Approved: March 12, 2009
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Thomas C. (Tim) Owens at 9:32 a.m. on January 22, 2009, in Room 545-N of the Capitol.

All members were present except:
Senator Derek Schmidt - excused

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Jerry Donaldson, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Jim Bush, Kansas Judicial Council, Probate Advisory Committee
Jennifer Roth, Kansas Association of Criminal Defense Lawyers
Jerry Gorman, Wyandotte Co. District Attorney, Kansas Co. & District Attorney's Assn.
Ed Klumpp, Kansas Chief's of Police and Kansas Peace Officers Assn.

Others attending:
See attached list.

Bill Introductions

Judge Phil Journey requested the introduction of two bills. The first would provide for a procedure to obtain a restricted driver's license while suspended for failure to comply with a traffic citation or court-ordered fine or restitution. The second bill concerns driver improvement clinics, fees, and the disposition of funds. The bills were introduced without objection.

Debbie Holyroid, Alzheimer's Association, requested the introduction of a bill that create the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The bill was introduced without objection.

Senator Owens alerted the committee members to written testimony in opposition to **SB 26** from Jennifer Roth, Kansas Association of Criminal Defense Lawyers. (Attachment 1)

The Chairman opened the hearing on **SB 34 - Continuation of certain exceptions to disclosure under the open records act.**

Written testimony in support of **SB 34** was submitted by:
Eric Sartorius, City of Overland Park, Kansas (Attachment 2)

There being no other conferees, the hearing on **SB 34** was closed.

The Chairman opened the hearing on **SB 45 - Kansas power of attorney act amendments.**

Jim Bush appeared in support indicating **SB 45** would make several amendments to the Kansas Power of Attorney Act. Specifically it would:

- authorize a physically unable but mentally competent person the ability to appoint a designated adult,
- requires the attorney to maintain all receipts, disbursements, and account for all transactions, and
- define the process for modifying or terminating the fiduciary relationship by the principal. (Attachment 3)

There being no other conferees, the hearing on **SB 45** was closed.

Minutes of the Senate Judiciary Committee at 9:32 a.m. on January 22, 2009, in Room 545-N of the Capitol.

Chairman Owens opened the hearing on **SB 17 - Videotaping felony interrogations.** Jason Thompson, staff revisor, reviewed the bill.

Senator David Haley spoke in support as sponsor of the bill. The bill would require all interrogations in which a felony crime has been or will be charged to be videotaped. Senator Haley stated the bill is intended to protect law enforcement as well as the general public by providing an inexpensive and unbiased record of interrogations. (Attachment 4)

Jennifer Roth testified in support indicating the bill has several positive aspects such as:

- the ability to prevent and/or disprove allegations of police misconduct,
- insure that exculpatory statements are accurately documented,
- will temper the influence of false confessions,
- prosecutors would be allowed to admit recordings at trial, and
- will allow judges to make rulings based on neutral accountings. (Attachment 5)

Jerry Gorman testified in opposition stating **SB 17** presents several issues of concern to prosecutors. Of foremost concern is that the bill creates an additional hurdle to prosecution that is not constitutionally mandated. In addition, the bill may have the unintended effect of punishing law enforcement for conduct beyond their control by creating a presumption of inadmissibility where no wrongful conduct occurred. Operator errors, power failures, economic limitations or geographic limitations may prohibit an otherwise admissible statement from being used as evidence. Mr. Gorman feels the present law need not be changed. (Attachment 6)

Ed Klumpp spoke against **SB 17** presenting several concerns. The bill would eliminate the use at trial of information obtained outside of a taped interrogation, has no provision for technical malfunctions of equipment, contains no provisions for interrogations in the field, lacks adequate definitions regarding key words and may be cost prohibitive for some agencies. In addition, Mr. Klumpp feels the requirement to videotape every felony interrogation is too broad of an application. The intended good of **SB 17** is far outweighed by the unintended problems the bill will create. (Attachment 7)

Written testimony in support of **SB 17** was submitted by:
Stephen Saloom, Policy Director, Innocence Project (Attachment 8)

Neutral written testimony was submitted on **SB 17** was submitted by:
Roger Werholtz, Secretary, Department of Corrections (Attachment 9)

There being no further conferees, the hearing on **SB 17** was closed.

