Approved March 3, 1983
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Bob Frey at
Chairperson

12:30 ~~a.m.~~/p.m. on February 25, 1983 in room 526-S of the Capitol.

All members were present except:

Representatives Douville, Harper, and Peterson were absent.

Committee staff present:
Mark Burghart, Legislative Research Department
Nedra Spingler, Secretary
Mike Heim, Legislative Research Department, and
Mary Ann Torrence, Revisor of Statutes Office, were excused.

Conferees appearing before the committee:

Jim Clark, Kansas County and District Attorneys Association
Steve Tatum, Assistant District Attorney, Johnson County
Elizabeth Taylor, Kansas Association on Domestic Violence Programs and the Institute of Electrical and Electronic Engineers
Sylvia Hougland, Secretary, Department on Aging
Ed Friesen, Joint Legislative Committee for the American Association of Retired Persons, Wichita
Charlie Mulliken, Sedgwick County Area Agency on Aging, Wichita
Nadine Burch, Kansas Coalition on Aging, Topeka
Mike Bailey, Director, Kansas Commission on Civil Rights
T. A. Lockhart, NAACP
Helen Miller, Senior Adult Specialist, Topeka Parks and Recreation Department
Lee Rowe, Chairperson, Advisory Committee to the Department on Aging

The minutes of February 21, 1983, were approved.

HB 2522 - An act relating to preliminary examinations.

A hearing was held on the bill. Jim Clark, Kansas County and District Attorneys Association, said the bill was needed because many criminal courts allow preliminary hearings to become fullblown trials. Attachment No.1 contains a draft and explanation of the bill.

Steve Tatum, Assistant District Attorney, Johnson County, presented a statement (Attachment No.2) supporting the bill which is also endorsed by the Johnson County District Attorney. In additional remarks, Mr. Tatum said preliminary hearings require additional court time, and, since they are not constitutionally mandated, this bill could result in a savings to Kansas. HB 2522 is a victims' rights bill and would remove additional trauma from their lives. The bill would result in attorneys evaluating cases more thoroughly before trial and would provide that preliminary hearings be used only to determine probable cause.

Information regarding the admissibility of hearsay at preliminary hearings, eliminating the need for victims to testify, is contained in Attachment No.1.

Elizabeth Taylor, Kansas Association on Domestic Violence Programs, supported the bill. It would remove the need for victims of domestic type violence to go through preliminary hearings as well as the trial. She noted victims are intimidated and will change their testimony for fear of incrimination when the defense is freed.

HB 2523 - An act concerning discrimination in employment.

Sylvia Hougland, Secretary, Department on Aging, presented a packet of information, including statistics, in support of the bill (Attachment No. 3). She noted every other area of discrimination in employment was covered by law except the aged. She said HB 2523 is based on a model act but written to be compatible with KCCR functions.

Ed Friesen, AARP, supported the bill, stating it would contribute to the well-being of older citizens. By keeping the elderly employed, it will help the Social Security program and the economy. Kansas is one of only five states that do not have this law.

Charlie Mulliken, Sedgwick County Area Agency on Aging, stated that most elderly people who

cannot find jobs believe they are not hired because of age, and a large percentage need to work to survive.

Nadine Burch, a federal mediator, said HB 2523 should include a provision against discrimination toward the elderly regarding services such as hospitals, housing, and colleges. She noted that older persons are expected to volunteer their assistance rather than being paid for it.

Mike Bailey, Director, KCCR, said, because of a growing population of people over 65 in Kansas, HB 2523 was needed. Kansas is behind in legislation regarding age discrimination in employment. He noted the federal EEO was unable to enforce the federal law in this regard because of cutbacks in funds, and the majority of its investigations are done by telephone. Passage of the bill would require two additional investigators and support staff for the approximately 150 extra cases. Mr. Bailey believed the fiscal note (Attachment No. 4), along with federal EEO funds, would be sufficient to cover this. He suggested including in the bill provisions to cover discrimination in public accommodations and housing as the KCCR receives many inquiries in this regard.

Lee Rowe, Chairperson, Advisory Committee to the Department on Aging, supported the bill which would cover 30% of the population.

Elizabeth Taylor, IEEE, said this group supports the bill because about one-half of its members is comprised of older persons or of those approaching retirement age. Recent layoffs have been a problem for older engineers.

T. A. Lockhart, NAACP, supported the bill, noting the economy has forced layoffs for older people who might not be rehired when the economy improves. This will be especially true in the black community. Many will go to court but will be 70 years of age before cases are settled.

Helen Miller, Senior Adult Specialist, supported the bill.

