Approved: 3/5/09
Date

# MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 11, 2009, in Room 143-N of the Capitol.

All members were present except:
Representative Jason Watkins- excused
Representative Kevin Yoder- excused

Committee staff present:
Melissa Doeblin, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the committee:
Representative Mike O'Neal
Senator Terry Bruce
Marcia Knight, Assistant City Attorney-Lenexa, Kansas
Mike Kautsch, Professor of Law-Kansas University
Doug Anstaett, Kansas Press Association
Richard Gannon for Judge Eric R Yost, District Court, 18th District, Wichita, Kansas
Kevin O'Connor, Deputy District Attorney-Wichita, Kansas
Scott Schultz, Association General Council-Securities Commission
Kathy Porter, Office of Judicial Administration

Others attending:
No guest list for this day.

The hearing on **HB 2164 - Judges and justices, mandatory retirement at 75, may elect to serve until the end of current term,** was opened.

Representative Mike O'Neal, appeared as a sponsor of the bill that would establish a new mandatory retirement age provision for Kansas Judges of 75, while allowing any judge reaching age 75 to continue until the end of his or her pending term. The "hard 75" does result in term interruption in most cases and is problematic in the sense that it limits by law the term of a duly elected judge. He added that judges in the federal system are not age limited and Kansas is noted for federal judges who have remained active after reaching a senior status. (Attachment 1).

Senator Terry Bruce also appeared in support of the bill adding that judges are the only public official required to retire at a mandatory age, and that while this bill does offer some relief, it does not go far enough so as to remove the cap altogether. (Attachment 2).

Following a few questions and answers regarding other professions and mandatory retirement, and no opponents to the bill, the hearing on **HB 2164** was closed.

The hearing on **HB 2154 - Conduct and offenses giving rise to forfeiture; adding prostitution and related offenses,** was opened.

Marcia Knight, Assistant City Attorney of Lenexa, Kansas presented testimony in support of this bill which would allow cities and the State to pursue civil forfeiture of property recovered in an investigation of prostitution or prostitution related activities. Common tools and resources used in prostitution activities include computers, money and cars. (Attachment 3)

In answer to questions, Marcia further added that many of these people are using the internet, Craigs List, and newspaper Pitch and make a lot of money. She further stated that while prostitution is a misdemeanor, and even if found not guilty, the forfeiture, identified as proceeds or facilitating, is a civil action through the courts

and this bill provides a means to transfer the tools and resources used by the offenders from their criminal enterprises to the public good.

There were no opponents to the bill.

The hearing on **HB 2154** was closed.

The hearing on **HB 2204 - Affidavits and sworn testimony in support of probable cause for issuance of warrant are open court records following execution of a warrant or summons; certain exclusions** was opened.

Proponents:
Mike Kautsch, a Professor of Law-Kansas University, and former Dean of Journalism, spoke as a proponent and said if enacted into law, it will serve the public interest in a way that other states have done, and it will serve as a significant affirmation of the Kansas Legislature's commitment to open government. He also advised the newspaper editor in Emporia confirmed that arrest warrant affidavits are open there by virtue of a local district court rule that was adopted about twenty years or more ago. (Attachment 4)

Doug Anstaett, Executive Director-Kansas Press Association , appeared in support of the bill. He stated that only in Kansas are probable cause affidavits systematically closed to the public unless a judge rules otherwise. He further stated that judges do not rule otherwise, except in Lyon and Chase counties, where judges have routinely opened these records because of the leadership three decades ago by then District Judge and now-Court of Appeals Judge Gary Rulon, and since then by his successors. (Attachment 5)

Richard Gannon, presented the testimony on behalf of Judge Eric R.Yost, Eighteenth District Court, Wichita, Kansas. Judge Yost expressed his personal view of concern that government wishes to exercise search warrants as a power of secrecy. He stated that he does not recall any search warrant applications which were of a nature as to justify keeping its contents secret once the investigation has concluded and an arrest made. (Attachment 6)

Chairman Kinzer addressed the issue of adding the language of Lines 28 and 29 back into the bill which would allow the defendant or defendant's counsel to have immediate access as under current law.

Professor Kautsch agreed he did not see a problem with adding that language back into the bill and stated it was not the intent of this bill to restrict the defendants access to the information.