The next meeting is scheduled for January 23, 2009.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-22-09

NAME	REPRESENTING
Jerome Gorman	Wyandotte County D.A.
Richard Simmons	Ks Ag Assoc.
Jennifer Roth	KACDL
[illegible]	
Jeff Brandau	KBI
[illegible]	Alzheimer's Assoc.
Michelle Meiden	Alzheimer Assoc.
Gail Bright	Ks Securities Commissioner's office
Diane Miller	Ks Sec. of State
Joseph Molini	Ks Bar Admin
Ed Klumpp	KACP & KPOA
Stanley Jacquot	LKM
John C. Bottenberg	Sheriff's Assoc
Melissa Wagoner	KAC
Joe Ernst	KAHSA
ERIK SARTORIUS	City of Overland Park
N. Zogleman	Polsinelli
[illegible]	Sachs Braden

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1/22/09

NAME	REPRESENTING
Jane Carter	KOSE
Tim Madden	KNOC
Jeremy Barclay	KNOC
Mark Drummond	Sen. Haley's Intern

Senate Judiciary Committee
January 21, 2009

Testimony prepared by
Kansas Association of Criminal Defense Lawyers
Opponent of Senate Bill 26

The Kansas Association of Criminal Defense Lawyers (KACDL) is a 300-person organization dedicated to justice and due process for those accused of crimes. KACDL opposes **Senate Bill 26** because **it is a violation of the Sixth and Fourteenth Amendments to the United States Constitution, as well as Sections 5 and 10 of the Kansas Bill of Rights**. Furthermore, **it is unnecessary,** especially in light of the **unknown potential costs**.

SB 26 provides for sentence enhancements for offenders who carry a firearm to commit a drug felony, or in furtherance of a drug felony, possess a firearm. The enhancement starts at 60 months, but increases for "brandishing" (84 months) and "discharging" (120 months). This period of months is in addition to the applicable guideline sentence.

This enhancement violates the U.S. and Kansas Constitutions and would result in immediate constitutional challenges. (See, *e.g. Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), *United States v. Booker*, 543 U.S. 220 (2005), and *Cunningham v. California*, 127 S.Ct. 856 (2007). **This enhancement is also contrary to Kansas statutory law.** (See K.S.A. 21-4716(b): ". . . any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt.") **This enhancement is unprecedented** in that nowhere else in the Kansas Sentencing Guidelines Act (KSGA) is a specific number of additional months over the guideline sentence proscribed for certain behavior.

Furthermore, **SB 26 is unnecessary**. The KSGA already includes a procedure for upward durational departures. In addition, if a firearm is brandished or discharged during a drug felony, that act presumably constitutes a separate count (ex.: attempted or completed aggravated assault, aggravated battery, aggravated robbery or discharge at an occupied dwelling/vehicle, all of which are person felonies) with its own presumptive prison sentence (offenses committed with a firearm are presumptive prison under the KSGA).

Finally, there seems to be no concrete information about the cost of this bill. We have no idea how many offenders would be subject to this bill. Obviously **increasing sentences by 5-10 years will have a substantial price tag.** Thank you for your consideration.

Respectfully submitted,
Jennifer Roth

Jennifer Roth
on behalf of the KACDL Legislative Committee
rothjennifer@yahoo.com
(785) 832-9583

Senate Judiciary
1-22-09
Attachment 1

The City of Overland Park KANSAS

8500 Santa Fe Drive
Overland Park, Kansas 66212
• Fax: 913-895-5003
www.opkansas.org

Testimony Before The
Senate Judiciary Committee
Presented by Erik Sartorius
Regarding SB 34

January 22, 2009

The City of Overland Park appreciates the opportunity to share with the committee its support for Senate Bill 34.

The Kansas Open Records Act assures public access to important public records. At the same time, the law allows essential exceptions to protect the privacy of citizens and allow the effective and efficient administration of government programs.

The City of Overland Park believes the Kansas Open Records Act currently strikes a fair balance to create open and efficient government, and strongly supports retention of current exceptions. When contemplating reauthorization of KORA, critical consideration must be given to just whose data is generally contained in records held by the government. More often than not, the information contained in governmental records either belongs to or refers to private individuals.

Of interest to the City of Overland Park is a provision excepting discussions of homeland security issues (K.S.A 45-221 (a) (45)). This exception is particularly important when local jurisdictions are working in cooperation with private companies, religious institutions, hospitals and schools to coordinate on security matters. The City requests that this exception be retained by the legislature, as Senate Bill 34 does in subsection (l) on page 4 (lines 19-25).

