

Approved by the Judicial Council December 4, 2009

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON 2009 HB 2204**

In May, 2009, the House Judiciary Committee requested that the Judicial Council study and make a formal or informal recommendation on 2009 House Bill 2204. HB 2204 concerns public release of the probable cause affidavits for arrest warrants. The study was assigned to the Criminal Law Advisory Committee.

COMMITTEE

The members of the Committee taking part in this study are as follows:

1. **Stephen E. Robison, Chair**, Wichita; practicing attorney and member of the Judicial Council.
2. **James W. Clark**, Lawrence; attorney for the Health Care Stabilization Fund.
3. **Edward G. Collister**, Lawrence; practicing attorney.
4. **Representative Pat Colloton**, Leawood; Kansas State Legislator.
5. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
6. **Patrick M. Lewis**, Olathe; practicing attorney.
7. **Hon. Michael Malone**, Lawrence; District Judge in the 7th Judicial District.
8. **Joel Meinecke**, Topeka; practicing attorney.
9. **Steven L. Opat**, Junction City; Geary County Attorney.
10. **Senator Tim Owens**, Overland Park; Kansas State Legislator.
11. **John M. Settle**, Larned; Pawnee County Attorney.
12. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
13. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
14. **Debra J. Wilson**, Topeka; Capital Appeals and Conflicts Office.
15. **Ron Wurtz**, Topeka; Federal Public Defender's Office.

DISCUSSION

The Criminal Law Advisory Committee met in July and August, 2009 and discussed 2009 House Bill 2204 in those meetings. The committee reviewed written testimony provided to the House Judiciary and also received testimony and comments from Professor Mike Kautsch of the Kansas University School of Law, Richard Gannon of the Kansas Press Association, Ed Klumpp of the Kansas Association of Chiefs of Police and Kansas Peace Officer's Association, and Kent Cornish of the Kansas Association of Broadcasters.

Currently, K.S.A. 22-2302 provides that affidavits or sworn testimony in support of the probable cause requirement for arrest warrants "shall not be made available for examination without a written order of the court, except that such affidavits or testimony when requested shall be made available to the defendant or the defendant's counsel for such disposition as either may desire." 2009 HB 2204 proposes to make such documents presumptively open to the public once the arrest warrant has been executed, with limited exceptions.

During the discussion, the committee recognized and discussed several potential due process issues as well as other concerns with the proposed legislation. First, the committee was concerned that release of the affidavits supporting probable cause for arrest could be detrimental to a defendant's right to a fair trial. Although law enforcement tries to make correct judgments throughout an investigation, when sifting through investigative information it is sometimes difficult to ascertain what information is true and what is not, whether that information has been provided by witnesses, informants or discovered through investigative tactics. Therefore, the committee recognized that the information contained in an affidavit is not always accurate. In addition, in order to obtain an arrest warrant, many times law enforcement will include extraneous and irrelevant information. Since the information in the affidavit is not subject to the

rules of evidence nor is it tested through any type of cross examination, it has the potential to be very prejudicial against the defendant if it is allowed to be open to the public.

Furthermore, the committee is concerned that release of the information contained in a probable cause affidavit could result in a tainted jury pool. Typically, the public is only interested in this type of information when the case is one that becomes high profile such as the Carr brothers or BTK case. Although these cases are really few and far between, the press coverage of them almost inevitably results in a public inundated with every little detail of the case that the press can report whether that information turns out to be accurate or not. Therefore, if an affidavit in one of these high profile cases is released to the public and the affidavit contains inaccurate, extraneous, irrelevant and prejudicial information that has not been subject to the rules of evidence or cross examination as discussed previously, it creates a concern that a juror may have difficulty distinguishing between the information he or she heard in the news in the days leading up to the trial and the information that is actually allowed as evidence in the trial.

The committee is also concerned that release of the information in an affidavit supporting an arrest warrant could result in inflated positive identifications with regard to eyewitness testimony. For instance, an eyewitness provides information identifying a suspect at the time of an incident and that information is subsequently used in the affidavit to support an arrest warrant. If that information is then released to the public and reported by the press the witness will be more likely to think that his or her identification was correct and may report such at trial, whether that identification was in fact accurate or not. Conversely, the committee is also concerned that release of information in an affidavit could also have a chilling effect on whether witnesses will come forward or even corroborate their initial reports when questioned during trial since the first thing many defendants want to know is who saw what or who ratted them out.

