

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:35 a.m. on February 8, 2010, in Room 548-S of the Capitol.

All members were present.

Committee staff present:

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

Conferees appearing before the Committee

Sarah Bryne, Assistant Attorney General, Alcoholic Beverage Control
Ron Hein, Kansas Restaurant & Hospitality Association
Pat Scalia, Kansas Board of Indigent
Christine Ladner, Assistant Attorney General, State of Kansas
Robbin Wasson, Assistant Wyandotte County District Attorney
Stan Heffley of behalf of O. Carl Anderson, KBI
Don Mohler, League of Kansas Municipalities (No written testimony)
Ed Klumpp, Kansas Association of Chiefs of Police

Others attending:

See attached list.

The hearing on **SB 407 - Prescribing penalties for violations of liquor enforcement tax by licensees and persons required to be licensed** was opened. Jason Thompson, staff revisor, reviewed the bill.

Sarah Bryne appeared in support, stating the intent of the bill is to codify the authority of the Director of Alcoholic Beverage Control (ABC) and the Director of Taxation of the Kansas Department of Revenue (KDOR) to enjoin any licensee from engaging in business when the liquor enforcement tax has not been filed or paid in a timely manner. Enactment of this bill will allow the ABC and KDOR a quick, efficient method to encourage compliance. Ms. Bryne recommended the bill be amended to clarify that the bill applies only to those licensees who are subject to the provisions of the liquor enforcement tax act. (Attachment 1)

Ron Hein spoke in opposition, stating enactment of **SB 407** will extend authority to the Director of Alcoholic Beverage Control (ABC) over and above what is currently held by the Director of Taxation. The negative impact of this legislation is:

- additional tax revenues lost during the period of resolution,
- profits lost which could be credited to the amount due, and
- job losses

The Kansas Restaurant & Hospitality Association opposes this increase in authority and the related implications. (Attachment 2)

Amy Campbell provided neutral testimony, indicating this bill is not in response to a specific problem and the Department of Revenue already has the authority stated in the bill and does not oppose clarification in statute. Ms. Campbell stated the need to amend the enforcement tax statute to include wine shippers. (Attachment 3)

There being no further conferees, the hearing on **SB 407** was closed.

The hearing on **SB 457 - Barring privately retained attorneys from collecting reimbursement from the state for expert services provided for an indigent defendant except in capital murder cases** was opened. Jason Thompson, staff revisor, reviewed the bill.

Pat Scalia appeared in support, stating **SB 457** would eliminate the assessment to the Board of Indigents' Defense Services of the costs for expert services on criminal cases where private counsel has been retained for the defense. The Board estimates this will save the agency approximately \$10,000 per year for non-capital cases. (Attachment 4)

CONTINUATION SHEET

Minutes of the Senate Judiciary Committee at 9:35 a.m. on February 8, 2010, in Room 548-S of the Capitol.

There being no further conferees, the hearing on **SB 457** was closed.

The hearing on **SB 455 - Civil commitment of sexually violent predators; expert testimony** was opened. Jason Thompson, staff revisor, reviewed the bill.

Christine Ladner spoke in support stating enactment of **SB 455** will allow an expert in sexual violent predators cases to rely on facts or data perceived by or made known prior to the hearing. The proposed legislation will save money and streamline the presentation of evidence by amending the rules of evidence to mirror the Federal Rules of Evidence. (Attachment 5)

Robbin Wasson testified in support and provided several supporting factors, such as:

- The Kansas Supreme Court ruled in 2006 that expert opinions may not be based upon past reports and information which were not actually admitted into evidence.
- Proceedings pursuant to the Sexually Violent Predator Act are unique by seeking to address the particular danger poised by untreated sexual offenders. The determination of whether an offender should be committed for further treatment comes only at the end of their criminal sentence. Sentences are often lengthy and there may be years or decades of historical data relating to the offenders diagnosis and treatment.
- Mental health professionals routinely rely upon historical information when making any evaluation of a person's mental condition.

The proposed amendments will allow experts to give the fact-finder a well-rounded opinion that reflects all the necessary considerations in arriving at a diagnosis. (Attachment 6)

There being no further conferees, the hearing on **SB 455** was closed.

The hearing on **SB 458 - Providing for the use of interactive video testimony in hearings or trials where there is a report concerning a forensic examination** was opened. Jason Thompson, staff revisor, reviewed the bill including the need for a technical correction on page 2, line 2.