The exceptions to the Kansas Open Records Act balance the need for open government with the necessity for insuring the right to privacy of individuals. Because of this, the City of Overland Park supports SB 34 and respectfully requests that the committee recommend SB 34 favorably for passage.

Senate Judiciary
1-22-09
Attachment 2

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council**

DATE: **January 22, 2009**

RE: **Testimony on 2009 SB 45 Relating to Amendments to the Kansas Power of Attorney Act.**

BACKGROUND

In 2003, the Kansas Power of Attorney Act was passed by the Legislature. The act was drafted by the Kansas Judicial Council's Probate Advisory Committee (PLAC) and recommended by the Judicial Council

In July of 2006, the National Conference of Commissioners on Uniform State Laws approved the Uniform Power of Attorney Act. The PLAC reviewed the Uniform Power of Attorney Act and noted that in several respects the Kansas act was more comprehensive. Therefore, PLAC did not recommend the adoption of the Uniform act at this time. However, it was the consensus of the Committee that after a number of states (including some that border Kansas) have adopted the act, that the PLAC will again review the Uniform act.

Though the PLAC did not recommend adoption of the Uniform Power of Attorney act at this time, the Committee did propose three amendments to the Kansas Power of Attorney act which are based on the Uniform Act.

Senate Judiciary
1-22-09
Attachment 3

PROPOSED AMENDMENTS

K.S.A 58-652 (at page 1) outlines the process for executing a power of attorney document, including key provisions to be included. However, it does not deal with the issue of the execution by a party who is competent, but physically unable to sign the document. Therefore, an amendment to K.S.A. 58-652(a)(3) is proposed which permits the document to be physically signed by a designee of the principal, in the presence of the principal and in the presence of a notary public.

K.S.A. 58-656 (at page 2) enumerates the general duties of the attorney in fact. However, the act currently does not explicitly require the attorney in fact to keep record of all receipts, disbursements and transaction made in a fiduciary capacity. Therefore, this proposed amendment specifically requires the attorney in fact to keep funds separate and to account for all transactions.

K.S.A. 58-657 (at page 4) describes the process for modifying, terminating or suspending the fiduciary relationship by the principal. However, the act does not specifically authorize the attorney in fact to resign. This proposed amendment establishes a formal procedure for the voluntary resignation by the attorney in fact.

OFFICE
TE CAPITOL BUILDING
ROOM 403-N
TOPEKA, KANSAS 66612
(785) 296-7376
(785) 296-0103/FAX

STATE OF KANSAS

DISTRICT
CIVIC CENTER S
POST OFFICE BOX O
KANSAS CITY, KANSAS 66117
(913) 321-3210
(913) 321-3110/FAX

SENATE CHAMBER

DAVID B. HALEY
SENATOR
DISTRICT 4
WYANDOTTE COUNTY

SENATE BILL 17 **January 22, 2009**

RELATING TO EVIDENCE & VIDEOTAPE OF FELONY INTERROGATIONS

TO : Hon. Tim Owens, Chair ; Hon. Derek Schmidt, Vice-Chair & Members

KANSAS SENATE JUDICIARY COMMITTEE

Mr.Chairman & Members of the Committee. Thank you for holding a hearing on SB 17.

Senate Bill 17 creates the requirement of a videoed, taped, recording to be made of all interrogations in which a felony crime has been, or subsequently will be, charged. The bill would make statutory and uniform a custodial requirement *already* in force and effect in our State in several departments (including: the Sedgwick County Sheriff; Wichita PD; Liberal PD; Ottawa PD and others) AND in some law enforcement division of forty-eight (48) *other* States *and* the District of Columbia .* These measures have resulted in NO reports of judicial, prosecutorial, custodial or defense tampering or misconduct in at least the last three (3) years. (I actually introduced a similar measure in Kansas years *before*, then state Senator, Obama introduced and passed *his* in Illinois...)

Frankly Mr.Chairman, in the genuine interest of protecting law enforcement AND the folks they interview, it just makes good sense to require objective and responsible evidence. Prudent, inexpensive and unbiased, a videotape serves this purpose for all parties. Hardly an "unfunded mandate," a sufficient video camera costs less than three hundred dollars($300) and are, of course, readily available for sale. The American Bar Association has adopted resolutions for several years urging all law enforcement agencies to videotape entire custodial interrogations.

