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Testimony in Support of Senate Bill 228
Presented to the Senate Judiciary Committee
By Attorney General Derek Schmidt

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Mr. Chairman, members of the Committee, thank you for the opportunity to testify today in support of Senate Bill 228.

This measure codifies and clarifies the longstanding authority of the Attorney General as the State's chief legal representative in all appellate matters and in federal court. It does so by modifying the language in K.S.A. 75-702.

We bring forward this measure now because of two recent situations in which local prosecutors have sought, on behalf of the State of Kansas, United States Supreme Court review of a Kansas Supreme Court decision. Under well-established Kansas case law and practice, the decision to petition the United States Supreme Court for certiorari on behalf of the State of Kansas is an appellate matter vested in the Attorney General – not in local prosecutors or other lawyers who represent the State at various stages of civil or criminal legal proceedings. However, while the case law and practice are clear on this point, the statute – which was written in 1879 – may not be. To erase any ambiguity from the statute, Senate Bill 228 would codify the longstanding law and practice that designate the Attorney General as the state's chief legal representative in appellate and in federal proceedings and also would clarify that the Legislature intends the Attorney General to serve as the state's chief attorney controlling the state's litigation and legal positions taken in appellate and federal court matters.

The longstanding Kansas policy and practice that the Attorney General speaks for the State in legal matters before the appellate courts and federal courts is wise and should be clarified and reaffirmed. Absent that policy, it is possible that the State of Kansas could find itself on different sides of the same appeal before the United States Supreme Court, another federal court, or the Kansas Supreme Court. That is what happened to the State of New York in *New York v. Uplinger*, 467 U.S. 246, 247 n.1 (1984), when a New York District Attorney sought U.S. Supreme Court review of a state criminal case, review was granted, and the New York Attorney General then filed a brief on the opposite side of the question. Both the District Attorney and the Attorney General claimed authority to represent the State of New York in the matter, and their conflicting positions put the State of New York on the opposite sides of the same legal question. Confronted with that confusion about who could properly represent the State, the United States Supreme Court reversed itself and declined to review the case. This example illustrates why a clear policy that the State of Kansas speaks with a

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single voice, through its Attorney General, in the federal courts, and in the state appellate courts, is wise policy and should be reaffirmed clearly in statute.

To codify and clarify that existing policy, Senate Bill 228 contains several elements:

First, it provides that "any and all" cases in which the State of Kansas is a party or has an interest are subject to the Attorney General's authority. The Kansas Supreme Court long ago held that "wherever the public interest is involved or the state is a party, the attorney general is primarily the proper counsel to appear." *State ex rel. Foster v. City of Kansas City*, 186 Kan. 190, 194 (1960). This proposed clarification in statutory language codifies that longstanding rule from the case law and is intended to demonstrate the Legislature's clear intent that no case, civil or criminal, in which the State is a party or is interested falls outside the Attorney General's primary authority granted by this statute. This also would codify the longstanding rule from the case law that "[t]he county attorney looks after criminal cases in the district court, the Attorney General looks after criminal appeals in the Supreme Court." *Heinz v. Board of County Com'rs of Shawnee County*, 136 Kan 104, 108 (1932).

Second, it provides that the Attorney General's duty and authority to represent the state extends to any and all cases in "all federal courts." This, of course, includes, but is not limited to, the United States Supreme Court and directly addresses the recent situations that motivated this legislation.

It is well-established that the authority of county and district attorneys to represent the State of Kansas is limited to doing so in the courts within their jurisdiction, *see* K.S.A. 19-702 (county attorney) and K.S.A. 22a-104 (district attorney). The Kansas Supreme Court has held that the authority of a local prosecutor "extends no further than to appear and prosecute and defend in the courts of his county. A federal court sitting in a county is not a court of that county." *Heinz,* 136 Kan. at 106. Thus, this part of the bill codifies case law that has been settled for more than 80 years and would provide clarity by expressly stating in statute the Legislature's intent that the Attorney General's authority to represent the State extends to representing the State in any and all matters before federal courts.

Third, it provides that when the Attorney General is representing the State of Kansas, he controls the state's litigation. This common-sense provision codifies the rule established in *Foster*, supra. It also is consistent with the longstanding rule recognized by the Kansas Supreme Court that "[m]anagement and control of the state's side of a criminal appeal is vested by [] statute in the Attorney General." *Heinz*, 136 Kan. at 107. This provision of the bill would clarify that this longstanding practice of the primacy of the Attorney General in representing the State, which has been recognized by the case law, is in fact the Legislature's intent.

Finally, I would bring to the Committee's attention a potential amendment for consideration. With respect to the Attorney General's authority to represent the State of Kansas in the state appellate courts, the existing language of K.S.A. 75-702 refers only to matters in the Supreme Court. This is because the statute was enacted before the Court of Appeals was created. We long have interpreted this provision to apply to all state appeals, including those in the Court of Appeals. Indeed, pursuant to Supreme Court Rule 6.10, the Attorney General must approve all of the State's appellate briefs, including those filed in the Court of Appeals, before they can be properly filed.

The Committee could further codify and clarify the existing law and practice by amending the bill on page 1, line 9, by inserting ", the Court of Appeals" after "Kansas Supreme Court". I would ask that you consider adding that amendment.

Thank you for your consideration.