Stan Heffley testified in support, indicating last year KBI scientists logged over 1200 hours of travel and wait time for less than 150 hours of testimony. The option of presenting testimony via video conference will reduce the waste of time and travel significantly while allowing additional time in the laboratories addressing the backlog of samples awaiting testing. (Attachment 7)

Don Mohler spoke in support, stating it is a good, common sense idea that will save money and time. (No testimony submitted)

Ed Klumpp appeared as a proponent, stating the ability for forensic scientists to provide interactive video conference testimony will save the state by reducing travel expenses and increasing efficiency by allowing more time in the laboratory. Interactive video testimony should be allowed when acceptable and available. (Attachment 8)

Kyle Smith spoke in favor, stating forensic science has provided incredibly accurate and reliable evidence in criminal cases. The demands for services is growing rapidly, and it is expensive in training, salaries, and scientific equipment. The backlog of samples continues to grow, frustrating victims, and law enforcement. Enactment of this bill will elevate some of the problem. (Attachment 9)

Written testimony in support of **SB 458** was submitted by:
Senator Derek Schmidt (Attachment 10)

The next and meeting is scheduled for February 9, 2010.

The meeting was adjourned at 10:31 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Monday, FEB 8

NAME	REPRESENTING
SEAN MILLER	CAPITOL STRATEGIES
Scott Heidner	KS Association of Deten. Courts
Sandy Barnett	KCSIDV
Ed Kwapp	KACCP / KSA / KPOA
Don Moler	LKM
ROBERT L. WASSON	NVCO DA / KCDAA
Christine Ladner	ASST ATT General
Richard Samwiego	Kearney & ASSOC.
John Peterson	Capital Strategies
Mike Huttles	HGR, Inc.
STAN HEFFLEY	KBI
Kendra Hanson	Hein Law Firm
Berend Koops	Hein Law Firm
PATRICIA SCALIA	BIDS
Levi J. Henry	Sandstone Group LLC
SARAH BYRNE	KDOR / ABC
Stephen Hilbert	KDOR
Harry Campbell	KABOR

Senate Judiciary Committee
Senate Bill No. 407

Testimony of
Sarah Byrne
Assistant Attorney General, Alcoholic Beverage Control

February 8, 2010

Good morning Mr. Chairman and members of the committee. I thank you for the opportunity to appear here today to present testimony in support of SB 407.

Liquor retailers, farm wineries and microbreweries must collect liquor enforcement tax on sales of alcoholic liquor made to the general public. Liquor distributors must collect liquor enforcement tax on liquor sold directly to private clubs and drinking establishments. Also, special order shipping licensees must collect liquor enforcement tax on all wine sold and shipped to Kansas residents. Under the liquor enforcement tax act, all enforcement taxes collected during a calendar month are to be filed and paid by the 15th day of the subsequent month.

Some licensees fail to file or pay the liquor enforcement tax timely. In such cases, KDOR and ABC need a quick, efficient method to encourage compliance. K.S.A. 41-407 prohibits any person from evading or attempting to evade the payment of any tax or duty on alcoholic liquor. ABC has been using this statute as a basis for fining or suspending the licenses of those licensees who fail to comply with the provisions of the act. While ABC feels that it is authorized, under the liquor control act and K.S.A. 41-407, to fine, suspend or revoke the license of any licensee who fails to comply, we feel clarification of that authority could prevent or significantly shorten future legal action based upon our interpretation of the law.

The liquor **drink** tax act currently contains a provision authorizing the director of ABC to impose a fine on, revoke, or suspend the license of any licensee who fails to timely file and pay its liquor drink taxes. SB 407 amends the liquor **enforcement** tax act to mirror that provision and establish clear authority for the director to fine, revoke, or suspend the license of any licensee subject to the provisions of the liquor enforcement tax act who fails to timely file and pay its liquor enforcement tax.

The ABC proposes that the bill be amended (see attachment A) to clarify that the bill applies only to those licensees who are subject to the provisions of the liquor enforcement tax act.

Please consider favorably the passage of SB 407, amended as proposed, as it will clarify the Director's authority, create consistent enforcement throughout the industry, and encourage compliance with the provisions of the liquor enforcement tax act.