Opponents:
Kevin O'Connor, Deputy District Attorney-Wichita, appeared as an opponent stating that under current law, the accused has immediate access to the affidavit and that Kansas also has open preliminary hearings unlike most States that use secret grand jury proceedings. He explained that in 1979, the Senate Judiciary Committee recommended the changes currently contained in K.S.A. 22-2302 and that proponents of this bill fail to suggest why there is a need to change the law other than their own desire to obtain the affidavits in high profile cases in those relatively few cases. Current law does not prohibit the media from requesting the affidavit of probable cause. He advised the change will result in defense and/or prosecution motions to seal affidavits causing hearing on the motions, interested parties will need to be notifies and court personnel will be needed, resulting in some very real costs associated the proposed change. (Attachment 7)

Scott Schultz, Association General Council-Securities Commission , testified as an opponent of this bill and explained their office has statutory authority to investigate and prosecute securities fraud. As a natural part of such an investigation, they routinely prepare and file affidavits in support of the issuance of arrest warrants, which could include a number of financial entities such as banks, credit unions, savings and loans broker-dealers and investment advisors which contain specific account information as well as personally identifiable victim information. While there are exclusions in Section 1(b) of the proposed bill, the list does not exclude personal identifiable information. Contained within the Kansas Open Records Act, is a provision which excludes release of "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of privacy. K.S.A. 2008 Supp. 45-221(a)(30); therefore they request similar

language be inserted into HB this proposed bill. Without exclusionary language, victims of financial fraud could be victimized again with their financial account information becomes available to the general public. (Attachment 8)

Kathy Porter, Office of Judicial Administration, appeared as an opponent and stated the clerks of the district are not staffed to perform the redaction required by all the exclusion of information listed in this bill. It would require someone to read each page of an affidavit or sworn testimony plus trying to make each determination just what information would reveal an identity, interfere with a law enforcement action, endanger a life, or any of the other consequences specified in the bill. She added it is particularly burdensome at a time when staffing is impaired by a hiring freeze and the current status of the state financials. (Attachment 9)

The hearing on **HB 2204** was closed.

**HB 2250 - Rules of evidence; admissibility of prior acts or offenses of sexual misconduct.**

Representative Whitham moved to report **HB 2250** favorably for passage. Representative Patton seconded the motion.

Representative Goyle made a substitute motion to amend the bill with revisors technical amendments. (Attachment 10) Representative Wolf seconded. After discussion, with the permission of the second, Representative Goyle changed his amendment to read from "sex crimes" to "sex offense". Motion carried.

The Attorney General's staff spoke in support of the Representative Goyle amendment because the wording has been tested in courts.

Representative Patton moved to amend to add Sec b, Items (1) through (F). ( Attachment 11). Representative Jack seconded the motion. Motion failed.

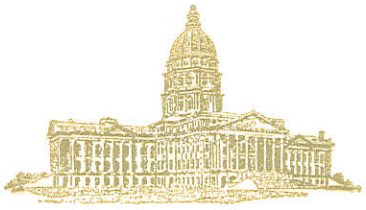
Representative Brookens made a motion to change Item 6 on last page from "any federal conviction" so it reflects convictions in cities and counties.
Representative Patton seconded the motion. Motion carried.

Representative Whitham makes a motion to report **HB 2250** favorably for passage with revisors technical amendments. Representative Jack seconded. Motion carried.

The next meeting is scheduled for February 12, 2009.

The meeting was adjourned at 6:10 p.m.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES



MICHAEL R. (MIKE) O'NEAL
SPEAKER

**Testimony in support of HB 2164**

**House Judiciary Committee 2-11-09**

CHAIRMAN Kinzer and members of the House Judiciary Committee, thank you for allowing me to appear in support of HB 2164, dealing with judicial retirement. The bill's provisions are straightforward. HB 2164 would establish a new mandatory retirement age provision for Kansas judges of 75, while allowing any judge reaching age 75 to continue until the end of his or her pending term.

The law was changed several years ago to establish a "hard 75" provision, amending the existing law that set the retirement age at 70 subject to allowing judges to finish out terms that had not yet expired. The "hard 75" amendment did not affect Supreme Court Justices as their terms were and are 6 year terms, as opposed to the 4 year terms possessed by all other judges. The "hard 75" was an improvement at the time as it addressed the need of several judges who would have otherwise been forced to retire while healthy and very active on the bench.

The impetus for this current proposal arises out of concern over age limits in general and term interruption specifically, particularly for elected judges. While no judge, to my knowledge, has raised the constitutional question about age limits or term

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interruption, the question exists. No other state officer is age limited. Judges in the federal system are not age limited and Kansas is noted for federal judges who have remained very active after reaching senior status. Our own Judge Wesley Brown, of the Federal District Court in Wichita, is still very active on the bench and is over 100 years old. I had the pleasure of trying a case before Judge Brown when he was 97 years young.