In discussion, the threshold level of 4 employees was noted. Ms. Hougland said 4 is the threshold level for other discrimination acts in Kansas and for most other states. The federal level is 20. Staff was requested to obtain information from other areas regarding threshold levels.

In regard to broadening HB 2523 to include services, Ms. Hougland believed services was a different issue, it was not as significant to older persons as employment, and should not be included in this bill.

The meeting was adjourned at 1:45 p.m.

ATTACHMENT # 1

BILL NO. _____

AN ACT concerning criminal procedure; relating to preliminary examinations; amending K.S.A. 22-2902 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 22-2902 is hereby amended to read as follows:

22-2902. Preliminary examination. (1) Every person arrested on a warrant charging a felony or served with a summons charging a felony or served with a summons charging a felony shall have a right to a preliminary examination before a magistrate, unless such warrant has been issued as a result of an indictment by a grand jury.

(2) The preliminary examination shall be held before a magistrate of a county in which venue for the prosecution lies within ten (10) days after the arrest or personal appearance of the defendant. Continuances may be granted only for good cause shown.

(3) The defendant shall not enter a plea at the preliminary examination. The defendant shall be personally present. ~~and the witnesses shall be examined in said defendant's presence. The defendant's voluntary absence after the preliminary examination has been begun in said defendant's presence shall not prevent the continuation of the examination. The defendant shall have the right to cross-examine witnesses against the defendant and introduce evidence in his or her own behalf.~~ If from the evidence it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant the magistrate shall order the defendant bound over to the district judge or associate district judge having jurisdiction to try the case; otherwise, the magistrate shall discharge the defendant.

(4) If the defendant waives preliminary examination the magistrate shall order the defendant bound over to the district judge or associate district judge having jurisdiction to try the case.

(5) Any judge of the district court may conduct a preliminary examination, and a district judge or associate district judge may preside at the trial of any defendant even though such judge presided at the preliminary examination of such defendant.

(6) The complaint or information, as filed by the prosecuting attorney pursuant to K.S.A. 22-2905, as amended, shall serve as the formal charging document at trial. When a defendant and prosecuting attorney reach agreement on a plea of guilty or *nolo contendere*, they shall notify the district court of their agreement and arrange for a time to plead, pursuant to K.S.A. 22-3210.

(7) The district judge or associate district judge, when conducting the preliminary examination, shall have the discretion to conduct arraignment at the conclusion of the preliminary examination.

Section 2. K.S.A. 22-2902 is hereby repealed.

Section 3. This act shall take effect and be in force from and after its publication in the statute book.

Speeding the Criminal Justice System

SEP 2 1979 SUN

By Sidney L. Willens

MIAMI — If you crave to keep innocent people out of jail and guilty criminals off the streets, then listen to this story.

In Dade County, Fla., a formidable chief trial judge and a forthright state attorney have put in motion a direct ling criminal justice program where e innocent go free and the guilty are it away in 60 days.

(No Jackson County statistics are ept to show arrest-to-trial time, but formed sources estimate an average five months.)

The Dade County chief trial judge, dward D. Cowart, and the state atrney, Janet Reno, seized on a United ates Supreme Court decision that nks an ancient first step in the crimil justice trial process called "preminary hearing."

The story begins in 1975 when the gh court told the state of Florida in *erstein vs. Pugh* that you can dump e "adversary" part of the hearing.

"It is not essential to meet the ourth Amendment's probable cause andard to confront and cross-exame witnesses to believe a suspect has mmitted a crime," Justice Powell rote. "An informal determination n be made by a judicial officer ther before or promptly after ar-st."

That means, of course, if a policean yanks you into a police station, a dge should see to it quickly that the licer had good reason ("probable use") to deprive you of your freem.

The sticky question is whether a iminal defense lawyer has a right to cide the cop and other state tnesses quickly after arrest and in en court or whether the judge can ake a "probable cause" decision by ading only sworn written reports thout flesh-and-blood testimony.

Early this year Judge Cowart and s. Reno put the kiss of death to the dversary" preliminary hearing in ade County in favor of sworn docuntation. Today in Dade County a nd-hearing judge decides "probable use" for arrest without live testimo-

Are Dade County defense lawyers tisfied with a streamlined criminal stice system that removes the tradinal first courtroom confrontation th prosecution witnesses?

"The program works well," Bennett Brummer, Dade County public deder told me. "The office of state torney under Janet Reno tells the dense everything. No surprise evince pops up during trial."

A top civil liberties lawyer who ked not to be identified credits the ogram's success to Cowart and no.

"They don't buckle when they get ssure from the cops. Hell, assistant te attorneys under Reno throw out re cases at the 'pre-trial conferce' than judges did at the preliminy hearings."