Senate Judiciary Committee
Senate Bill No. 407

Testimony of
Sarah Byrne
Assistant Attorney General, Alcoholic Beverage Control

February 8, 2010

Attachment A
Proposed amendment to SB407

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

Section 1. (a) The director of taxation or the director of alcoholic beverage control may enjoin any person subject to the provisions of K.S.A. 79-4101 et seq from engaging in business in which such person is required to be licensed by the director of alcoholic beverage control when the person is in violation of any of the provisions of K.S.A. 79-4101 et seq., and amendments thereto, or any of the terms of this act, and shall be entitled in any proceeding brought for that purpose to have an order restraining the person from engaging in such business. No bond shall be required for any such restraining order or for any temporary or permanent injunction issued in that proceeding.

(b) If any licensee licensed by the director of alcoholic beverage control and subject to the provisions of K.S.A. 79-4101 et seq violates any of the provisions of K.S.A. 79-4101 et seq., and amendments thereto, or any of the terms of this act, the director of alcoholic beverage control may suspend or revoke the license of such licensee in accordance with K.S.A. 41-320, and amendments thereto, or may impose a civil fine on the licensee in the manner provided by K.S.A. 41-328, and amendments thereto, or both.

(c) The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 79-4101 et seq., and amendments thereto.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.



**Testimony Re: SB 407 – Authority for Alcohol Beverage Control
Senate Judiciary
February 3, 2010**

Chairman Owens and Members of the Committee:

My name is Don Sayler and I am the CEO for the Kansas Restaurant & Hospitality Association (KRHA). KRHA is the leading business association for restaurants, hotels, motels, country clubs and allied business in Kansas. Along with the KRHA Educational Foundation, the association works to represent, educate and promote the growing industry of hospitality in Kansas.

I am here on behalf of the KRHA members in opposition to SB 407.

As I read this bill, it will extend authority to the director of alcoholic beverage control (ABC) over and above what is currently held by the director of taxation. We are uncertain as to the intent of this extension of authority. Currently, if there is a dispute on payment of taxes, there is a process to go through to resolve the difference. The licensee is allowed to continue operations while the issue is resolved. If ABC enjoins the business operations, the impact is:

- Additional tax revenues are lost during the period of resolution
- Profits will be lost to actually pay any amount due
- Employees will be laid off
- With the economy in the current state, the above items seem to be counter productive

KRHA opposes this proposed increase in authority for ABC and the related implications. We ask that you consider the negative impact that the proposed change will have and oppose this legislation. Thank you for allowing me to provide testimony on this important issue.

KANSAS ASSOCIATION OF BEVERAGE RETAILERS

P.O. Box 3842, Topeka, KS 66604

785-969-1617 – campbell525@sbcglobal.net

TESTIMONY PRESENTED TO THE SENATE JUDICIARY COMMITTEE

February 8, 2010

By Amy A. Campbell, Executive Director

Mr. Chairman and members of the committee, the Kansas Association of Beverage Retailers is neutral on Senate Bill 407.

In the past two years, the Department of Revenue has brought similar bills to the Legislature. Last year, the bill was SB 97. The Department has stated in public testimony that this bill is not a response to any specific problem in collecting enforcement taxes.

KABR submitted comments last year requesting that legislation amending the law relating to tax collection should apply to all entities that are subject to that tax. Therefore, in a bill relating to enforcement tax, the bill should apply not only to retail liquor stores, but also to all licensees subject to the enforcement tax. This version of the bill appears to answer our request.

KABR believes that the Department of Revenue already has this authority and does not oppose the clarification in statute. We can assure you that retail liquor stores do a good job of paying their enforcement taxes and, in fact, a licensee must pay enforcement taxes prior to their license renewal.

Please note that the enforcement tax statute – see below – appears to need an amendment to include wine shippers. Wine shippers are a new category of licensee created by the Legislature last session. Wine shippers are also subject to enforcement taxes, but do not appear in K.S.A. 79-4101.

Thank you, Mr. Chairman, and members of the Committee for your kind attention.

Chapter 79: Taxation

Article 41: Liquor Enforcement Tax

Statute 79-4101: Imposition and rate of tax. (a) For the purpose of providing revenue which may be used by the state, counties and cities in the enforcement of the provisions of this act, from and after the effective date of this act, for the privilege of engaging in the business of selling alcoholic liquor by retailers or farm wineries to consumers in this state or selling alcoholic liquor or cereal malt beverage by distributors to clubs, drinking establishments or caterers in this state, there is hereby levied and there shall be collected and paid a tax at the rate of 8% upon the gross receipts received from: (1) The sale of alcoholic liquor by retailers, microbreweries or farm wineries to consumers within this state; and (2) the sale of alcoholic liquor or cereal malt beverage by distributors to clubs, drinking establishments or caterers in this state.