The bill does not propose to strike the age limit, although I would not oppose such a move. The current age limit provision, however, does result in term interruption in most cases and is problematic in the sense that it limits by law the term of a duly elected judge. The same limit applies to an appointed judge but the voter disenfranchisement issue does not apply with retained judges. Treating the two types of judges differently would not be a solution either, of course.

With the change to a "soft 75" provision, we'd want to pick up the Supreme Court and have the provision apply to all judges, retained or elected. Again, even this new provision will have the effect of age limiting some otherwise very healthy and active judges and consideration could and should be given to deciding whether an age limit should exist at all. However, this Bill is a reasonable step to take. Thank you for your favorable consideration.

STATE OF KANSAS

TERRY BRUCE
STATE SENATOR
34TH DISTRICT
RENO COUNTY

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
VICE CHAIR: JUDICIARY
MEMBER: JOINT COMMITTEE ON SPECIAL CLAIMS AGAINST THE STATE
AGRICULTURE
ASSESSMENT & TAXATION
NATURAL RESOURCES

RE: Testimony on House Bill 2164

Chairman Kinzer and Committee Members,

Thank you for allowing me to address House Bill 2164. I have been contacted on several occasions by Reno County District Court Judge Richard Rome and members of the Reno County Bar Association to address the mandatory retirement age for elected district court judges contained in K.S.A. 20-2608. After reviewing the issue, I agree the current policy is ill conceived and, along with the rest of the practicing attorneys in the Reno County legislative delegation, seek its change.

Under existing Kansas law, every district court judge that reaches the age of 75 must retire. For judges serving in judicial districts that elect their judges, it means a judge would have to retire during the course of their term. I believe this mandate is contrary to the will of the public who elected them to fill these positions.

As a publicly elected official myself, I find this requirement troubling for the above-stated reason, as well as for the fact that judges are the only public officials required to retire at a mandatory age. This bill does not go so far as to remove the cap altogether, and that issue can certainly be discussed, but HB 2164 does offer some relief to jurists with whom the public has voiced its trust.

In addition to extending the retirement of elected judges, HB 2164 extends the mandatory retirement of a justice to the end of the term he or she attains the age of 75. This was done to be consistent.

I introduced a similar bill last session, Senate Bill 494. Although it received a hearing, the committee ran out of time to work it. Thankfully, the issue is now being discussed by the House, who I'm positive has better time management skills.

Terry Bruce

Terry Bruce,
Reno County State Senator

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Lenexa
KANSAS

**TESTIMONY IN SUPPORT OF HOUSE BILL NO. 2154**

To: The Honorable Lance Kinzer, Chairperson
Members of the House Judiciary Committee

From: Marcy Knight, Assistant City Attorney MK

Date: February 11, 2009

RE: House Bill 2154 – Forfeitable Offenses

Thank you for the opportunity to appear before you today and to present testimony in support of House Bill No. 2154.

This bill would allow cities and the State to pursue civil forfeiture of property recovered in an investigation of prostitution and prostitution-related activities. The Kansas Standard Asset Seizure Forfeiture Act provides a means to transfer tools and resources used by offenders from their criminal enterprises to the public good. Consistent with current forfeiture law, any proceeds obtained from forfeiture are credited to either a special law enforcement trust fund or to a special prosecutor's trust fund.

Common tools and resources used in prostitution activities include computers, money, and cars. This bill would enable these types of tools to be immediately seized by law enforcement and held pending judicial forfeiture. Removing tools used to facilitate prostitution activities from the hands of the offenders will further assist law enforcement in combating these types of crimes in our communities.

For the above reasons, the City of Lenexa asks for your support of HB 2154. Thank you for your consideration.

City of Lenexa / 12350 West 87th Street Parkway / Lenexa, Kansas
City of Lenexa / P.O. Box 14888 / Lenexa, Kansas 66285-
Telephone 913-477-7500 City Hall / Fax 913-477-750

House Judiciary
Date 2-11-09
Attachment # 3

**February 11, 2009**

**Hearing on House Bill No. 2204,* Committee on Judiciary**

Testimony by Mike Kautsch**

If enacted into law, H.B. 2204 will serve the public interest in a way that other states have done, and it will serve as a significant affirmation of the Kansas Legislature's commitment to open government.

Affidavits or sworn testimony that law enforcement officers give in support of arrest warrants can be an extremely important source of public information. Once made known, the information can improve the public's understanding of law enforcement and increase public confidence in judicial oversight of the criminal justice system. Alternatively, once it is made known, the information can enhance the public's ability to monitor the quality of law enforcement, detect any official incompetence or corruption, and determine whether improvements in the justice system are needed. The information also can give members of the public important, timely insights into the criminal element that threatens their communities.

