

Senate Judiciary Committee
Senate Bill 305
Testimony of the Kansas Association of Criminal Defense Lawyers
Presented by Jennifer Roth
Opponent
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The Kansas Association of Criminal Defense Lawyers is a 350+ member organization dedicated to justice and due process for people accused of crimes. **SB 305 would make dramatic changes to K.S.A. 22-3402 – changes that are contrary to over a century of legislative action and/or are unconstitutional.**

The United States and Kansas Constitutions guarantee an accused person the right to a speedy trial (the Sixth Amendment and Section 10 of the Bill of Rights, respectively). Over 40 years ago, the Legislature passed K.S.A. 22-3402¹. The two foundations of the speedy trial right – constitutional and statutory – are married, according to at least 124 years of Kansas Supreme Court decisions:

- “Section 10, of the bill of rights in the constitution of the state declares that, in all prosecutions, the accused shall be allowed a speedy public trial. The statute is intended practically to carry out that right by prescribing a definite and uniform rule for the government of courts in their practice.” *In re McMicken*, 39 Kan. 406 (1888).
- “It is generally held that the statutes supplement the Constitution and are to be regarded as rendering the constitutional guaranty effective and constitute a legislative definition of what is, under the circumstances named, a reasonable and proper delay in bringing an accused to trial.” *In re Trull*, 133 Kan. 165 (1931).
- “It is apparent that the purpose of this statute [K.S.A. 22-3402] is to implement the constitutional guarantee of a speedy trial.” *State v. Sanders*, 209 Kan. 231, 233 (1972).

Clearly, the purpose of K.S.A. 22-3402 is to carry out the constitutional speedy trial right, yet SB 305 proposes to do things that are unconstitutional. For example, the provisions in (g) allowing a defendant’s attorney to request a delay “without consulting the defendant” and/or “over the defendant’s objection” which would be charged to the defendant “regardless of the reasons for making the request” are unconstitutional. The speedy trial right provided by the U.S. and Kansas Constitutions belongs to the accused – not to his/her attorney.²

¹ Prior to July 1, 1970 (the effective date of K.S.A. 22-3402), speedy trial provisions were in Chapter 62. According to *Sanders*, “[i]t should also be noted that [with the passage of K.S.A. 22-3402] the period of time in which to bring an accused to trial has been shortened and the period of time is expressly in days after arraignment rather than court terms after the filing of the information or indictment as provided in prior statutes. See K.S.A. 62-1301, 62-1431, 62-1432, and 62-1433 (repealed L.1970, Ch. 129).” These Chapter 62 statutes are outlined in *In re Trull*, 133 Kan. 165 (1931).

² There are scores of Kansas cases on what actions of defense counsel are attributable to the defendant in computing speedy trial violations, how that is determined, etc. These cases provide guidance to all involved in a criminal case.

In addition, this new subsection (g) would permit defense counsel to violate the ethical duty of communication. See Kansas Rules of Professional Conduct 1.2(a) (“A lawyer shall . . . consult with the client as to the means which the lawyer shall choose to pursue.”).

The addition of (g) grants the State broad license to commit misconduct without speedy-trial repercussions. For instance, if the State violates its discovery obligations, defense counsel may be forced to request a delay in the proceedings to review the withheld evidence once it finally comes to light (and to preserve any *Brady* claim for appeal, the appellate courts always say if you don’t request a continuance you can’t complain about the violation). Even though the State’s misconduct has caused the delay (i.e., the delay is unquestionably the *fault* of the State, not the defendant), the speedy-trial time now appears unchargeable to the State.

As another example, the proposed language in (h) covers when “a party” makes or files a motion or the court raises a concern and would make the time between said action and resolution of the matter by court order never count toward speedy-trial time is, at best, contrary to decades of Kansas appellate case law and, at worst, unconstitutional. Defendants’ cases could get lost on dockets and there would be no speedy-trial repercussions.

Furthermore, the proposed language in (j) – “the provisions of this section shall be applied retroactively in any legal challenge or proceeding that comes before a district court or an appellate court” – is arguably unconstitutional as an Ex Post Facto violation. At minimum, this provision will give the State an unfair basis for appeal. For example, if a district court dismissed a charge last week because the State violated the statute, the State could rely on (j). It is unfair to the defendant to retrospectively yank away rights the defendant may have depended on in litigating his case. It is not unfair to the State to hold it responsible for noncompliance with the law as it stands today.

In closing, please consider the words of the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), the case on constitutional speedy trial claims:

A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society’s representatives are the ones who should protect that interest.

Thank you for your consideration,

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