(b) The tax imposed by this section shall be in addition to the license fee imposed on distributors, retailers, microbreweries and farm wineries by K.S.A. 41-310 and amendments thereto.

History: L. 1949, ch. 242, § 117; L. 1958, ch. 35, § 1 (Special Session); L. 1965, ch. 536, § 1; L. 1983, ch. 332, § 1; L. 1984, ch. 363, § 1; L. 1987, ch. 182, § 109; L. 1987, ch. 182, § 110; Jan. 1, 1988.

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Attachment 3



BOARD OF INDIGENTS' DEFENSE SERVICES

**JAYHAWK WALK
714 SW JACKSON, SUITE 200
TOPEKA, KANSAS 66603-3714**

(785) 296-4505

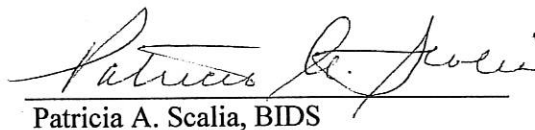
Testimony on SB 457

The proposed legislation is requested by the State Board of Indigents' Defense Services as a cost saving measure. This bill would eliminate the assessment to BIDS of the cost for expert services on criminal cases where private counsel has been hired, for cases other than capital murder.

The current statute allows for the assessment to BIDS of the costs for expert services on criminal cases where private counsel has been retained to provide the defense. The cost to BIDS is about \$10,000 per year for non-capital cases. With the passage of the legislation, private attorneys can consider whether to allow for the costs of experts and collect that cost together with their fees or to decline to accept the case. If the case is then handled by a public defender or by an attorney on the assigned counsel panel, expert services will still be provided but probably with less frequency and in some instances, less costly experts would be provided.

For capital cases, however, allowing for the provision of expert services on privately retained cases is cost effective because it ensures that the case will not be returned for retrial based on ineffective defense due to a lack of defense experts.

Respectfully submitted,


Patricia A. Scalia, BIDS

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Attachment 4



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
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Senate Judiciary Committee
SB 455

Assistant Attorney General Christine Ladner
February 8, 2010

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony on behalf of Attorney General Steve Six in support of Senate bill 455. I am the Assistant Attorney General responsible for prosecution of sexually violent predators (SVPs) in the office of Attorney General Six.

SB 455 would save costs and streamline presentation of evidence by amending the rules of evidence in SVP cases to mirror the Federal Rules of Evidence (FRE). Expert testimony of psychologists are at the heart of SVP cases. If the Respondent objects to a psychologist's testimony as hearsay, presentation of the expert opinion soon becomes unwieldy depending upon the source of the information in the prior records. In Kansas, "experts' opinions based upon hearsay are not admissible in any court proceedings." *In re Care & Treatment of Foster*, 280 Kan. 845, Syl. ¶ 9 (2006).

Existing law is a problem because the hearsay objection makes foundation requirements for expert opinion in SVP cases extraordinary foundation. If we must subpoena records custodians in order to satisfy foundation requirements, cost, travel and efficiency are issues. Even more problematic, if we have to subpoena prior victims (particularly those who were children at the time of the prior molestations) or law enforcement officials who may no longer be available, the burden of having these declarants available is enormous. It seems a disservice to victims of violent sexual assaults, whose cases were long ago disposed of, to have to testify about the same facts again to establish SVP status on the same perpetrator. For those predators who have lengthy criminal histories, it surely is not the legislative intent behind the SVPA for predators to avoid commitment because they have outlived their victims.

In litigating SVP cases, the State relies heavily upon psychological experts. Before an inmate is released from custody for a sexually violent offense, the inmate is interviewed and evaluated by a psychologist employed by the Department of Corrections (DOC). The psychologist prepares a Clinical Services Report (CSR). The CSR includes the diagnosis, progress in Sex Offender Treatment while in DOC and risk assessment. These

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psychologists rely on DOC records and other treatment records of the inmate in making their assessments.

If the State files a Petition pursuant to the KSVPA and a court finds probable cause that the inmate meets the criteria for a Sexually Violent Predator, the inmate is further evaluated by psychologists at Larned State Security Hospital (LSSH). If the LSSH evaluation determines that the respondent meets the criteria for SVP status, we proceed to trial. These psychologists rely on volumes of prior treatment records.

K.S.A. 60-456(b) controls the admission of testimony of expert opinion. The testimony must be: (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of special knowledge, skill, experience or training possessed by the witness.