H.B. 2204 essentially would establish a state-wide rule of a kind that has worked well for many years in one Kansas judicial district—namely, the 5th, consisting of Chase and Lyon counties. I have been in touch with a newspaper editor in Emporia, and she confirmed that arrest warrant affidavits are open there by virtue of a local district court rule. She estimated that the rule was adopted 20 or more years ago. There evidently are limited exceptions to the rule, principally in high-profile criminal cases or ones that involve sex crimes, especially against minors. In such cases, an affidavit may be sealed. Yet, the editor said, the courts' general practice is to open affidavits as soon as the original need for the sealing has passed. An alternative approach, she said, has been for the authorities to seal a full affidavit but, at the same time, to place a version with some redactions on the public record.

The openness practiced in Lyon and Chase counties is like that mandated by statute in other states. The Wichita Eagle reported in 2005 on the accessibility of affidavits, saying:

> In other states, including Texas, Missouri and Oklahoma, the affidavits are open to public view unless sealed by a judge for a specific reason.
>
> In those states, the affidavit lays out a brief version of the reason police suspect an individual in a crime and offer a kind of mini-preview of the prosecution case.

The Texas statute is among those that quite plainly provide for openness of affidavits. Here is an excerpt from Vernon's Ann.Texas C.C.P. Art. 15.26 - Authority to Arrest Must be Made Known:

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The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

The secrecy that surrounds affidavits in Kansas has been widely noted. For example, a national law journal in 2005 included a reference to the fact that a Kansas court had:

refused to release the probable cause affidavit supporting the arrest of Dennis L. Rader, the long-sought "BTK" serial killer. State law prohibits the release of such affidavits without a court order. The law was intended to avoid tipping off a suspect, but Rader was already in custody when the press asked for the document. Although the affidavit was off-limits to the public by statute, the court entered a sealing order for good measure.

In jurisdictions where probable cause affidavits are open rather than closed, the public has learned, in a timely way, about important matters of concern. News accounts show that the public sometimes has learned about highly competent law enforcement officials and how they protect the communities they serve. Other times, the public has learned about police who have engaged in wrong-doing, such as by making false statements in support of their warrant applications. On other occasions, the public has learned about patterns of criminal activity, sometimes even including connections between powerful officials and organized criminals, that might not otherwise be known.

Enactment of H.B. 2204 would authorize openness across Kansas in a way that has already been shown to serve the public well in one part of the state, namely, the 5th judicial district, and in other states.

* In the original version of this testimony, the bill was identified as H.B. 2742. That was the number of the bill when it was introduced in a previous legislative session.

** Professor of law and director of Media, Law and Policy at the University of Kansas School of Law. This testimony is offered as a personal statement of opinion with the hope that it will be of help to the Committee in deliberating on H.B. 2204. The testimony is not offered on behalf of the University of Kansas or the School of Law and is not reflective of any institutional view or position regarding H.B. 2204.

**Kansas Press Association, Inc.**

*Dedicated to serving and advancing the interests of Kansas newspapers*

5423 SW Seventh Street • Topeka, Kansas 66606 • Phone (785) 271-5304 • Fax (785) 271-7341 • www.kspress.com

Feb. 11, 2009

To: Rep. Lance Kinzer, chairman of the House Judiciary Committee, and members of the committee

From: Doug Anstaett, executive director, Kansas Press Association

Re: HB 2204

Chairman Kinzer and members of the committee:

Thank you for this opportunity to appear before the committee and address HB 2204, a bill to open probable cause affidavits to public inspection.

This bill is designed to right a huge wrong that sets Kansas apart. Every one of the states bordering Kansas — in fact, every other state in the union — provides that these affidavits are presumed to be public records once an arrest has been made or a search warrant served.

Why is that? And why is it such an important issue to the newspaper reporters my association represents?

Because news coverage of our law enforcement and court system is an imperative part of the checks and balances system we cherish in America.

In America, we believe no one is above the law, including those who we count upon to enforce those laws. Probable cause affidavits are the documents that give the underlying reasons why a suspect should be arrested or his or her house searched for evidence.

These affidavits give tremendous power to the police. Consequently, they must contain more than mere suspicions; they must contain evidence sufficient enough to convince a judge to believe that a crime has been committed and that the person named has committed it.

Our study of the laws of other states has been an eye-opening experience.

Only in Kansas are probable cause affidavits systematically closed to the public unless a judge rules otherwise. Judges do not rule otherwise, except in Lyon and Chase counties (yes, in Kansas), where judges have routinely opened these records because of the leadership three decades ago by then District Judge and now-Court of Appeals Judge Gary W. Rulon, and since then by his successors.

