**House Judiciary Committee -House Bill 2078**
**January 26, 2021**

**Kansas Association of Criminal Defense Lawyers**
**Opponent**

Dear Chairman Patton and Members of the Committee:

HB 2078 would suspend the speedy trial statute for all those presently charged with crimes until May 1, 2024 and would eliminate the speedy trial statute for all cases filed after the proposed statute comes into effect. We absolutely oppose the elimination of our statutory speedy trial provision and we oppose the proposed suspension of statutory speedy trial in its current form.

**Why we have a right to a speedy trial, and should not repeal it.**

The Sixth Amendment of the Federal Bill of Rights and Section 10 of Kansas' Bill of Rights both guarantee an accused the right to a speedy trial. Since our earliest days of statehood, the Kansas Legislature has provided a statute for the purpose of guaranteeing and guarding those Constitutional rights.[1] We have consistently had these statutory protections throughout Kansas' history for many reasons.

First and foremost, the statute protects our Constitutional rights enacted by our founders to prevent the harm of long trial delays both to the accused and to the public. The accused, of course, is harmed by excessive pretrial incarceration should they be unable to make bail, or have their liberty infringed by pretrial release conditions if they do make bail. These are people who have not yet had the ability to exercise their right to a jury trial that could determine their innocence or guilt. These are people who are presumed innocent under our system of laws, who will be harmed by excessive pretrial delays our speedy trial rules are meant to prevent.

Just as importantly, both the accused and the public, share many interests in maintaining the orderly and speedy processing of our court system. As time passes, evidence stales, and the memories of witnesses gets cloudy. This weakens both the

[1] See *In re McMicken*, 39 Kan. 406 (1888) ("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."); The statutory right was first codified at statehood and required a case be discharged if not brought to trial before the end of the second term of the district court following indictment. See Ch. 32, Sec. 199, pg 265, of the General Laws of the State of Kansas (1862). The provision was subsequently codified at Sec. 62-1432 of the Revised Statutes, before taking its present form in the 1970s at K.S.A. 22-3402.

prosecution's potential evidence of guilt as well as the accused's potential evidence of innocence. It weakens the reliability of our jury trials. Additionally, excessive delays extend the anxiety felt by witnesses, and especially crime victims, who may have to re-live trauma at trial. The interest of crime victims in prompt results is also recognized in the Kansas bill of rights for victims of crime. *See* K.S.A. 74-7333. Ensuring speedy trials helps prevent those harms.

This brings us to why the Kansas legislature has always protected the right to a speedy trial through our statute. The statute is there to ***prevent*** the right to a speedy trial from being violated by establishing timelines that, practically speaking, are safe harbors. The Constitution does not provide clear instructions on how not to violate speedy trial rights, it only provides a remedy of dismissal once the right is violated.

The Constitutional analysis explained in *Barker v. Wingo*, 407 U.S. 514 (1972), examines whether the right to a speedy trial has been violated by directing courts to analyze four factors: 1) the length of the delay; 2) the reason(s) for the delay; 3) the defendant's assertion of his or her speedy trial rights; and 4) the degree of prejudice to the defendant. This analysis is complex, case specific, and difficult to apply. Moreover, because it examines the prejudice to the defendant at trial, it primarily comes up after a conviction has already occurred. The courts are left to evaluate only whether the right has been ***violated***, and the only cure is the uniquely harsh remedy of dismissal of the case.

In contrast, the speedy trial statute is meant to set clear bright-line standards for bringing the accused to trial in a reasonable time, and ***prevent*** the Constitutional violations, and subsequent dismissals, from ever occurring. Throughout our state's history our speedy trial statute has always set a specific and reasonable period of time in which the prosecution has to bring the accused to trial or it will be dismissed.[2] The statutory standards are easy to understand, and easy for the prosecution to comply with.[3] Dismissals due to violations of the speedy trial statute are extremely rare, and easily avoidable by the standard practice of checking a calendar.[4] The statute prevents the Constitutional speedy trial right from being violated, and it works. Without the statute, we are at risk of more convictions being dismissed due to Constitutional violations.

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[2] K.S.A. 22-3402 currently sets that time as 150 days for those held in jail and 180 days for those held on an appearance bond.

[3] And, of course, the prosecutor has total discretion to determine when speedy trial starts because they control when criminal charges are filed.

[4] For example, in *State v. Danny Queen*, 2020 WL 3579872, the district court judge specifically asked the prosecutor to confirm the date of the statutory speedy trial deadline. The case was only mistakenly set beyond the deadline after the prosecutor confirmed the wrong date to the district court. The case is currently pending before the Kansas Supreme Court.