This proposal does not change K.S.A. 60-456(b), but amends the rule only in SVP cases to conform with the Federal Rules of Evidence on the admission of expert opinion. Justice Beier in *In Re Care and Treatment of Colt* recognized that FRE 703 is more in line with the practice of experts.

The rationale of the Federal Rule is that judicial practice should be brought in line with the practice of experts themselves when not in court, who, in the case of physicians, may make life and death decisions on the basis of hearsay statements.

Under the federal rule, if it is the customary practice in the expert's specialty to consider reports from nontestifying third parties in formulating an opinion, the expert's testimony may be based on such reports. Under such circumstances, however, evidence of the report is not admitted as substantive proof of the report's truth but for the limited purpose of showing the basis of the expert's opinion.

Office of the District Attorney
Twenty-Ninth Judicial District of Kansas
at the Wyandotte County Courthouse
710 N. 7th Street
Kansas City, Kansas 66101

Jerome Gorman
District Attorney

Robbin L. Wasson
Assistant District Attorney

February 8, 2010

**Testimony Regarding SB 455
Submitted by Robbin L. Wasson, Assistant District Attorney
On Behalf of Jerome Gorman, District Attorney
Twenty-Ninth Judicial District
And the Kansas County and District Attorneys Association**

Honorable Chairman Owens and Members of the Senate Judiciary Committee:

Thank you for the opportunity to address you regarding SB 455. On behalf of Jerome Gorman, Wyandotte County District Attorney, and the Kansas County and District Attorney's Association, I would like to bring to your attention specific issues related to section 1(f), proposing changes to the admissibility of expert testimony.

The changes address the testimony of expert witnesses in Sexually Violent Predator Civil Commitment proceedings. Specifically, these changes address the material upon which an expert may rely when giving testimony in any hearing pursuant to the civil commitment of a sexually violent predator. Essentially, the proposed language would permit an expert to rely upon historical information including prior evaluations, interviews with the Respondent, and other relevant information in offering an opinion as to whether the Respondent does or does not meet the criteria to be committed as a sexually violent predator. For several reasons, we support this legislation.

First, the impact of this legislation is not speculative, but very real. In October 2006, the Kansas Supreme Court rendered their decision in the criminal appeal of *State v. Gonzalez*. Therein, the court held that Expert opinions may not be based upon past reports and information concerning a defendant which were not actually admitted into evidence. Respondents in Sexual Predator proceedings are seizing upon that language to urge the courts to disallow State experts testimony that is not based upon personal observations and treatment.

Second, by its very nature, proceedings pursuant to the Sexually Violent Predator Act are unique. While neither purely civil nor criminal in nature, the act seeks to address the particular danger posed by untreated sexual offenders who have a mental abnormality or personality disorder which makes it likely that such individuals will re-

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Attachment 6

offend. The determination of whether a particular offender should be committed for further treatment comes only at the end of their criminal sentence.

Because the sentences for such crimes are often quite lengthy, there are often many years, or decades of historical data relating to such offenders diagnosis and treatment. Such information is critical for an expert to accurately assess an individual's proper diagnosis and likelihood to re-offend. This would include offense records, any sex offender treatment attended during incarceration and all records attendant thereto. Such an offender may be treated by any number of providers over the course of that term of incarceration. As a practical matter, it may be extraordinarily difficult if not impossible for the State or Respondent to secure the presence of each and every individual who participated in the care and treatment of the offender.

Third, mental health professionals routinely rely upon historical information when making any evaluation of a person's mental condition. Without doing so, it is impossible for the expert to develop a complete and accurate view of an offender's condition. For instance, the diagnosis of an abnormality such as pedophilia involves an examination of the offender's life history of sexually-based offenses in order to determine whether the individual has an actual attraction to young victims, or whether the crimes were more opportunistic with regard to the choice of victim. The addition of the proposed language in K.S.A. 59-29a03 would allow experts in these cases to give the fact-finder a well-rounded opinion that reflects all the necessary considerations in arriving at a diagnosis.

For the above stated reasons, we support section SB 455, regarding K.S.A. 59-29a03.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Robbin L. Wasson
Assistant District Attorney
Twenty-Ninth Judicial District



Kansas Bureau of Investigation

Robert E. Blecha
Director

Steve Six
Attorney General

**TESTIMONY
BEFORE THE SENATE JUDICIARY COMMITTEE
REGARDING SB 458
O. CARL ANDERSON
LABORATORY QUALITY ASSURANCE MANAGER
KANSAS BUREAU OF INVESTIGATION
FEBRUARY 8, 2009**

Chairman Owens and Members of the Committee,

I appear today on behalf of the KBI to speak regarding SB 458 which amends K.S.A. 2009 Supp. 22-3437 to allow interactive video testimony in limited instances.