. David Weed, executive assistant blic defender, told me the program working "fine" but he expressed his rsonal belief that "a defendant has a stitutional right to an adversary liminary hearing."

lank Adorno, chief trial assistant der Janet Reno, said the refusal of de County's 12 felony judges to poste cases without good cause and re-trial conference" go a long way in protecting defendant rights.

"Garbage is dumped at a 'pre-trial conference' that must be scheduled within 14 days of arrest," Adorno explained. "Our assistants meet together face-to-face with crime victims, witnesses, including policemen. If we can't make a case, we stop wasting everybody's time and dismiss or reduce to misdemeanor."

(In Jackson County an assistant prosecutor screens police cases beforehand, a protection against police abuse.)

Adorno says a key to the program's success is that his 36 assistants stay hitched to a case from start to finish as does a felony judge. So it pays assistant state attorneys to drop felony cases within the 14-day arraignment period where prosecution is not warranted and to pursue cases that have merit.

Dade County assistant state attorneys at "pre-trial conference" are trained to quiz crime victims and witnesses, comfort them and remind them the law jumps from "probable cause" for arrest to "beyond a reasonable doubt" for conviction.

An assistant state attorney must fish or cut bait at the "arraignment" in open court scheduled within 14 days of arrest. There the assistant state attorney simply announces to the judge and defendant and counsel the decision whether to dismiss charges, reduce them or try the case. A trial date is set within 45 days which, of course, aims at 60 days from arrest to trial.

"The beauty of keeping the same assistant state attorney on a case from beginning to end," Adorno says, "is that he or she aims for the bottom line, innocence or guilt beyond a reasonable doubt."

(In Jackson County a criminal case leapfrogs from one assistant prosecutor to another.)

In Dade County a criminal felony defendant appears in court twice before trial, once for a bond hearing and "probable cause" determination and once for arraignment and setting of trial date. In Jackson County a criminal felony defendant appears in court three times before trial, once for a bond hearing (arraignment), once for an "adversary" preliminary hearing and once for a second bond hearing and assignment to a court division (also called arraignment). So Jackson County has one more step in the process than Dade County, with an adversary hearing thrown in and duplication that should be eliminated.

Do policemen in Dade County favor the new seven-month-old program? At first they didn't. The police union grumbled at loss of overtime pay for attending a preliminary hearing. Today Dade County policemen show no regrets over its demise.

"We like it," Bobby L. Jones, acting director of the Dade County Public Safety Department, told me. "Ms. Reno rides patrol cars, speaks to policemen at roll calls and exchanges memos with me."

According to James Bryant, chief of court services of the Public Safety Department, the Dade County police department has so far saved $6,000 a month with the new program. Policemen no longer rack up overtime pay waiting out preliminary hearings.

My interview with Judge Cowart took place after I had learned by long distance phone of the murder of Katherine Jo Allen in Kansas City. I asked the judge whether the new Dade County criminal justice system could have saved the life of a rape victim ready to testify at her alleged rapist's trial.

"I can't answer that," the judge replied. "After all, each situation is so totally different. But what I do know is that the quicker you dispose of a serious criminal case without sacrificing rights of defendants, victims and witnesses, the safer everybody is."

Judge Cowart released to me statistics showing that 59 percent of Dade County's felony defendants have dropped out of the system since the first of the year, which meant to the judge that the people involved with the cases that remained were dealt with more efficiently and fairly.

The Dade County state attorney, Janet Reno, is a woman described by others as "forthright," "erudite," "energetic" and "innovative."