I could go on but since there are other conferees, I will defer to them and be pleased to stand for questions at the appropriate time. I urge your favorable consideration.

Thank you again, Mr. Chairman; Members.

* = *List Available Now*

COMMITTEE ASSIGNMENTS
ASSESSMENT & TAXATION
JUDICIARY REAPPORTIONMENT
PUBLIC HEALTH & WELFARE
HEALTH CARE STRATEGIES

SenHaley@aol.com
Haley@senate.state.ks.us

JOINT COMMITTEE ASSIGNMENTS
STATE T
CORRECTION
HEALTH F
CHILD

Senate Judiciary
1-22-09
Attachment 4

Senate Judiciary Committee
January 22, 2009
Testimony of the Kansas Association of Criminal Defense Lawyers
by Jennifer Roth, Legislative Committee Chair
Proponent of Senate Bill 17

KACDL is a 300-person organization dedicated to justice and due process for those accused of crimes. Members practice all over Kansas, from big cities to rural counties. KACDL supports recording felony interrogations because such a law promotes justice – everyone wins with SB 17.

Recording is good for law enforcement. It allows the officer to focus on the suspect and the content of the interview without having to also concentrate on notetaking. If the recording is simultaneously watched by another officer, then that officer can suggest questions for the interviewer. It prevents and/or disproves allegations of police misconduct or inappropriate behavior that are made in the absence of a recording. In so doing, the public's trust in law enforcement is re-enforced. With recorded interviews, law enforcement officers spend less time preparing for and/or appearing in court and more time fighting and solving crimes.

Recording is good for defendants. It shows *Miranda* violations, coercive techniques, etc. It insures that exculpatory statements are accurately documented. Recordings can show the extent or manifestations of a defendant's mental illness. It can help in cases where a false confession is a possible issue. According to the Innocence Project, around 25% of the wrongful convictions in the U.S.'s 227 DNA exonerations involved a false confession. That's about 56 people in that group alone. Recording interrogations will temper the influence of false confessions on prosecutors/judges/juries.

Recording is good for prosecutors. The prosecution can play the interrogation at trial. The recording brings to life something the jurors would otherwise have to imagine in their heads. This means an increase in guilty verdicts.

Recording is good for the judicial system. There would be fewer pretrial motions and a lot more (and quicker) pleas. It allows a judge to make rulings based on a neutral, objective account rather than on disputed testimony. Recordings can contain sentencing information (ex. if a defendant came across as having no remorse). Furthermore, recordings prevent civil suits arising from police misconduct or claims for damages that may result from DNA exoneration cases.

Recording felony interrogations is not difficult in this technological age. While we do not have statistics, arguably many law enforcement agencies in the state already have the necessary equipment (ex. they are already recording some interrogations; have recording devices for use in DUI stops/advisories; have equipped interview rooms for use in child abuse/child sex cases). With the availability the latest technology such as digital equipment and digital file storage, etc., SB 17 would be possible for departments of all sizes.

Thank you for your consideration,
Jennifer Roth

Jennifer Roth
rothjennifer@yahoo.com
(785) 832-9583

Senate Judiciary
1-22-09
Attachment 5

Office of The
DISTRICT ATTORNEY
JEROME A. GORMAN
Twenty-Ninth Judicial District of Kansas
Wyandotte County Criminal Justice Complex
710 North 7th Street, Suite 10 - Kansas City, Kansas 66101-3051
Telephone: 913-573-2851

Fax:
913-573-2948
913-573-2860
913-573-8151

January 22, 2009

Senator Thomas Owens, Chairman
Senate Judiciary Committee
Kansas State Senate
Topeka, Kansas

RE: Senate Bill 17

Thank you for the opportunity to address the Senate Judiciary Committee regarding Senate Bill 17. On behalf of the Kansas County and District Attorneys Association, I am here today to express opposition to this proposal.

Initially, I would like to comment on the stated purpose of Senate Bill 17. It would appear that it is the intent of this bill to ensure voluntarily given statements that are reliable under the totality of the circumstance (section f). All prosecutors across the State of Kansas share this committee's concern. Kansas prosecutors wish to base their convictions upon conditionally sound evidence.

Further, I am sure that all prosecutors would agree with me when I say that I would want nothing less than to be able to present a videotaped confession in every case. We would also like to present DNA, fingerprints and videotaped surveillance in every case. However, most of the time, not all of the most incriminating and reliable types of evidence are available.