I serve as the Quality Assurance Manager for the KBI Forensic Laboratory. My duties include activities that help assure the Forensic Laboratory remains in compliance with legal and accreditation requirements. Additionally I serve as a system administrator for the laboratory's state-wide Laboratory Information Management System.

The option of being able to present testimony via a video conference connection is, on the surface, appealing. Our examiners frequently drive to various courts across the state, spend time waiting to appear, only to be advised their testimony is no longer required. These "wasted" trips are expensive not only in travel costs, but also contribute to the backlog of samples waiting testing in the laboratory.

During 2009 our scientists cumulatively logged over 1200 hours of travel and wait time for less than 150 hours of testimony.

With the option of testimony via video conference SOME of the trips to court would have been potentially eliminated. However, based on information from another state system with an active video testimony program, use of the system is generally limited to simple, uncontested, single item cases, such as simple drug possession or DUI. These types of testimonies account for approximately 50% of all appearances for the Kansas Bureau of Investigation Forensic Laboratory.

Additional limitations on the overall impact of the system would include the availability of suitable hardware and telecommunications capabilities in the many courtrooms throughout the state, as well as the acceptance of the court and participating attorneys.

As written, the KBI supports SB 458.

Thank you for your attention and time. I would be happy to attempt to answer any questions you may have.



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Marysville Police Dept.

Ron Olin
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Mike Keller
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Bob Sage
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Doyle King
Executive Director
KACP

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Ronnie Grice
Region III
KSU Public Safety Dept.

Jim Daily
Region IV
Newton Police Dept.

James Braun
Region V
Hays Police Dept.

Vernon Ralston
Region VI
St. John Police Dept.

**TESTIMONY TO THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SB458
VIDEO PRESENTATION OF FORENSIC EVIDENCE**

February 8, 2010

Chairman Owens and Committee Members,

The Kansas Association of Chiefs of Police, the Kansas Sheriffs Association, and the Kansas Peace Officers' Association support the provisions of SB458. In determining our 2010 legislative priorities, it became very clear a major concern of our membership is the declining support and efficiency of support to local law enforcement by the KBI. This bill will offer one step of many that are necessary to reverse this trend. We recognize the fiscal dilemma currently challenging the state. Our local governments are also facing those challenges.

The KBI continues to seek solutions to backlogs in their laboratory operations. Local agencies frequently have to wait months for critical forensic examination of evidence, particularly in the area of DNA analysis. In today's highly technical world, delays in forensic examinations means suspects remain unidentified, unapprehended, and free to produce more victims of crime while we wait for scientific test results. In some cases, local agencies have begun using other labs to get the evidence they need to proceed with their cases.

With the continued fiscal challenges we must look for other ways to maximize efficiency of the operations we can afford. This bill offers a contribution to that end. But it will not solve the problem by itself.

The ability for forensic scientists to provide interactive video conference testimony will save the state in several ways. First, it will directly reduce travel expenses whenever such testimony can be accomplished. Second, it will increase efficiency by allowing the scientists to spend more time in the lab and less time out of the lab travelling to and from court.

The urgency of this bill is increased given the decision in the US Supreme Court's 5-4 decision in *Melendez-Diaz v. Massachusetts* last year ruling the Massachusetts law permitting certified forensic reports in court as unconstitutional. The US Supreme Court will soon decide another case, *Briscoe vs. Virginia*, reviewing the Virginia law on the same matter.

We understand there may be technology availability issues in some jurisdictions initially and that video testimony may not be acceptable in every case. But every case where it can be used will increase the KBI ability to address local law enforcement's forensic investigation needs and will save the state money directly and indirectly.

We strongly encourage the committee to recommend SB458 favorable to pass.

Ed Klumpp
Legislative Liaison

Senate Judiciary

2-8-10

Kansas Peace Officers' Association



INCORPORATED

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Senate Judiciary Committee

Testimony of Kyle Smith

In Support of SB 458

February 8, 2010

Chairman Owens and Members of the Committee,

On behalf of the Kansas Peace Officers Association, I appear today in support of SB 458. Justice in Kansas is in crisis. Forensic science has provided incredibly accurate and reliable evidence and become the standard for proving criminal cases beyond a reasonable doubt. And not just for the prosecution, but also for defense, as evidenced by exonerations by DNA evidence in the headlines. We are blest to be living in this day where so much certainty can be introduced before the courts.