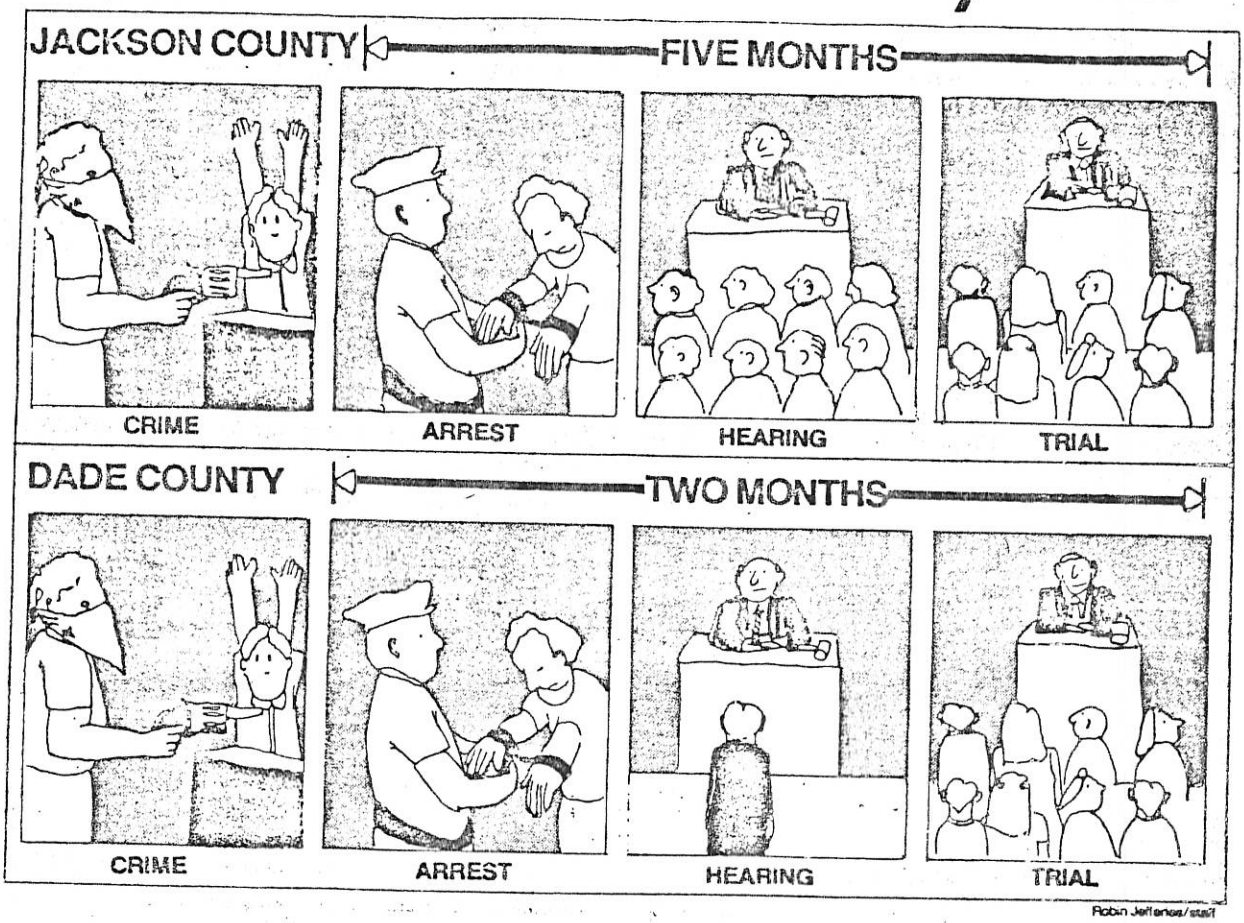
When I asked Ms. Reno how she has been able to achieve a right blend of efficiency and fairness in a sprawling criminal justice system involving 20,000 felony cases a year, she replied:

"Cooperation from well-motivated people inside the judiciary, the police department, the public defender's office and even lower level employees. After all, a system is only as good as people who manage it."

Ms. Reno praised Dade County's court aide victim-witness program where a full-time staff tracks 100 volunteer "court watchers" who also notify crime victims and witnesses when and where to appear in court. According to Bobbi Silber, program director, volunteer hours from 1976 to June 1979 totaled 25,139. The program was started by the Crime Commission of Dade County.

Hank Adorno, Ms. Reno's outspoken right-hand man, finds no problems working with a woman whom he calls, "Boss."

I asked Adorno the same question I asked Ms. Reno, namely, how his office seems to have combined efficiency and fairness. Adorno's response was, "Come back to Miami for a longer stay and I'll tell you how much more we've got to do to make the justice system work."



Robin Jefferies/staff

A Streamlined System Here?

Can Jackson County under the 1975 United States Supreme Court decision of *Gerstein vs. Pugh* abolish "preliminary hearings" in order to efficiently and fairly speed up arrest-to-trial time? Yes, if the Dade County, Fla., experience is followed.

Shortly after *Gerstein vs. Pugh*, the Florida Supreme Court repealed the "adversary" rule, Dade County chief trial judge Edward D. Cowart made an "in-house" study for his court, found justice could be served by removing the adversary aspects of a preliminary hearing, tested the idea beginning in October 1978 and removed "adversary" preliminary hearings from the system beginning the first of this year.

Judge Cowart said that in his judgment the only thing necessary for implementation in Jackson County would be a Missouri Supreme Court ruling permitting it. *S.L.W.*

Sidney L. Willens, a Kansas City lawyer, has helped develop police and county complaint offices, a police-social worker program and witness assistance project here. He regularly reviews books for The Star and The Times on the law and court system.

trial without a probable cause determination. U.S.C.A.Const. Amend. 4.