Senate Judiciary
1-22-09
Attachment 6

Senate Bill 17 presents a number of issues that are of great concern to prosecutors. First and foremost, is that this bill creates an additional hurdle to prosecution that is not constitutionally mandated. Pursuant to *Miranda v. Arizona* and its progeny, the court must find in a hearing outside the presence of the jury, that a defendant was advised of his rights, waived those rights and then gave a voluntary statement. This burden is upon the state, pursuant to K.S.A. 22-3215(4) in a Motion to Suppress a Confession.

Such a finding may also be made after a request by the prosecution. This is generally referred to as a *Jackson v. Denno* hearing. The United States Supreme Court has long found that the above described procedures sufficiently safeguard the accused.

To add an additional requirement, on top of the existing due process constitutional requirements, may have an adverse effect on the safety of a community and the justice due to victims of crime.

In a search and seizure suppression issue decided by the United States Supreme Court on January 14, 2009 in a case entitled *Herring v. United States*, Chief Justice Roberts stated that the extent to which the exclusionary rule is justified by its deterrent effect varies with the degree of law enforcement culpability. Abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the justice system.

Senate Bill 17 does not punish illegal, unconstitutional, or repulsive conduct as contemplated by Miranda, the Fourth Amendment's exclusionary rule or the recent United States Supreme Court decision. Senate Bill 17 punishes the fear of such conduct.

K.S.A. 22-3215 and case law sufficiently protect an accused against illegal police conduct. A review of Kansas appellate decisions allow one to conclude that law enforcement in Kansas understand the limits of police interrogations and the courts sufficiently hold law enforcement accountable to those constitutional standards.

Senate Bill 17 may have the unwanted effect of punishing law enforcement for conduct or occurrences that are beyond its control. Senate Bill 17 creates a presumption of inadmissibility where no wrongful conduct by law enforcement occurs.

Extrinsic matters such as operator error, power failures, economic limitations or geographic prohibitions may prohibit an otherwise admissible statement from being used as evidence against an accused. Situations such as the hospitalization of an accused or a deaf/mute suspect may prohibit compliance with Senate Bill 17.

I fully recognize that Senate Bill 17 excepts the admission of non-videotaped interrogation in certain circumstances. The State still fears the burden of proving the exceptions apply where no police misconduct occurs. Victims and communities bear the brunt of circumstances that may be beyond the control of law enforcement.

While the State fully accepts the burden of proving a defendant guilty beyond a reasonable doubt, and proving the voluntariness of any statement, this committee should not take the extra step of requiring non-constitutional safeguards where no threat lies.

Illinois was the first state to pass legislation in 2003 to require videotaped statements in homicide interrogations. Illinois has long had a history of corruption for decades as evidenced through the mobster era of prohibition, the administrations of a Chicago mayor, and the current indictment of a sitting governor.

No such conduct in Kansas is alleged to have occurred. Let us not punish the fear of illegal conduct, but the conduct itself.

As I acknowledged previous, the bill provides exceptions to the presumption of inadmissibility of a non-videotaped confession. However, those exceptions place a burden upon the State to prove the exception. These exceptions, subject to a preponderance of the

evidence standard, are subject to interpretation by the many district court judges and therefore would be susceptible to disparate interpretation across the state.

Present safeguards already in place regarding the admissibility have ably served Kansas law enforcement, prosecutors and the accused for many years. The present law need not be changed. I urge this committee to not pass Senate Bill 17.

Thank you,

Jerome A. Gorman
Wyandotte County District Attorney

Kansas Association of Chiefs of Police
PO Box 780603, Wichita, KS 67278 (316)733-7301

Kansas Peace Officers Association
PO Box 2592, Wichita, KS 67201 (316)722-8433

January 22, 2009

Testimony To The Senate Judiciary Committee
In Opposition To SB 17
Videotaping felony interrogations

Chairman Owens and Committee members,

The Kansas Association of Chiefs of Police and the Kansas Peace Officers Association strongly oppose this bill. In our opinion, this bill is fraught with unintended consequences.

We agree that videotaping an interrogation can be beneficial in some cases. In fact, such videotaping is completed in many high level person felony investigations by larger law enforcement agencies. The mandates of this bill to videotape every felony interrogation is not feasible in our opinion. Our experience with this videotaping is what gives rise to some of our concerns.

