeka, KS 66604
(913) 296-6555

Regarding Senate Bill 511

The Kansas Association of Criminal Defense Lawyers opposes Senate Bill 511 as drafted because:

1. It is unclear in its meaning and intent; and
2. Its result invites abuse by the prosecution and unnecessary delay and expense in criminal trials.

Meaning and Intent

This writer and others who have examined the amendment cannot agree on the exact meaning and effect of the draft. We can agree that the bill would permit prosecutors to hide witnesses until their testimony is actually needed, but who those witnesses are and when they can be withheld is in question.

SB 511 would permit prosecutors to withhold the identify of any witness who comes within the definition of K.S.A. 60-436. The latter statute gives witnesses a privilege to refuse to release the name of a witness who has given information concerning a crime if the evidence given by the witness is not admissible except when the informant's name has already been disclosed or the informant's identity is essential to a fair trial. 60-436 defines a privilege of a witness (usually a police officer) to keep informants confidential if the informant is not going to be used as a witness.

This amendment becomes confusing because of the different purposes of the two statutes.

To fully understand this confusion, substitute relevant language of K.S.A. 60-436 into the bill. The following italicized print is the amendment and the bold print is the language from K.S.A. 60-436.

> *If the witness to testify is* **a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or a governmental division thereof, charged with the duty of enforcing that provision, or to a member of a crime stoppers chapter recognized by the Kansas state crime stoppers organization, and evidence thereof is inadmissible, unless the judge finds that: (a) the identity of the person furnishing the information has already been otherwise disclosed; or (b) disclosure of such person's identity is essential to assure a fair determination of the issues**, *the prosecuting attorney*

Sen. Jud.
2-8-96
Attach 5

may delay identifying such informant wi[illegible]ss until such informant witness actually testifies.

Whose name may be withheld? Potentially any witness who furnished information about a crime. BUT: the name may be withheld under K.S.A. 60-436 only if "evidence thereof is inadmissible." This results in a "Catch 22." If only witnesses whose evidence is not admissible may be withheld from the defense, why is this bill necessary? Finally, the effect of the required judge findings on the definition is confusing.

The present meaning of the bill is seriously in question. It must be redrafted if it is to serve any purpose..

Discovery Delay is Not Good Policy

Leaving aside drafting problems, the amendment certainly holds the potential for trial delay and interruption. The proposed amendment deals with timing of disclosure, not whether disclosure is necessary. Once the witness is identified, the accused's right to discovery and investigation of the witness' background for exculpatory information and impeachment material comes into play. Before cross-examining the witness there must be a delay during which the accused must be provided criminal history, prior statements, promises and inducements for testimony, an opportunity to interview the witness, and perhaps time to investigate the witness' background. This spells trial delay--in the middle of trial. Failure to adequately serve the accused's right to discovery could easily result in reversal of any conviction obtained. All of this is caused by late disclosure of a witness.

Alternative Approaches

If the goal of this legislation is to facilitate protection of witnesses from improper influence and intimidation, there are methods to permit this goal while avoiding denial of accused rights or the expense and inconvenience of trial delay.

1. Permit sealed endorsement of witnesses who have been promised confidentiality upon a showing on necessity; names sealed from public records could be under a presumptive protective order which prohibits counsel from redisclosing the name without authorization of the Court, but the name and related discovery materials would be given to the accused's counsel to permit trial preparation.

2. Under current practice, a party can request a protective order from the Court. No amendment would be necessary to invoke this. See State v. Norman, 232 Kan. 102, 652 P.2d 683 (1982). The original draft of the ABA Standards for Criminal Justice, Discovery and Procedure Before Trial Sec. 2.1(a)(I) (Approved Draft 1970), requires that the prosecuting attorney disclose to defense counsel the names and addresses of witnesses subject to protective orders (section 4.4). That language was not ultimately adopted, but Standard 11-2.6 (2d Ed.) is consistent with this goal.