21. Indictment and Information ⇐41(1)

A judicial probable cause hearing is not prerequisite to prosecution by information. U.S.C.A.Const. Amend. 4.

22. Criminal Law ⇐99

Illegal arrest or detention does not void a subsequent conviction. U.S.C.A. Const. Amend. 4.

23. Criminal Law ⇐223

An arrestee may challenge the probable cause for his pretrial confinement; however, his conviction will not be vacated on ground that he was detained pending trial without such a determination. U.S.C.A.Const. Amend. 4.

24. Criminal Law ⇐223

The probable cause determination, as an initial step into criminal justice process, may be made by judicial officer without an adversary hearing. U.S.C.A.Const. Amend. 4.

25. Criminal Law ⇐230

Single issue at a pretrial detention hearing is whether there is probable cause for detaining the arrested person pending further proceedings; such issue can be determined reliably by the use of informal procedures. U.S.C.A.Const. Amend. 4.

26. Criminal Law ⇐223

Standard for determining whether to detain an arrested person pending further proceedings is the same as that for arrest, i. e., probable cause to believe the suspect has committed a crime. U.S.C.A.Const. Amend. 4.

27. Indictment and Information ⇐39

A prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause.

28. Criminal Law ⇐232

Because of its limited function and nonadversary character, the probable cause determination is not a critical stage in the prosecution that would require appointed counsel. U.S.C.A.Const. Amend. 4.

29. Criminal Law ⇐641.3

A "critical stage" in the prosecution requiring appointed counsel includes those pretrial procedures which will impair a defense on the merits if the accused is required to proceed without counsel.

See publication Words and Phrases for other judicial constructions and definitions.

30. Searches and Seizures ⇐7(1)

The Fourth Amendment probable cause determination is addressed only to pretrial custody. U.S.C.A.Const. Amend. 4.

31. Criminal Law ⇐223

There is no single preferred pretrial procedure for determining probable cause for detaining an arrested person pending further proceedings; nature of the determination usually will be shaped to accord with the state's pretrial procedure viewed as a whole; flexibility and experimentation by the state is desirable. U.S.C.A.Const. Amend. 4.

32. Criminal Law ⇐223, 228

Whatever procedure a state may adopt for making a pretrial determination of probable cause for detaining an arrested person pending further proceedings, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty; such determination must be made by a judicial officer either before or promptly after arrest. U.S.C.A.Const. Amend. 4.

33. Criminal Law ⇐223

Probable cause determination is not a constitutional prerequisite to the charging decision; it is required only for those suspects who suffer restraint of liberty other than the condition that they appear for trial. U.S.C.A.Const. Amend. 4.

34. Criminal Law ⇐223

A significant restraint of liberty is the key factor in defining which kind of pretrial release and what degree of conditional liberty require a prior probable

Rule 3.131. Pretrial Probable Cause Determinations and Adversary Preliminary Hearings

(a) Nonadversary Probable Cause Determination.

(1) *Defendants in Custody.* In all cases where the defendant is in custody, a nonadversary probable cause determination shall be held before a magistrate within 72 hours from the time of the defendant's arrest; provided, however, that this proceeding shall not be required when a probable cause determination has been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. The magistrate for good cause may continue the proceeding for not more than 24 hours beyond the above 72-hour period. This determination shall be made if the necessary proof is available at the time of the first appearance as required under Rule 3.130, but the holding of this determination at said time shall not affect the fact that it is a nonadversary proceeding.

(2) *Defendants on Pretrial Release.* A defendant who has been released from custody before a probable cause determination is made and who is able to establish that his pretrial release conditions are a significant restraint on his liberty may file a written motion for a nonadversary probable cause determination setting forth with specificity the items of significant restraint that a finding of no probable cause would eliminate. The motion shall be filed within 21 days from the date of arrest, and notice shall be given to the State. The magistrate shall, if he finds significant restraints on the defendant's liberty, make a probable cause determination within 7 days from the filing of the motion.

(3) *Standard of Proof.* Upon presentation of proof, the magistrate shall determine whether there is probable cause for detaining the arrested person pending further proceedings. The defendant need not be present. In determining probable cause to detain the defendant, the magistrate shall apply the standard for issuance of an arrest warrant, and his finding may be based upon sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded.

(4) *Action on Determination.* If probable cause is found, the defendant shall be held to answer the charges. If probable cause is not found or the specified time periods are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and filed, together with the evidence of such probable cause, with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

(b) **Adversary Preliminary Hearing.**

(1) *When Applicable.* A defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him shall have a right to an adversary preliminary hearing on any felony charge then pending against him. The subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding.