Only in Kansas can suspects be arrested, charged and confined without the public ever seeing the prosecutorial or investigational rationale that led to the suspicion in the first place.

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Only in Kansas can prosecutors hide behind the law when they make a mistake, leaving the public without the necessary information to judge the efficacy of our system of justice.

Kansas' stance on probable cause affidavits is an embarrassment that must be corrected.

Our present system exhibits a callous disregard for the public's right to know. This distrust of the public is unconscionable. This is America, where we believe in public access to the kind of information we can use to judge whether our law enforcement and court systems are effectively working. This protects everyone: the public, defendants and the integrity of our system.

Instead, the public is asked to blindly "trust" that investigators, prosecutors and judges know best. As attorney Lyndon Vix wrote in 2006, "The notion that a person can be arrested, charged and confined, without the state revealing to the public that it has any basis for doing so, is more consistent with an authoritarian state than the United States."

Vix went on to argue that such levels of secrecy do nothing to engender public confidence in the system. He quoted Richmond Newspapers v. Virginia, 448 U.S. 555, 572 (1980): "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing ... In the absence of this basic information, speculation will flourish, cynicism will grow and the people of this community will feel they have no part in the administration of justice."

One of the arguments you will hear from the other side is that opening up probable cause affidavits will lead to prejudicial pre-trial publicity, tainted jury pools and extra expense as trials are moved to venues where no one has heard much about the case.

This is baloney cooked up by a system that has come to love the lack of oversight and scrutiny over the past 30 years.

Of course, if no one can see what you're doing, you're less likely to get caught with your hand in the cookie jar!

Our law enforcement and court systems have almost unbridled power to arrest us, lock us up and yet to never have to reveal to the public — or even to those arrested — the evidence they relied upon to make that decision.

We cannot allow the paranoia brought on by terrorism to allow our judicial system to escape the public scrutiny we've come to expect in America.

Those in the media understand that certain information must be protected, including the names of informants, confidential investigative methods, information that might endanger the life or physical safety of someone or reveal the name of a victim of a sexual offense. Exceptions for those circumstances are allowed for and prominently spelled out in this legislation.

The Kansas Press Association, in partnership with the Kansas Association of Broadcasters and the Kansas Sunshine Coalition for Open Government believe the time has come to right this wrong. We ask you to support HB 2204.

Thank you for your time.

Presented By
Richard Gannon

**Eric R. Yost**
JUDGE

(316) 660-5612
eyost@dc18.org

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
525 N. MAIN
WICHITA, KANSAS
67203

February 10, 2009

Hon. Lance Kinzer
Chairman, House Judiciary Committee
Kansas House of Representatives
Topeka, Kansas 66612

Re: House Bill 2204

Dear Chairman Kinzer,

Thank you for the opportunity to express my view on House Bill 2204. I apologize for not being able to attend the hearing in person.

I support House Bill 2204 as introduced by the House Committee on the Judiciary. As a conservative, I am every bit as concerned about granting the government too much power as I am about the criminal element. My concern becomes even greater when, as we have with search warrants in Kansas, the government wishes to exercise that power in secrecy.

The integrity and professionalism of our law enforcement personnel, and prosecutors, is not the issue. I have served as district judge for 12 years, most recently as Presiding Judge in the Criminal Department of the 18th Judicial District, and I have the utmost respect for Sedgwick County's law enforcement community. I have read and approved hundreds of search warrant applications during my tenure on the bench, and I do not recall any of those applications constituting an abuse of power. Having said that, I also do not recall any search warrant applications which were of a nature as to justify keeping its contents secret once the investigation has concluded and an arrest made.

House Judiciary
Date 2-11-09
Attachment # 6

Ours is an open society. We are aware of which persons get charged with crimes, and our criminal trials are open to the public. We are, necessarily, also aware of what the probable cause was to investigate and arrest those persons in the first place. All of that comes out in open court. So it makes little sense to me that the information and testimony that was provided to the judge who issued a search warrant at the early stages of an investigation should be sealed. And it strikes me as somewhat odd that the citizens of Kansas are the only citizens in all of America who can't be trusted with the information which was used to justify searches of other citizens' homes and businesses.

Let me reiterate that I have meant no offense to law enforcement officials or prosecutors. They do an excellent job. I just don't see why they need to keep this aspect of their job secret from the public.

In all of history, I am unaware of a single example of a government that was made more accountable for its conduct towards its citizenry by keeping that conduct secret.

Chairman Kinzer, thank you for the opportunity to express my view on this legislation.