But forensic science is expensive, not only for the scientific instruments but also the training and salaries of the scientists. Both the scientists and instruments must be of the highest quality as they are not only doing important, sometimes life and death, work, but the work is constantly challenged and subject to cross examination by hired experts.

And the demand for these services is growing at an almost unbelievable rate. Success breeds success, and jurors, prosecutors, judges and the public expect and demand that the miracles seem on 'CSI' each week be used in every case in the farthest corner of Kansas.

Not surprisingly, we have fallen far behind in meeting this demand. The KBI forensic laboratories are currently unable to begin to respond to the need. They are "bleeding brains" as their scientists are hired away – I think they are currently down 20% of their authorized scientist positions. The backlog is ridiculous and denying victims and defendants justice. Local law enforcement is frustrated. For just one example, I spoke last week with the Sheriff in Crawford County and he had one rape case that was over 18 months old. When he had a murder happen he didn't even call the KBI, but begged a favor from the Johnson county lab to do the DNA. Here in Topeka, my police department is actually paying the salary of one of the KBI scientists that would otherwise have been let go, in order to get our cases worked.

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Attachment 9

The KBI desperately needs a new laboratory, more people, better pay and more equipment. And do you see the budget situation allowing the legislature to be addressing these fiscal needs in any adequate way?

When scientists are travel to court, all across Kansas, they are not 'on the bench' turning out cases and reducing the back log. Prosecutors and judges are frustrated in trying to set hearings, and meet speedy trial requirements, do to scientists having prior subpoenas in other counties. Even more frustrating, frequently when the scientist does go to court, the case does not go to trial but is then plead out as the defense's only hope was that the KBI scientist would be unable to show. A not unreasonable hope given the number of subpoenas each scientist gets each day.

I note in the KBI's testimony that in 2009 there were over 1,200 hours in travel and wait time for only 150 hours of actual testimony. That is a lot of expensive man-hours that could be better spent in the lab.

And the situation could become exponentially worse. The KBI and other forensic laboratories rely on the use of Certified Laboratory Reports pursuant to K.S.A. 22-3437 in a large number of cases. Last June the U.S. Supreme court ruled in *Melendez-Diaz v Massachusetts* 129 S.Ct. 2527 (2009), that crime lab reports are inadmissible as not meeting the defendant's right to confront and cross examine the witness. While our statute provides more protection to the defendant and so might be distinguishable from the Massachusetts statute it is possible that the use of the Certified Laboratory Reports will be curtailed or banned by the Kansas appellate courts. If that happens, and KBI scientists have to travel and testify on every DUI and marijuana possession case, not to mention the major cases, a system already in crisis will grind to a halt. It is almost impossible to overstate the scope of this problem. With statutory and constitutional speedy trial requirements, we will have more guilty criminals going free.

SB 458 is a creative and constitutional way to address at least some of these problems. While a defendant has the constitutional right to confront the witnesses against the defendant, this is not an absolute right. The right is to effectively confront the witnesses, but that does not mean that the witness has to appear in person, as opposed to by video conferencing. Where there are other significant public policy issues at stake, these can justify live video testimony. The United States Supreme Court held that live testimony via one-way closed-circuit television is permissible under the Federal Constitution, provided there is an individualized determination that denial of "physical, face-to-face confrontation" is "necessary to further an important public policy" and "the reliability of the testimony is otherwise assured" *Maryland v. Craig*, 497 U.S. 836, 850 [1990]). And this legislation is even friendlier to defendants as it involves two-way video testimony. See also *State v. Bejarano*, Kansas Court of Appeals, No. 98,237 (Feb. 20, 2009) where another statutory authorization for video testimony (child sexual assault victims) was held constitutional. Other courts across the country have allowed live video testimony when adults are not able or available to travel and testify. See *People v. Wrotten*, 2009 WL 4782864 (N.Y.) and *Acevedo v Texas*, Ct. Appeals No. 05-08-00839-CER, 2009.

In short, if there is good public policy need, and the defendant is still able to see, be seen and cross examine a witness, video testimony has been held to be constitutional and proper. Clearly there are a very important public policy interests in allowing the use of live video testimony.

