

**TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE  
MARCH 13, 2014**

Chairman King and Committee Members,

Thank you very much for this opportunity to appear before you and testify in support of HB 2555, regarding public release of probable cause affidavits supporting search and arrest warrants in Kansas.

Working with others, I drafted and introduced HB House Bill 2555, seeking amendment of statutes providing for secrecy of search and arrest warrant affidavits in Kansas, in the Corrections and Juvenile Justice Committee and carried it through to passage in the House Judiciary Committee and on the House floor, where it passed by a final vote of 113-10. I come before you today to describe my reasons for proposing and strongly supporting this important legislation, and urging your support as well.

This issue first came to my attention in 2013, as a result of a well-publicized incident occurring in Leawood, Kansas in 2012, involving Bob and Adlynn Harte and their family. In this incident, Johnson County Sheriff's Department officers executed a search warrant at their home that turned out to be based on faulty information contained in the probable cause affidavit supporting the warrant. The officers had a battering ram ready to break down the front door of the Hartes' home when they were admitted, ordered the Hartes to the floor, where they were guarded by officers armed with rifles while their house was searched, and terrified their children. They were told that the officers were looking for narcotics. The search failed to yield any narcotics or any other evidence of a crime, and the Hartes were never charged with any crime.

The Hartes asked to see the search warrant and supporting information at the time, but were told the warrant would not be provided to them until the officers were leaving, and that they were not required to provide the supporting information. It was a full year later, only after the Hartes had hired a lawyer and incurred over \$25,000 in expenses in litigation to obtain the probable cause affidavit underlying the search warrant, that they obtained the probable cause information underlying the search warrant. They found that they were suspected of growing marijuana in their basement, because Mr. Harte had been observed purchasing hydroponics equipment at an area store (this equipment is known to be used to grow marijuana indoors, although Mr. Harte actually purchased it to help his son grow vegetables indoors for a school project), and a field test of leaves found in the Hartes' garbage was positive for cannabis (although the test equipment was not approved for use in the United States, and when the leaves were retested in a laboratory, they proved to be tea leaves.) Bob and Adlynn Harte are here today, and will provide you more detail about their ordeal.

This incident prompted me to inquire into the state of current Kansas law regarding probable cause affidavit secrecy/confidentiality in Kansas, and how our policy in this regard compared with that of other states. LRD staff researched this issue for me; Principal Analyst Robert Allison-Gallimore's resulting January 17 memo is being provided to the Committee. It reveals that, via 1979 HB 2124, the applicable statute, K.S.A. 3013 Supp. 22-2502, was amended to provide that affidavits or sworn testimony in support of the probable cause requirement for issuance of search warrants "shall not be made available for examination without a written order of the court...." There is a comparable provision in the arrest warrant issuance statute, K.S.A. 22-2302. There have been multiple legislative attempts to modify or rescind these provisions since, all unsuccessful.

Further, research by LRD staff, and information provided by conferees at an informational hearing on this issue conducted by the House Corrections and Juvenile Justice Committee on January 15, revealed that Kansas is an outlier with regard to sealing probable cause affidavits supporting search and arrest warrants. This research and information substantiates that Kansas has some of the country's most restrictive laws regarding public release of criminal records, including in particular probable cause affidavits and sworn statements.

Of the 40 other states whose laws in this area were reviewed by research staff, 39 presumptively make probable cause affidavits supporting search and/or arrest warrants available to the public at some point, usually after execution, or execution and return, of the warrant. Most if not all of these jurisdictions make provision for the continued sealing or confidentiality by redaction of the warrant or supporting affidavit by court order for good cause shown, such as protection of a confidential informant, an ongoing investigation or personal identifying information regarding innocent third parties. This squares with my own experience as a federal agency attorney for many years; the federal practice also presumes that probable cause affidavits are public records upon execution of the associated warrants, subject to sealing or redaction to protect confidential sources or information. Only one of the 40 states reviewed, New Jersey, roughly parallels the practice in Kansas, by requiring executed warrants and supporting affidavits to be kept confidential except for disclosure to the defendant in discovery and to any person who claims to be aggrieved by an unlawful search or seizure, if such person provides good cause for the disclosure.

These research findings and the hearing information confirmed my fundamental belief that, as a matter of good public policy, all governmental entities and instrumentalities in Kansas, including in particular prosecutors and state, county and local law enforcement, should provide full transparency and accountability to the public in all their actions and functions, except to the extent confidentiality is required for legitimate law enforcement purposes, such as protecting confidential informants or sources, ongoing criminal investigations, or personal, identifying information regarding innocent third parties. Accordingly, working with other members, we crafted HB 2555 to promote this fundamental and widespread principle favoring public disclosure, accountability and transparency regarding probable cause affidavits, with appropriate confidentiality safeguards.

Thank you, and I will be pleased to stand for questions.