Eric R. Yost
District Judge

**Office of the District Attorney**
**Eighteenth Judicial District of Kansas**
*at the Sedgwick County Courthouse*
535 N. Main
Wichita, Kansas 67203

**Nola Foulston**
*District Attorney*

**Kevin O'Connor**
*Deputy District Attorney*

February 11, 2009

**Testimony in Opposition to HB 2204**
**Submitted by Kevin O'Connor, Deputy District Attorney**
**On Behalf of Nola Tedesco Foulston, District Attorney**
**Eighteenth Judicial District**
**And**
**On Behalf of the Kansas County and District Attorneys Association**

Honorable Chairman Kinzer and members of the Committee,

I appreciate the opportunity to address the Committee on this important subject. I hope to provide information so the Committee can make a sound decision based upon facts and law. My goal is to present, for your thoughtful consideration, legitimate legal concerns that impact the fairness of trials, ethical and judicial canons, law enforcement and civilian safety, privacy, and the protection of investigations. We want you to understand and appreciate the risks involved in a change in the law.

An argument is made that Kansas is the only state that closes probable cause affidavits issued in support of criminal charges. However, in 44 states, a judge can seal the affidavit at the request of the police or prosecutors. The Kansas statute performs the same function in a different and better manner. An affidavit of probable cause can be released upon written order of the Court. The onus to obtain the affidavit is placed upon the person seeking the affidavit. Under Kansas law, the media or anyone else may request the affidavit. Any such request is reviewed by a Judge and a decision is made with proper consideration to the accused and the people of the State of Kansas. Kansas law protects the accused from an unwarranted release of information that has not been tested in Court. The requested change would only impact the media's ability to obtain the affidavit. Under current law, the accused has immediate access to

the affidavit. Kansas also has open preliminary hearings unlike most States that use secret grand jury proceedings.

The practice of other jurisdictions is often not the best route to proceed and should not be the reason to change longstanding law that has served justice well. In 1979, the Senate Judiciary Committee recommended the changes currently contained in K.S.A. 22-2302. Proponents of the bill fail to suggest why there is a need to change the law other than their own desire to obtain affidavits in high profile cases. The media is interested in relatively few cases. Current law does not prohibit the media from requesting the affidavit of probable cause. The proposed change will result in defense and/or prosecution motions to seal affidavits. Hearings on the motions will be necessary. Interested parties will need to be notified. Court personnel will be needed. The Committee should consider the practical results and very real costs associated with the proposed change.

Release of probable cause affidavits, particularly in high profile cases, directly impacts the constitutional rights of the accused. A suggestion that venue can be moved does not take into account the cost and, more importantly, the impact on the victims of a long trial in another jurisdiction.

In a Wichita Eagle article a few years ago, a New Hampshire prosecutor stated that the release of probable cause affidavits "helps us." The statement is proof that the affidavits should not be released absent a court order. The fact that the release "helps" prosecutors in New Hampshire should be a red flag. The statement indicates that the prosecution is aided by the release of information that is prohibited from release under Rule 3.6 of the Code of Professional Conduct. The prosecutor was quoted as saying, "[s]o many times, we want to tell a reporter but can't." A prosecutor "can't" tell due to the provisions of the ethical rules. Criminal cases should be tried in the courtroom.

An argument has been made that the proposed bill is offered in response to the case of Roger Valadez. The statement is inaccurate. The proposed bill does not address the Valadez situation. Roger Valadez was not arrested as a suspect in the BTK investigation. If the law allowed for the release of a search warrant affidavit after a warrant has been served, the release of the affidavit in the Valadez matter would have negatively impacted the investigation of the BTK Killer.

Thank you for your consideration of the facts and the law. Thank you for listening to the real world concerns of those individuals responsible for the ethical prosecution of criminal cases. The Kansas County and District Attorneys Association hopes that the Committee exercises caution before changing a law that has well served the interests of defendants and the People of the State of Kansas.

Respectfully submitted,

Kevin O'Connor
Deputy District Attorney

KANSAS

OFFICE OF THE SECURITIES COMMISSIONER

KATHLEEN SEBELIUS, GOVERNOR
CHRIS BIGGS, COMMISSIONER

**TESTIMONY IN OPPOSITION TO HOUSE BILL No. 2204**
**House Judiciary Committee**

**Scott M. Schultz**
**Associate General Counsel**
**Office of the Kansas Securities Commissioner**
**February 11, 2009**

Mr. Chairman and Members of the Committee,

I appear before this Committee, on behalf of Securities Commissioner Chris Biggs, in opposition to HB 2204. In its current form, HB 2204 would require an affidavit or sworn testimony, in support of an arrest warrant or summons, to be an open public record after the warrant or summons has been executed. There are a limited number of exclusions contained in the bill.