(2) *Process.* The magistrate shall issue such process as may be necessary to secure attendance of witnesses within the state for the state or the defendant.

(3) *Witnesses.* All witnesses shall be examined in the presence of the defendant and may be cross-examined. Either party may request that the witnesses be sequestered. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf, and in such cases he shall be warned in advance of testifying that anything he may say can be used against him at a subsequent trial. He may be cross-examined in the same manner as other witnesses, and any witnesses offered by him shall be sworn and examined.

(4) *Record.* At the request of either party, the entire preliminary hearing, including all testimony, shall be recorded verbatim stenographically or by mechanical means, and at the request of either party shall be transcribed. If the record of the proceedings, or any part thereof, is transcribed at the request of the prosecuting attorney, a copy of this transcript shall be furnished free of cost to defendant or his counsel.

(5) *Action on Hearing.* If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall cause the defendant to be held to answer to the circuit court; otherwise, the magistrate shall release the defendant from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Such release does not, however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial.

A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and, together with the evidence received in the cause, shall be filed with the clerk of the circuit court.

Committee Notes

1967 Adoption—Rule 1.122 [3.122] (a) Substantially the same as [F.S.A. §] 902.01 [repealed]; the word "examination" is changed to "hearing" to conform to modern terminology. [Magistrates in Federal cases have similar duties. See Federal Criminal Procedure Rule 5(b).]

(b through j) Substantially the same as [F.S.A. §§] 902.02 through 902.10 and 902.13 and 902.14 [all repealed], except for exchange of "hearing" for "examination."

(k) Parts of [F.S.A.] Section 902.11 [repealed], and all of 902.12 [repealed] were omitted because of conflict with case law: Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193.

(*l*) Taken from Federal [Criminal] Rule 5(c). Previously Florida had no statute or rule defining what the magistrate should do at the conclusion of the preliminary hearing.

(m) Substantially the same as [F.S.A. §] 902.18 [repealed] except "without delay" changed to "within 7 days." Some specific time limit was felt necessary because of frequent delay by magistrates while defendants remain in jail.

1972 Revision. The ABA Standards on Pre-Trial Release provide for a person arrested to be taken before a committing magistrate without unreasonable delay for immediate judicial consideration of the release decision. The Committee determined that, since a determination of probable cause at this immediate hearing presents difficult logistical problems for the State and for the defense counsel, the question of probable cause should be decided at a later preliminary hearing. For this reason, sections (c), (d) and (e) of the former Rule have been deleted in favor of the hearing provision now contained in Rule 3.130.

(a) A revised version of former Rule 3.122(a).

(b) New. Establishes the time period in which the preliminary hearing must take place.

(c) (1) Substantially the same as former Rule 3.122(b). Amended to provide for advice of counsel relative to waiver, and to provide for written waiver.

(c) (2) Amended to delete provisions relating to recording of proceedings as same are now contained in subparagraph (h).

(d) Same as prior rule 3.122(g).

(e) Same as prior rule 3.122(h).

(f) Substantially the same as prior rule 3.122(i); language modernized by slight changes.

(g) Same as prior rule 3.122(j).

(h) New rule to provide for record of proceedings. [See Author's Comment, post].

(i) Same as prior rule 3.122(k) (2).

(j) Substantially the same as prior rule 3.122(m). Time period for transmission of papers is reduced. (2) provides for transmission of any transcript of proceedings.

Author's Comment

Rule 3.131 as stated by the Supreme Court of Florida, in adopting the rule on March 26, 1975, as an emergency matter effective after 12:01 A.M., March 31, 1975, constitutes a complete re-writing of the Preliminary Hearing Rule. The former rule was derived from previous Rule 3.122, portions of F.S.A. c. 902, repealed by Laws 1970, c. 70–339, § 180, and Rule 5(c) of the Federal Rules of Criminal Procedure. Much of the substance is found in the new Federal Criminal Rule 5.1, relating to Preliminary Examination. See 1 Wright, Federal Practice and Procedure (West 1969). Although many of the provisions of F.S.A. c. 902, *supra,* have been repealed certain portions remain in effect as rules promulgated by the Supreme Court; therefore, such statutes must be considered in criminal practice as important procedural guideposts in preliminary hearings, even though they do not appear in the compilation of the rules. The preliminary hearing replaces the prior existing preliminary examination as found in the earlier statutes. The statutes remaining in effect are F.S.A. § 902.15, relating to a written recognizance by material witnesses; F.S.A. § 902.17, relating to the procedure when a witness does not give security; F.S.A. § 902.19 relating to costs at a preliminary hearing; F.S.A. § 902.20, relating to the contempt power of a judge at a preliminary hearing; and F.S.A. § 902.21 relating to commitment to a jail in another county. The order of the Supreme Court dated March 26, 1975, adopting the drastic revision of the preliminary hearing rule establishes that all conflicting rules and statutes were thereby superseded; however, the order of the Supreme Court of Florida in 272 So.2d 65 (1973), recognized that the Rules of Criminal Procedure supersede all conflicting rules and statutes, whereas those statutes not superseded shall remain in effect as rules promulgated by the Supreme Court. Therefore, such statutes should be considered in criminal practice as important procedural guideposts in preliminary hearings, even though they do not appear in the compilation of the rules.