First, this bill would eliminate the use at trial of any information obtained in an interrogation where no video and audio recording is made. This is an extreme consequence for not having a videotape of an interrogation that actually met constitutional requirements.

Second, this bill has no provision for technical malfunctions in equipment. As a result, a technical malfunction prohibits the use of critical information obtained during the interrogation. I doubt anyone in this room has not experienced an effort to record a television show or to videotape a family event with a camcorder and found for a multitude of reasons there is no recording, no picture, or no sound. It has been our experience even with the expensive equipment some law enforcement agencies currently use that malfunctions and unintentional operator error occasionally result.

Third, the bill does not contain any provisions for field interrogations. These interrogations are common and are necessary to public safety. These interrogations can occur for numerous reasons, such as: Attempting to identify other suspects that may still be in the area of a crime, attempting to recover the victim's property and other evidence of the crime, attempting to determine the suspect's actual involvement, attempting to find hazardous materials a suspect may have hidden, and sometimes attempting to gain information to find a victim. It is unclear whether or not the courts would find these conditions adequate to determine the required videotaping to be unfeasible.

Fourth, the bill lacks adequate guidance to law enforcement and the court. For example, some of the key words to be interpreted by law enforcement and the courts are: 1) *Interrogation* - what types of interrogation are intended and at what point does the officer's suspicions and intent cross the line from inquiry to interrogation. Will this interpretation be different from case law on specific constitutional issues? 2) Feasible – what will the courts determine is a feasible reason for law enforcement to not record.

Senate Judiciary
1-22-09
Attachment 7

Frequently, there are circumstances where a suspect wants to talk to law enforcement in the field at the time of arrest. It is not infrequent that a suspect will volunteer some information which the officer needs to clarify or ask for additional information in the field at the time of arrest. In practice, it is best to pursue this while the suspect is in the frame of mind to talk to us. In such cases what is the law enforcement officer to do? Should we tell the defendant to not talk to us because we don't have video equipment available? Or is that an instance where the feasibility standard will apply? I can see courts ruling quite differently on this single issue.

The bill does not attempt to restrict the definition or applicable circumstances of "interrogation" the way most case law has done. I also could not find a definition of it in any existing statute. So I turned to Black's Law Dictionary. Black's defines "interrogation" as "The formal or systematic questioning of a person; esp., intensive questioning by the police, usu. of a person arrested for or suspected of committing a crime." KSA 22-2402 allows law enforcement officers to stop and detain a person who they reasonably suspect of committing, having committed, or about to commit a crime and to demand an explanation of their actions. In such a case, the person stopped is "suspected of committing a crime" and therefore can fall under Black's definition of interrogation. The strict language of applicability in this bill is most certainly to lead to the broadest of interpretations by the court. This bill could effectively prohibit investigatory stops by law enforcement.

Black's also lists three specific types of interrogation: Custodial, investigatory, and noncustodial. Will the courts rule that all of these types of interrogation are included in the provisions of this bill?

Fifth, the requirement to videotape literally every felony interrogation is too broad of an application. This will include felony DUI's, felony driving while suspended, and non-grid felonies which do not seem to warrant the costs of videotaping in all cases.

Sixth, the cost and availability of videotaping equipment is an issue. More than half of the law enforcement agencies in Kansas have 10 or fewer officers. This bill would require every agency to invest in video recording equipment. In order for these systems to be effective, it takes much more than just a cheap video camera from a department store set up in the corner of the room. Suspects often speak very softly in their responses during questioning; special microphones have to be used. Audio is susceptible to picking up a great deal of background noise which requires an isolated room for the interrogation. Video equipment that is not bolted down or behind glass is subject to vandalism or being used as a weapon by the suspects. The recording medium is also an expense, there is the cost of a secure storage facility, and there is the cost of making duplicate copies for prosecutors and defense attorneys. Additionally, it has been our experience that most prosecutors end up wanting a transcript of the entire interrogation prepared. This is very expensive.

To not belabor the point, I will stop with these points. I hope it is clear to the committee that the end result if this bill becomes law will not be good. The intended good is far outweighed by the unintended problems this bill will create.

We strongly encourage you to not pass this bill out of committee.