The Securities Commissioner's office has statutory authority to investigate and prosecute securities fraud. As a natural part of that charge, we routinely prepare and file affidavits in support of the issuance of arrest warrants. And, as one might expect, our investigations involve the review of individual victim account records of a number of financial entities, including banks, credit unions, savings and loans, broker-dealers and investment advisers. Specific account information, as well as personally identifiable victim information, is included in our affidavits to support the allegations of financial fraud.

While there are exclusions in Section 1(b) of the proposed bill, the list does not exclude personal identifiable information. Contained within the Kansas Open Records Act, is a provision which excludes release of "...information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of privacy." K.S.A. 2008 Supp. 45-221(a)(30). It would be the request of this office that similar language be inserted into HB 2204.

Without exclusionary language, victims of financial fraud could be victimized again when their financial account information becomes available to the general public.

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Voice 785-296-3307 Fax 785-296-6872 Investor Services 1
http://www.securities.state.ks.us

In addition to the specific concerns listed above, there are general concerns related to the publication of the affidavit in the media, which could lead to allegations that a defendant did not receive due process and requests a change in venue because of the alleged tainting of a jury pool.

Thank you for the opportunity to present testimony today. Commissioner Biggs would ask that HB 2204 be recommended unfavorably for passage unless additional exclusionary language is included to protect victims of financial fraud.

State of Kansas

# Office of Judicial Administration

Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507 (785) 296-2256

House Judiciary Committee
Wednesday, February 11, 2009

Testimony in Opposition to HB 2204
Kathy Porter

Thank you for the opportunity to appear before you today as an opponent of HB 2204. House Bill 2204 would amend K.S.A. 22-2302 to permit affidavits and sworn testimony in support of the probable cause requirement to be public court records following the exclusion of information that would:

- Interfere with any prospective law enforcement action, criminal investigation, or prosecution;
- reveal the identity of any confidential source or undercover agent;
- reveal confidential investigative techniques or procedures not known to the general public;
- endanger the life or physical safety of any person; or
- reveal the name, address, phone number, or any other information which specifically and individually identifies the victim of any sexual offense in Article 35 of Chapter 21 of the Kansas Statutes Annotated.

House Bill 2204 would require someone to read each page of an affidavit or sworn testimony that is subject to the bill's provisions in order to identify any of the information that is to be excluded. A majority of the affidavits and testimony filed pursuant to K.S.A. 22-2302 are several pages in length.

Clerks of the district court, who receive hundreds to thousands of requests for documents on an annual basis, will not have the time needed to perform the redaction required by this bill. The process of redaction requires a person to make a copy of the original, which must be kept in its "as filed" condition in the court file, redact the relevant material by crossing through it, and then make a second copy so that no one can read through or from the back of the crossed out material. Although it might be easier if an entire page or portion of a page is to be redacted, in most instances it would appear that pieces of information scattered throughout a document will need to be redacted, and the process outlined above will need to be followed.

It will not be readily apparent to anyone, including both judges and clerks, just what information would reveal an identity, interfere with a law enforcement action, endanger a life, or any of the other consequences specified in this bill. Certain information might seem innocent or innocuous to one individual, but to another individual who has additional knowledge it could

prove to be the "missing link" to trigger the identification of an informant or undercover agent, the location of a victim, or to alert someone regarding a prospective law enforcement action.

This bill is particularly burdensome at a time when Judicial Branch staffing is significantly impaired by a hiring freeze that has been in place since the beginning of the fiscal year, with no end in sight. I would ask that the proponents of the bill work to find a solution that does not impose this burden and create a risk of endangering those persons whose identities should be protected.

House Bill 2250
By Committee on Judiciary

AN ACT concerning the rules of evidence; relating to admissibility of prior acts or offenses of sexual misconduct; amending K.S.A. 60-455 and repealing the existing section.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. K.S.A. 60-455 is hereby amended to read as follows: 60-455. *(a)* Subject to K.S.A. 60-447, *and amendments thereto,* evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove ~~his or her~~ *such person's* disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448, *and amendments thereto,* such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

*(b) Except as provided by K.S.A. 60-445, in a criminal action in which the defendant is accused of a ~~sexual offense~~ sex crime under article 34, 35, or 36 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant.*

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*(c) In a criminal action in which the prosecution intends to offer evidence under this rule, the prosecuting attorney shall disclose the evidence to the defendant, including statements of witnesses ~~or a summary of the substance of any testimony that is expected to be offered~~, at least ~~15~~ 10 days before the scheduled date of trial or at such later time as the court may allow for good cause.*