For many years the rule in Florida had been that a preliminary hearing was not a step in due process of law and was not a prerequisite to a criminal prosecution or filing of an indictment or information. As explained in Baugus v. State, 1962, 141 So.2d 264, certiorari denied 83 S.Ct. 153, 371 U.S. 879, 9 L.Ed.2d 117, it served only to determine whether or not probable cause exists to hold a person for trial, and a prosecution could be instituted and maintained regardless of such an investigation. However, the Supreme Court of Florida had warned in Dawson v. State, 1962, 139 So.2d 408, that the provisions of then existing F.S.A. § 901.23 as to taking an accused arrested without warrant before a committing magistrate without unnecessary delay, should be followed, since the Federal rule could be extended to state courts on some future occasion as to the aspect of due process.

This warning crystallized, not solely under the due process clause of the Federal Constitution, but under the Fourth Amendment to the Federal Constitution as well, guaranteeing the right of people to protection against unreasonable intrusions upon liberty and privacy, requiring that the existence of probable cause be decided by a neutral and detached magistrate. The case initiated as Pugh v. Rainwater, 1972, 332 F.Supp. 1107, as well as the opinion adopting a plan to provide preliminary hearings in 336 F.Supp. 490. In the latter case, the federal court imposed sanctions for the failure to bring the accused before a committing magistrate and/or failure to hold a preliminary hearing, among others to preclude re-filing of a charge withdrawn on two occasions, except upon an indictment of the grand jury returned within 30 days of the date of the second withdrawal. The order approved of postponements in accordance with the then existing Florida Rules of Criminal Procedure after notice to the parties and an opportunity to be heard. The bases of the decision of the court were the Fourth Amendment and the due process clause of the Fourteenth Amendment of the Federal Constitution. Thereafter, in Pugh v. Rainwater, 1973, 355 F.Supp. 1286, the trial court expanded upon its earlier rulings which decision was modified on appeal in 483 F.2d 778 (5th Cir. 1973) to delete certain sanctions in view of the changes in the Rules of Criminal Procedure. Certiorari proceedings were perfected by only one of the named defendants, and in Gerstein v. Pugh, 95 S.Ct. 854, —— U.S. ——, 43 L.Ed.2d 54 (1975), the Supreme Court of the United States after having heard re-argument of the cause because of the interest of other governments' attorneys and their intervention in the case as *amicus curiae*, rendered a comprehensive opinion affirming in part and reversing in part the decision of the United States Court of Appeals. The current decision holds, as stated in 95 S.Ct. at page 863, ". . . that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest . . .".

Although the decision must be read in its entirety for full comprehension of the radical change in the concept of preliminary hearings and probable cause, the author will take the liberty of setting forth the syllabus prepared by the Reporter of Decisions for the convenience of the reader, which syllabus constitutes no part of the opinion of the court. (See U. S. v. Detroit Timber & Lumber Co., 26 S.Ct. 282, 287, 200 U.S. 321, 337, 50 L.Ed. 499).

Syllabus

"1. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, the Florida procedures challenged here whereby a person arrested without a warrant and charged by an information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional.

"(a) The prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth

Amendment and is insufficient to justify restraint of liberty pending trial.

"(b) The Constitution does not require, however, judicial oversight of the decision to prosecute by information, and a conviction will not be vacated on the ground that the defendant was detained pending trial without a probable cause determination.

"2. The probable cause determination, as an initial step in the criminal justice process, may be made by a judicial officer without an adversary hearing.

"(a) The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings, and this issue can be determined reliably by the use of informal procedures.

"(b) Because of its limited functions and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel. 483 F.2d 778, affirmed in part, reversed in part, and remanded."