And it should be noted that the nature of this testimony is somewhat different than that of victims or other witnesses. Forensic scientific testimony is based on scientific examinations done in a laboratory set up to document and record all features of the examination. The defense is given the scientific documentation long before trial to exam or have it reviewed by their own scientific experts. This is unlike the witness testifying from memory of a traumatic incident and so the issues that might argue for face to face confrontation, such personal animosity between defendant and witness or the importance of personalities - where nuances seen live might be important - are basically immaterial.

Finally I would note that while there is some fiscal impact for implementing this legislation, it is likely to be minimal. Most courts are set up already to play video depositions and so additional technology for a live link is all that would be needed and, as one county attorney pointed out, he couldn't think of a better thing for him to spend his forfeiture funds on. The KBI is in desperate need of space and that is a problem, but the costs and space will be offset by the savings in salaries from not having scientists drive all over the state, particularly if *Melendez-Diaz* is followed in Kansas.

On behalf of public safety and the peace officers of Kansas who risk their lives catching these criminals, we would urge passage of this crucial legislation that will help convict the guilty and free the innocent.

I would be happy to answer any questions.

Video Testimony Pilot Project

Michigan Office of Highway Safety Planning

www.michigan.gov/ohsp

This project was conceived in response to a large backlog of blood and drug analyses that developed due to the passage of the Michigan .08 BAC legislation in October, 2003.

The passage of the Michigan .08 BAC legislation allowed for all Schedule 1 drugs detectable in the blood to be considered under an impaired driving offense. Law enforcement was encouraged to ask for drug screening as well as blood screening for alcohol on all blood draws of suspected impaired driving offenders. As a result, there was a dramatic spike in the caseload for blood/alcohol analysis at the Michigan State Police (MSP) Forensic Science Division's Toxicology Laboratory.

The State Police realized that there was limited space at the lab and limited resources to address the backlog. The lab scientists were forced to spend a significant portion of their workday traveling and testifying in courts across the state. The MSP realized that addressing this issue through video technology could potentially save time and money, and address the BAC testing backlog issue at the same time. Furthermore, video technology would allow scientists to schedule multiple testimonies with various courts across the state on the same day. This was impossible to do when appearing in person at court.

The project, a partnership between the State Police, State Court Administrative Office, and the Office of Highway Safety Planning, has garnered much support from the State's judicial court system. After multiple video testimonies utilized by courts across the state, overall savings are estimated at approximately \$1,100 per testimony. This technology has also saved the state many staff hours (typically wasted in travel time), utilizing the technology to reduce the time scientists are out of the lab to 30 minutes instead of 14 hours. Savings will increase significantly as more courts utilize it on a regular basis and the state will quickly recoup the costs of the initial investment in equipment.

After one full year of operation, the Toxicology backlog status at the State Police Forensic Science Laboratory is as follows:

- The alcohol backlog had decreased to approximately 150 - 200 cases from a high of 300 cases. The turnaround time was approximately 5 days, from a high of 14 days.
- The toxicology (drug) backlog had decreased to approximately 600 cases from a high of 1,000 cases. The turnaround time was at 60 days, from a high of 120 days.

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Testimony in Support of Senate Bill 458
Presented to the Senate Judiciary Committee
by Senator Derek Schmidt

February 8, 2010

Mr. Chairman, members of the committee, thank you for considering this legislation today.

Senate Bill 458 is aimed at saving costs and resources for our forensic scientists. The bill would allow forensic scientists to testify in regards to their forensic reports by interactive video rather than having to appear in person in court. It is permissive, not mandatory.

The reality is that a considerable amount of time and resources of our forensic scientists are consumed by the need to travel to courtrooms, wait for the docket to be called, and then testify. In many cases, the only item to which they must testify is verifying the written forensic report that they previously prepared. Indeed, it is rather common that defense counsel will stipulate to admit the report once the scientist actually shows up and clearly will be available to testify.

This bill will save that travel time and will allow our forensic scientists to devote more of their time to analyzing samples and less to traveling the state to appear in court. The bill is narrowly tailored to apply only in cases where the testimony relates to admissibility of a written forensic report, and it is structured to allow for examination and cross-examination in order to protect the defendant's constitutional right to confront the witnesses against him.

Modern, off-the-shelf technology makes this bill timely and possible. Interactive, Internet-based videoconferencing is now readily available and affordable. The technology that many college students now use to keep in touch with friends and family can also be put to work to save make our courts more efficient, save costs, and ease the strain on our forensic laboratories and scientists.

I encourage the committee to recommend this measure favorably.

Senate Judiciary

2-8-10
Attachment 10