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*(d) This rule shall not be construed to limit the admission or consideration of evidence under any other rule or to limit the admissibility of the evidence of other crimes or civil wrongs, in a criminal action under a criminal statute other than article 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated.*

*(e) As used in this section, an "act or offense of sexual misconduct" includes:*

*(1) Any conduct proscribed by article 35 of chapter 21 of the Kansas Statutes Annotated; Aggravating Trafficking as defined by K.S.A. 21-3447(a)(1)(B) or the "sexual gratification" component under (a)(1)(C)(2); Exposing another to a life threatening communicable disease, as*

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*defined in K.S.A. 21-3435(a)(1); Incest as defined in K.S.A. 21-3602; or Aggravated Incest as defined in K.S.A. 21-3603, and amendments thereto;*

*(2) contact, without consent, between any part of the defendant's body or an object and the genitals ~~and~~ mouth or anus of the victim ~~another person~~;*

*(3) contact, without consent, between the genitals ~~and~~ mouth or anus of the defendant and any part of the victim's ~~another person's~~ body;*

*(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury or physical pain to the victim ~~another person~~;*

*(5) an attempt , solicitation or conspiracy to engage in conduct described in paragraphs (1) through (4); or*

*(6) any federal or other state conviction of an offense that would constitute an offense under article 35 of chapter 21 of the Kansas Statutes Annotated, Aggravating Trafficking as defined by K.S.A. 21-3447(a)(1)(B) or the "sexual gratification" component under (a)(1)(C)(2); Incest as defined in K.S.A. 21-3602; or Aggravated Incest as defined in K.S.A. 21-3603, and amendments thereto, or involved conduct described in paragraphs (2) through (5).*

Sec. 2. K.S.A. 60-455 is hereby repealed.

Sec. 3. This act shall take effect and be in force upon publication in the Kansas Register ~~from and after its publication in the statute book~~.

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Session of 2009

# HOUSE BILL No. 2250

By Committee on Judiciary

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AN ACT concerning the rules of evidence; relating to admissibility of prior acts or offenses of sexual misconduct; amending K.S.A. 60-455 and repealing the existing section.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. ~~K.S.A. 60-455 is hereby amended to read as follows: 60-~~ 455. *(a)* Subject to K.S.A. 60-447, *and amendments thereto,* evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove ~~his or her~~ *such person's* disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448, *and amendments thereto,* such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

*(b) In a criminal action in which the defendant is accused of a sexual offense under article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant.*

*(c) In a criminal action in which the prosecution intends to offer evidence under this rule, the prosecuting attorney shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.*

*(d) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.*

*(e) As used in this section, an "act or offense of sexual misconduct" includes:*

*(1) Any conduct proscribed by article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto;*

*(2) contact, without consent, between any part of the defendant's body or an object and the genitals and anus of another person;*

~~(3) contact, without consent, between the genitals and anus of the~~

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[Insert K.S.A. 60-447 page.]

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~~*defendant and any part of another person's body;*~~

*(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury or physical pain to another person;*

*(5) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (4); or*

*(6) any federal or other state conviction of an offense that would constitute an offense under article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, or involved conduct described in paragraphs (2) through (5).*

~~Sec. 2. K.S.A. 60-455 is hereby repealed.~~

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

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, and amendments thereto,

**60-447. Character trait as proof of conduct.** Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge under K.S.A. 60-445 if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character.

Except as provided further and

(b) Evidence of another act or offense of sexual misconduct, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise inadmissible under the Kansas Statutes Annotated, and amendments thereto, is admissible in a criminal case in which the accused is charged with another act or offense of sexual misconduct, or in a civil case in which a claim is predicated on a party's alleged commission of these other acts.
(1) In weighing the probative value of such evidence, the court may, as part of its determination under Supreme Court Rule 403, consider:
(A) Proximity in time to the charged or predicate misconduct;
(B) similarity to the charged or predicate misconduct;
(C) frequency of the other acts;
(D) surrounding circumstances;
(E) relevant intervening events; and
(F) other relevant similarities or differences.

(2) In a criminal action in which the prosecution intends to offer evidence under this rule, the prosecuting attorney shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) As used in this section, an "act or offense of sexual misconduct" includes:
(A) Any conduct proscribed by article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, or K.S.A. 21-3603, and amendments thereto;
(B) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
(C) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
(D) deriving sexual pleasure or gratification from the infliction of death, bodily injury or physical pain to another person;
(E) an attempt or conspiracy to engage in conduct described in paragraphs (A) through (D); or
(F) any federal or other state conviction of an offense that would constitute an offense under article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, or K.S.A. 21-3603, and amendments thereto, or involved conduct described in paragraphs (B) through (E).