Ed Klumpp

Ed Klumpp
Legislative Committee Chair
eklumpp@cox.net
785-640-1102

INNOCENCE PROJECT

Benjamin N. Cardozo School of Law, Yeshiva University

WRITTEN TESTIMONY OF STEPHEN SALOOM, ESQ., POLICY DIRECTOR,

INNOCENCE PROJECT,

BEFORE THE KANSAS SENATE JUDICIARY COMMITTEE

RE: SB 17

JANUARY 22, 2009

On behalf of the Innocence Project, thank you for allowing me to submit written testimony to the Kansas Senate Judiciary Committee for its consideration of SB 17, which would require the recording of felony interrogations in the state of Kansas.

Since its U.S. introduction, forensic DNA testing has proven the innocence of 227 people who had been wrongly convicted of serious crimes. With the certainty of innocence that DNA provides, we can also be certain that something(s) went wrong in the process which led fact finders to believe beyond a reasonable doubt that the exonerated person was, in fact, guilty of the crime.

The Innocence Project was founded in 1992 at the Benjamin N. Cardozo School of Law to exonerate the innocent through post-conviction DNA testing. We regard each DNA exoneration as an opportunity to review where the system fell short and identify factually-supported policies and procedures to minimize the possibility that such errors will impair justice again in the future. The recommendations that we make are grounded in robust social science findings and practitioner experience, all aimed at improving the reliability of the criminal justice system.

Barry C. Scheck, Esq. and Peter J. Neufeld, Esq., *Directors* Maddy deLone, Esq., *Executive*
100 Fifth Avenue, 3rd Floor • New York, NY 10011 • Tel: 212/364-5340 • Fax: 212/264-53

This testimony will address the electronic recording of custodial interrogations, an improvement that promises to help law enforcement in the criminal investigation process and assure that justice is served during the course of criminal proceedings.

False "confessions" are far more prevalent than one might think.

A false confession, admission, or dream statement was found to have contributed to nearly 25% of the wrongful convictions in America's 227 DNA exonerations. Electronically recording custodial interrogations from Miranda onward removes serious questions about the "confession" in question, by enabling the finder of fact to consider the most accurate presentation of the confession evidence at trial, thus narrowing the possibility of a wrongful conviction.

Ancillary Benefits of Recording Interrogations

There are a number of ancillary benefits that can be achieved through the implementation of mandatory recording. A record of the interrogation can resolve disputes about the conduct of law enforcement officers—allegations of police misconduct can be disproven. Investigators will not have to focus upon writing up a meticulous account of the statements provided by the suspect, and may instead focus his attention on small details, such as subtle changes in the narrative, which he might have otherwise missed. Having a record of good interrogation techniques can be a useful training device for police departments, particularly as cases with distinctive characteristics come to light. Overburdened courts will welcome a huge reduction in

defense motions to suppress unrecorded statements and confessions as well as pretrial and trial hearings focused upon establishing what transpired during the course of an interrogation.

The single best reform available to hinder the influence of false confessions, the mandatory electronic recording of interrogations, is being embraced by police departments around the country, now estimated at 500 law enforcement agencies. The states of Alaska, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Wisconsin, and the District of Columbia already require it in serious cases, and the same is done in large metropolitan cities such as Phoenix, AZ; Los Angeles, San Diego, San Francisco and San Jose, CA; Denver, CO; Portland, OR; Austin and Houston, TX. Kansas should follow suit, instigating a reform whose innumerable benefits will undeniably bolster the investigations of criminal cases.

In the summer of 2004, Thomas P. Sullivan, the former U.S. Attorney for the Northern District of Illinois, published a report detailing police experiences with the recording of custodial interrogations. **Researchers interviewed officers in 238 law enforcement agencies which have implemented the reform in 38 states and concluded, "virtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice."** (Sullivan, Thomas, "Police Experiences with Recording Custodial Interrogations." Report presented by Northwestern University School of Law's Center on Wrongful Convictions, p. 6.)

Mr. Sullivan has also drafted a model bill for the recording of interrogations, many provisions of which are present in SB 17. The bill carves out broad exceptions to recording interrogations that seek to protect law enforcement, while also ensuring that the best possible evidence is available to fact finders during the course of criminal proceedings. The Innocence Project applauds this committee for advancing this legislation and will gladly share its views on the provisions of the bill in more detail should that be of interest to the committee.

Passage of SB 17 will assure protections to the innocent, which in turn will allow law enforcement to focus its attention on the apprehension of the true culprit. Less than ideal interrogation procedures have contributed to or been the main factor in nearly one in five wrongful convictions of individuals later exonerated through DNA evidence. In each of these cases, the true perpetrator remained at large, able to commit additional crimes. The mandatory recording of interrogations is a reform whose time has come.