Although these two concerns are in opposition to each other, both are valid risks that the committee is concerned with.

In addition to these concerns, the committee had several more procedural concerns with the proposed legislation. The legislation does not appear to provide any guidance as to who has the responsibility of redacting excepted information from the affidavits. Supreme Court Rule 3.6 requires lawyers to avoid adverse or any other publicity prior to trial. The committee is concerned that if a lawyer is called upon to review an affidavit and redact sensitive information it contains, that lawyer could be seen as encouraging the release of the information and adding to the publicity prior to trial. This would violate Supreme Court Rule 3.6. In addition, if a prosecutor is required to complete or review affidavits, this could be considered participation in the investigation and prosecutors may lose their prosecutorial immunity.

Although the legislation includes several exceptions to the release of information, as written, the committee is concerned that it may conflict with the Kansas Open Records Act (KORA). The KORA already provides an exception for the release of criminal investigation records to the public. Since the type of information typically contained in an affidavit is basically a distillation of criminal investigation records, the release of an affidavit containing such information could conflict with this KORA exception and possibly invalidate the public policy that recognizes that there is a valid reason for keeping criminal investigation information confidential.

Finally, according to the University of Dayton School of Law, twenty-three states plus the District of Columbia require grand jury indictments to charge certain serious crimes. See <http://campus.udayton.edu/~grandjur/stategj/funcsgj.htm>. Fifteen states require grand jury indictments for all felonies according to the National Center for State Courts. See Rottman,

David, et al. State Court Organization, 2004: Part VI *The Jury*. Washington, DC: Bureau of Justice Statistics: 213 (2006). If the grand jury processes in these states are similar to the process used in Kansas, then all of the information provided in those proceedings, including the information supporting any potential arrests, would remain confidential until such time as it may be disclosed during pre-trial proceedings, a plea hearing or a trial. However, in Kansas the use of a grand jury is optional and criminal charges are typically brought against someone by filing a complaint. A defendant charged by a complaint has a statutory right to a preliminary hearing, where evidence must be presented to establish probable cause that the defendant committed the charged crimes. If a hearing is held, rather than waived, the evidence in support of the charges is brought out at this public hearing. A defendant charged by indictment does not have a right to a preliminary hearing. Therefore, in Kansas, access to the type of information included in affidavits supporting arrest is already made available much earlier in the criminal proceeding than in the states that use grand jury indictments.

CONCLUSION

The current law allows for the public, and the press, to request release of the affidavits supporting arrest warrants from the court. This process provides protections against all of the concerns discussed by the committee. In addition, in Kansas, defendants are entitled to a preliminary hearing and at that time, the information typically contained in these affidavits is presented to the court and becomes open to the public. Although the committee agrees that transparency with regard to government and court action is a positive goal, it still feels that the risks of allowing release of the type of information contained in the affidavits, prior to a defendant even having counsel or the information being tested via the rules of evidence,

outweighs the potential positive aspects. In light of the foregoing discussion, the committee voted with a majority of 8 members recommending against passage of HB 2204, 4 members dissented.

DISSENT

The committee's discussion of HB 2204 concerned the issue of whether or not affidavits supporting arrest warrants should become public record after execution of the arrest (and appointment of counsel). Current law states that, with the exception of the defendant, such information shall not be made available, absent a written court order. Several conferees at the House Judiciary Committee hearing, and the majority of this committee, assure us that such information can be readily obtained through application with a court. The dissenting members of the committee contend that in an open society, such information should be routinely available to the public, and that application to a court should only be required if disclosure will result in harm to an individual or further investigations.

In essence, we have an all-encompassing law to cover only a few, infrequent situations. The proposal in HB 2204 would reverse that, and would presume such records to be open, but would allow further nondisclosure specifically for those few, infrequent situations. While the change may result in loss of convenience to prosecutors and defense counsel, they are much better equipped to prove the need for secrecy to a court, than is a member of the general public equipped to seek access to routinely closed records. In speaking to the House Judiciary Committee concerning affidavits supporting search warrants, Sedgwick County District Judge Eric Yost noted: "...it strikes me as somewhat odd that the citizens of Kansas are the only citizens in all of American who can't be trusted with information which was used to justify

searches of other citizens' homes and businesses." A similar oddity arises when Kansas citizens are denied information concerning the basis for the arrest of one of their fellow citizens.