

Senate Judiciary Committee
Testimony of Kansas Association of Criminal Defense Lawyers
HB 2468 - Opponent
March 7, 2012

HB 2468 amends K.S.A. 22-3212, the statute relating to discovery in criminal cases. Even with the changes to the bill made by the House, HB 2468 still presents due process and other constitutional issues.

**HB 2468 raises due process issues by requiring
more from defendants than is required from the State**

These charts illustrate the basis of this argument:

Defendant (under current law - KSA 22-3212)	State (under current law- KSA 22-3212)
Permit the State to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects , or copies or portions thereof, which the defendant intends to produce at any hearing, are material to the case and will not place an unreasonable burden on the defense.	Permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places , or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution, are material to the case and will not place an unreasonable burden on the prosecution. Permit the defendant to inspect and copy or photograph results or reports of physical or mental exams , and of scientific test or experiments made in connection with the case.
Various provisions for discovery to occur at times other than "no later than 21 days after arraignment"	Various provisions for discovery to occur at times other than "no later than 21 days after arraignment"

Defendant (under HB 2468)	State (current law remains under HB 2468)¹
Must provide a summary or written report of (1) what any expert witness intends to testify; (2) the expert's qualifications; and (3) the anticipated expert testimony, as well as bases and reasons for his/her opinions. Must do this no less than 30 days prior to trial.	There is no specific mention of expert witnesses as they relate to the State. (Current law refers to "results or reports of physical or mental exams, and of scientific test or experiments" – and there is no 30-day limitation.)
No definitive provision for late disclosure of the above-mentioned information – HB 2468 says: "All disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, such disclosures shall be made as provided in this section."	K.S.A. 22-3201(g) allows the State to endorse additional witnesses at any time "that the court may by rule or otherwise prescribe." In practice, the State routinely endorses additional witnesses fewer than 30 days before trial, and such tardy endorsements are never viewed by the appellate courts as reversible error.

The unequal nature of these discovery obligations arguably violates due process as defined in *Wardius v. Oregon*, 412 U.S. 470 (1973). In *Wardius*, the Supreme Court held that a statute that imposed discovery obligations on a criminal defendant, but did not impose those same obligations on the State, violated due

process and could not be enforced against the defendant. *Id.* at 472. The statute at issue in *Wardius* was an alibi notice statute, but the same due process principles apply here: “[I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street Indeed, the State’s inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant’s favor.” *Id.* at 475 & 475 n.9.

HB 2468 is unfair given the burden of proof in a criminal trial

As proposed, the defendant has greater discovery requirements than the State. But *even if* HB 2468 was amended to equalize discovery obligations between the State and the defendant, it would still be unfair given the nature of system. Discovery imbalances in the defendant’s favor make sense not only because of the State’s information-gathering advantages, but also because the State bears the burden of proof at trial. It thus makes sense to expect the State to marshal and disclose its evidence ahead of trial. The defendant, on the other hand, is not required to produce any evidence at trial, and may not decide until after the State has rested its case whether he or she will produce any evidence, much less which evidence. Obligating the defendant to disclose testimonial summaries unfairly puts the defendant in a position of disclosing evidence that he or she may yet choose never to present.

HB 2468 could impact defendants’ rights to counsel and speedy trial

Unlike K.S.A. 22-3201(g) – which permits the State late endorsement of witnesses (even during trial) – HB 2468 does not clearly provide a process for defendants to make a disclosure after the 30-day time period.ⁱⁱ Proposed (e) requires a court ruling or a stipulation by the state and defense. In the absence of these things, if a defendant does not or cannot comply in time, what is the consequence? Ineffective assistance of counsel? A continuance? Furthermore, there are many times when defendants receive discovery from the State days before trial that requires an expert’s consideration (maybe an expert already engaged, maybe there isn’t one yet because there was no need before).

For all of these reasons, we ask you to reject HB 2468.

Thank you for your consideration,
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ⁱ In the event the proponents of HB 2468 argue this proposal is akin to the federal rule, I have attached a copy of Rule 16 of the Federal Rules of Criminal Procedure and bracketed the relevant parts. Rule 16 requires the Government to provide the same sorts of information from experts as is required from the defendant. The federal rule equalizes discovery requirements while HB 2468 does not.

ⁱⁱ HB 2468 has arguably conflicting language – (c) provides “the defendant shall . . . provide for the attorney for the prosecution, no less than 30 days prior to trial . . .” yet (e) provides “[a]ll disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, such disclosures shall be made as provided in this section.” There are other provisions in the current K.S.A. 22-3212 that allow for discovery to be conducted at times other than “no later than 21 days after arraignment.” It appears (e) allows for a schedule other than (c) and/or is a late disclosure provision of sorts but as (c) is currently worded, (e) (and other current provisions of K.S.A. 22-3212) may be a provision with no teeth.

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) **Use as Evidence.** A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) **Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) **Depositions by Agreement Permitted.** The parties may by agreement take and use a deposition with the court's consent.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Oct. 12, 1984; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's

position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record*. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects*. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests*. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses*. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure*. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the

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discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) **Grand Jury Transcripts.** This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) **Defendant's Disclosure.**

(1) **Information Subject to Disclosure.**

(A) **Documents and Objects.** If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) **Reports of Examinations and Tests.** If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) **Expert Witnesses.** The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

(2) **Information Not Subject to Disclosure.** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

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- (ii) a government or defense witness; or
- (iii) a prospective government or defense witness.

(c) **Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

- (1) the evidence or material is subject to discovery or inspection under this rule; and
- (2) the other party previously requested, or the court ordered, its production.

(d) **Regulating Discovery.**

(1) **Protective and Modifying Orders.** At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) **Failure to Comply.** If a party fails to comply with this rule, the court may:

- (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
- (B) grant a continuance;
- (C) prohibit that party from introducing the undisclosed evidence; or
- (D) enter any other order that is just under the circumstances.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, eff. Dec. 1, 1975; Dec. 12, 1975; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 29, 2002, eff. Dec. 1, 2002; Nov. 2, 2002, eff. Dec. 1, 2002.)

Rule 17. Subpoena

(a) **Content.** A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) **Defendant Unable to Pay.** Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) **Producing Documents and Objects.**

- (1) **In General.** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may