The statute also ensures that cases proceed in an orderly manner, without a backlog of cases building up. This is clearly illustrated by our present situation. About nine months ago statutory speedy trial was suspended due to an unprecedented pandemic. When that happened, trials stopped, cases stopped proceeding in an orderly manner, and a backlog of cases built up. That backlog is now cited as justification for getting rid of the speedy trial statute altogether. The fix to the backlog is to get back to trials and the orderly processing of cases as quickly and safely as possible. The end of the suspension of the speedy trial statute provides an incentive to work through those back logs. In contrast, repealing speedy trial will allow further backlog to build up.

This Legislature has provided a speedy trial statute, protecting the rights guaranteed in the Sixth Amendment of the Federal Bill of Rights and Section 10 of Kansas' Bill of Rights, throughout our State's history. This Legislature should maintain that tradition and reject the request to end our speedy trial statute.

**The proposed suspension clause is the wrong course, but there are alternatives.**

Last session in 2020 S.B. 102, the Legislature provided the Chief Justice of the Kansas Supreme Court the ability to suspend the statutory speedy trial deadlines during a state of emergency pursuant to K.S.A. 48-924. This was understandable given the unprecedented emergency of the covid-19 pandemic. It also provided an important system of checks and balances for suspending such an important right by requiring action by the Chief Justice, the Governor, and the Legislature to recognize that the emergency is continuing and the suspension of deadlines is required.

The current proposal of a blanket suspension of statutory speedy trial for all those presently charged with crimes until May 1, 2024 lacks the careful protections this Legislature provided last session. It removes the Chief Justice, or any judge, from the determination that suspension of speedy trial is necessary. It further disconnects the suspension of speedy trial from a continuing recognition by our government that an ongoing emergency requires the suspension. This raises some Constitutional speedy trial concerns because one of the factors in the *Barker v. Wingo* test is the reason(s) for the delay. While an ongoing pandemic that prevents jury trials from safely occurring is an understandable reason for delay, May 1, 2024 is an arbitrary date that may be well beyond the conclusion of the pandemic. As that reason fades, Constitutional violations, and subsequent dismissals of cases due to those violations will become more likely. It is a poor substitute for the nuance of the bill enacted last session that already allows the suspension of speedy trial while there is an emergency.

Of course, given the ongoing debates about the current emergency declaration, and the scope of the Governor's powers, this committee may want to consider reasonable options to address the suspension of statutory speedy trial tied to this emergency, but not tied specifically to the Governor's powers. Those options exist. For example, the current system from 2020 S.B. 102 could be amended to provide that the Chief Justice's authority to suspend the speedy trial deadline is not triggered by a state of emergency pursuant to K.S.A. 48-924, but is allowed pursuant to other ongoing legislative or executive oversight. This would give the Courts flexibility in re-enacting the speedy trial deadlines given the backlog of cases, but also tie the suspension of rights to the continued existence of an emergency.

Another alternative is to give more local control to the district courts by temporarily amending the extensions of the speedy trial deadline following the statutory scheme already in place in K.S.A. 22-3402. For example, K.S.A. 22-3402(e)(4) already allows a district court to extend the speedy trial deadline "because of other cases pending for trial, the court does not have sufficient time to commence the trial of the case within the time fixed for trial by this section." That extension is allowed only once for thirty days. This committee could provide a similar extension tied to the pandemic adding as subsection (e)(5) of K.S.A. 22-3402 language such as:

> (e) For those situations not otherwise covered by subsection (a), (b) or (c), the time for trial may be extended for any of the following reasons:
> …
> (5) because of the conditions caused by the COVID-19 health emergency, the court or parties do not reasonably have sufficient time to commence the trial of the case within the time fixed for trial by this section. These conditions shall include the existence of other cases pending for trial caused by delays due to the COVID-19 health emergency. This extension may be granted for up to 90 days and may be granted more than once. The authority to grant an extension as provided in subjection (e)(5) shall expire on July 1, 2022.

Adding that language to K.S.A. 22-3402 would allow district courts to make the determination to extend the speedy trial deadline based upon the necessity of doing so in their specific jurisdictions. It would allow local determination as some courts will be able to proceed faster than others in recovering from the pandemic and eliminating their backlog. Moreover, it would help protect the Constitutional right to speedy trial because it would require a judicial finding that the extension of the trial date was reasonably necessary due to the COVID-19 health emergency. This would give district courts the flexibility to resolve the backlog of cases, while also protecting the constitutional right to a speedy trial. Finally, including a provision that the extensions expire on July 1, 2022

shows there is a deadline and incentives the courts and the governments to resolve the backlog of cases as expeditiously as possible. Moreover, it would set that deadline after the end of the next legislative session, which would give this legislature opportunity to adjust or extend the provision next year should it still be necessary.

Should this committee find that modification of the speedy trial statute is necessary due to the COVID-19 health emergency, we urge the adoption of an amendment that recognizes the emergency but also continues to protect the rights enshrined in our Federal and State Constitutions.

Sincerely,

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