



Kansas County & District Attorneys Association

1200 SW 10th Avenue
Topeka, KS 66604
(785) 232-5822 Fax: (785) 234-2433
www.kcdaa.org

To: Hon. Chairman Kinzer
From: Patrick Vogelsberg, KCDA
Date: 2013-02-11

Re: Opposition to HB 2182

Chairman Kinzer and members of the House Judiciary Committee:

Thank you for the opportunity to provide written testimony regarding HB 2182. The Kansas County & District Attorney Association (KCDA) opposes any efforts to second-guess the investigatory actions of grand juries by mandating what witnesses they need to call.

House Bill 2182 (§4) seeks to allow special interest groups to micromanage and potentially politicize the grand jury process. It mandates that the person who filed the petition "shall be the first witness called by the grand jury for the purpose of presenting evidence and testimony as to the subject matter and allegations of the petition." HB 2182 also seeks to permit any person who so desires the right to testify or appear before the grand jury if the district court finds that it would "serve the interests of justice." Since district court judges do not preside over confidential grand jury proceedings, they would have to guess at how the grand jury investigation is proceeding in order to determine whether to foist a witness upon the grand jury.

Most of the Kansas statutes relating to grand juries have not been amended since 1970. HB 2182 does not appear to be based on legislation from any other state. See *Grand Jury Law & Practice* § 6:1 *et seq.* Federal grand juries certainly do not employ this proposed procedure. See FED R CRIM PROC 6. HB 2182 is perhaps based on the anecdotal experience of a grand jury petitioner who was dissatisfied with the decision that an indictment was not a true bill.

The proposals in HB 2182 also defy the well-settled rule set forth in the U.S. Supreme Court case of *United States v. Calandra*, 414 U.S. 338, 343 (1974):

No judge presides to monitor the proceedings of the grand jury. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.

There are three ways in which a criminal case is filed in the district courts of Kansas. Almost 100 per cent of criminal prosecutions in Kansas are commenced when a prosecutor files either a complaint or an information. See K.S.A. 22-3201. In Fiscal Year 2012, for example, there were 18,943 felony cases and 15,159 misdemeanor cases initiated in Kansas. (See Annual Report of the Courts of Kansas, Fiscal Year 2012). A judge reviews a probable cause affidavit before deciding whether a warrant or a summons should issue. In addition, in felony cases, the accused is entitled to an evidentiary hearing requiring a showing of probable cause before a case can proceed to jury trial.

The third and rarest way to initiate a prosecution is when the presiding juror of a grand jury signs a true bill of indictment. K.S.A. 20-3011; K.S.A. 22-3201(b). The grand jury is a throw-back to common law England, a time before our country created a Constitution. One of the main purposes of the grand jury was to protect the rights of the individual citizen against possible oppression by the crown or its agencies in the prosecution of crimes; or to safeguard the individual's rights against private malice, party passion or governmental abuse. *Opinion to the Governor*, 4 A.2d 487 (R.I. 1939).

Grand juries are the most expensive and inefficient procedure in which to initiate a prosecution. They consist of 15 jurors who are compensated for their service and expenses at the same rate as petit jurors. The grand jury shall employ a certified shorthand reporter, who shall make a stenographic record of all testimony. The grand jury may employ special counsel and investigators (with court approval). K.S.A. 22-3006. The prosecuting attorney is required to attend sessions for the purpose of giving the grand jury legal advice or examining witnesses when requested by the grand jury. K.S.A. 20-3007. The grand jury may serve for up to six months. See K.S.A. 22-3013.

Once a true bill of indictment has issued, county and district attorneys have the discretion to decide whether to prosecute the case. See *State v. Cope*, 30 Kan. App. 2d 893, 895, 50 P.3d 513 (2002) (The prosecution of criminal offenses is the responsibility of the public prosecutor who ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. It is important to the public, as well as to individuals suspected or accused of crimes, that these discretionary functions of the prosecutor be exercised with the highest degree of integrity and impartiality, and with the appearance of the same. The prosecutor speaks not only for the victim, or the police, or those who support them, but for all citizens. Both the accused and the public have a legitimate expectation that the prosecutor's zeal will be objective and impartial in each individual case).

Grand juries are already required "to diligently inquire, and true presentment make, of all public offenses against the laws of this state" K.S.A. 22-3003. Grand juries need not be told what witness should testify first or what witness it should call. The KCDAAs requests that this bill be rejected in the firm belief that grand juries take their obligations seriously.

Respectfully submitted,

Patrick Vogelsberg
KCDAAs