It is the Innocence Project's hope that, with continued experience and evaluation, legislatures around the country – such as this one – will agree that taking advantage of the emerging research and best practices will further enhance the ability to swiftly and surely convict offenders, and avoid being misled into pursuing others, or worse, convicting the innocent. Passage of SB 17 will assure protections to the innocent, which in turn will allow law enforcement to focus its attention on the apprehension of the true culprit.

I thank you for the opportunity to speak to you about these important issues today. We believe that mandating the electronic recording of felony interrogations through the passage of SB 17 will serve the interests of law enforcement, while promising the fair administration of justice.

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on SB 17
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
January 22, 2009

SB 17 provides that statements of a defendant arising out of felony interrogations which are not video taped are to be presumed to be inadmissible in any criminal proceeding. Additionally, statements made during subsequent interviews, even if video taped, are inadmissible if the initial interrogation was not video taped.

The department adheres to the fundamental principles that law enforcement authorities should gather the best possible evidence feasible and that abusive interrogations and false statements regarding the statements made or the voluntary nature of those statements should never be tolerated. Needless to say, video recorded confessions by criminal defendants are compelling evidence to a jury and are sought by law enforcement on a case by case basis subject to a multitude of factors. SB 17, however, presents concerns to the department.

The concerns presented by SB 17 involve the volume of investigations conducted by the department and the inadmissibility of subsequently video taped interviews. The department also has a general concern regarding the meaning of paragraph (f) of the bill. Finally, the department has concerns regarding the exceptions provided when video recording is not feasible or for routine questions posed during the processing of an arrest.

The department annually undertakes hundreds of investigations and conducts thousands of interviews. While a significant number of investigations could result in a felony prosecution, the majority of such investigations result in administrative action rather than criminal prosecution. Since local county or district attorneys determine whether conduct will be prosecuted in the district court, department officials at the time of the investigation, particularly during the initial phases of the investigation, may not know whether the ultimate scope of the investigation will result in a felony prosecution in the district court. Additionally, a person perceived as a potential witness may make statements subsequently found to be false, resulting in that person becoming a suspect. However, due to the fact that the initial interview was not video taped, the initial statement would be inadmissible as would any subsequently video taped statement. Finally, department parole officers routinely question releasees about their activities. The video

Senate Judiciary
1-22-09
Attachment 9

exception for statements made at a time the interrogator is unaware that an alleged felony had occurred would nonetheless require a video recorded interview if the officer knew that a crime had been committed but for which there was no suspect or if the releasee was mentioned as a person of interest or possible witness by other law enforcement officers but was not subject to a custodial interrogation. While the questioning of releasees regarding their activities by parole officers is a routine part of supervising releases, those interviews are not part of the routine processing of an arrest exempted by paragraph (d) (5).

Paragraph (c) of Section 1 of SB 17, prohibits the admissibility of subsequently video taped interviews if the initial interview was not video taped. This provision would negate the possibility of law enforcement officers to present compelling evidence to a jury through a video confession if the significance of a prior statement or the culpability of a defendant became apparent through an investigation subsequent to the initial interview that was not video taped.

The department also believes that paragraph (f) of Section 1 is ambiguous. Paragraph (f) provides that the presumption of the inadmissibility of a statement maybe overcome if the interrogation is conducted at a police station or other place of detention if the statement was voluntary and reliable based on the totality of the circumstances. Since it is anticipated that a substantial number of felony interrogations would occur at a police station or place of detention, it is unclear whether the requirement of video recording the interview pursuant to paragraph (c) is nullified by paragraph (f). Additionally, the exception provided by paragraph (f) for interrogations conducted at a police station or place of detention if the statement was voluntary and reliable would not extend to interviews conducted at a parole office.

Finally, the department believes that the issue of whether video recording of interviews of inmates and releasees was feasible in a specific situation is ripe for extensive litigation that is unrelated to whether the statement was voluntary.

The department requests that if a statutory mandate for video recording of interviews is adopted, such mandate should be limited to custodial interrogations subject to Miranda v. Arizona and that statements that were not video taped would be admissible if a subsequent interview was video recorded, the defendant refused to participate in a proposed subsequent video interview, or the defendant asserted a constitutional right curtailing further law enforcement questioning. The department would also note that funding for video equipment and tapes will be necessary if this bill is enacted.