Following the rendition of this monumental decision, the Supreme Court of Florida recognized that there was a lack of uniform practice throughout the state in terms of preliminary hearings and on March 26, 1975, certain rules of criminal procedure were amended to conform with the holding of Gerstein v. Pugh, *supra*, and its specific holding that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest." The amended rules govern all proceedings within their scope after 12:01 A.M., March 31, 1975, with all conflicting rules and statutes being superseded. The Court adopted the amendments and new rules without the usual Petition and Notice of Procedure, considering them temporary in nature and requested the Criminal Procedure Rules Committee of The Florida Bar and other interested parties to file any appropriate suggestions or objections on or before May 5, 1975. Two of the rule changes constituted related areas to the Preliminary Hearing Rules, namely, Rule 3.040 relating to Computation of Time, and Rule 3.140(g), relating to The Signature, Oath, and Certification on an Information. See Author's Comment to these rules. The monumental change appears in a complete revamping of the Preliminary Hearing Rule, namely 3.131, to meet the requirements of Gerstein v. Pugh, *supra*.

Paragraph (a) of the new rule relates to the nonadversary probable cause determination in tracking Gerstein v. Pugh, *supra*, whereas paragraph (b), providing for an adversary preliminary hearing, appears to be a safety valve not specifically outlined in the decision by the Supreme Court of the United States.

Paragraph (a)(1) relates to defendants in custody and requires in all cases where a defendant is in custody, a nonadversary probable cause determination must be held before a magistrate within 72 hours

from the time of the defendant's arrest. The new rule no longer restricts the right to a felony charge, and there is no distinction between a felony or a misdemeanor insofar as the right is concerned. Moreover, no longer does the rule provide a distinction between capital offenses or offenses punishable by life imprisonment and other offenses to justify a longer period within which to hold a probable cause hearing. The rule does not require a nonadversary probable cause determination when a determination of probable cause had previously been made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. It would appear that upon the issuance of the warrant, probable cause had already been established before a neutral magistrate. The new rule authorizes the magistrate for good cause to continue the proceeding for not more than 24 hours beyond the above 72 hour period, which corresponds in part to the 96 hour rule that had existed in former Rule 3.131(b). However, it should be noted that the time for this pre-trial probable cause determination commences with the arrest of a defendant, as opposed to the former Rule 3.131(b) requiring the preliminary hearing within 96 hours from the time of the defendant's first appearance under Rule 3.130, *supra*. Former F.S.A. § 901.23, repealed by Laws 1973, c. 73–27 required a peace officer making an arrest without a warrant to take the arrested person without unnecessary delay before the most accessible magistrate in the county and to make a complaint stating the facts constituting the offense for which the person was arrested.

The new rule establishes that the nonadversary probable cause determination is not necessary when a probable cause determination had been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged. As noted above, probable cause has already been established by the sworn testimony before the magistrate for the issuance of the warrant. The magistrate must have good cause to continue the proceeding to the maximum of 96 hours from the time of the arrest. He can make this determination and should, if proof or good cause is shown and is available at the time of the first appearance under Rule 3.130, *supra,* which requires that the person in custody under the circumstances of not having previously been released in a lawful manner shall be taken before a judicial officer within 24 hours of his arrest for certain legal advice and bond hearing. The new rule establishes that the determination for the extension of time for the nonadversary probable cause determination at the first appearance shall not affect the fact that it is a nonadversary proceeding. Most nonadversary probable cause hearings will, in fact, take place at the first appearance hearings.

Paragraph (a)(2) provides that an accused who has been released from custody before a probable cause determination is made and who is able to establish that his pretrial release conditions are a significant restraint on his liberty, may file a written motion for a nonadversary probable cause determination setting forth with specificity, the items of significant restraint that a finding of no probable cause would eliminate. Thus, a person who has been released from custody on bond or personal recognizance or at the first appearance hearing under

Rule 3.130, *supra*, or is restricted in his liberty as a result of the first appearance hearing may file a written motion within 21 days of his arrest with notice to the state whereupon the magistrate if finding a significant restraint on the liberty of the accused shall make a probable cause determination within 7 days from the filing of the motion.

Paragraph (a)(3) requires the magistrate to determine the existence or non-existence of probable cause for detaining the arrested person pending further proceedings, and the defendant need not be present. In determining probable cause to detain the defendant, the standard applicable for the issuance of an arrest warrant must be applied, and the magistrate's conclusion may be based upon a sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony made under oath properly recorded. The Supreme Court of the United States in Gerstein v. Pugh, *supra*, at page 862, set forth the standard for arrest as probable cause, "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense' ". This is in accord with the Florida rule as expressed in Dunnavant v. State, 46 So.2d 871 (1950) wherein the court stated at page 874:

> "The term 'probable cause' has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. The courts in determination of the existence of probable cause are not concerned with the question of the guilt or innocence of the accused but whether or not the affiant has reasonable grounds for his belief".

Paragraph (a)(4) is similar to former Rule 3.131(i), in small part. It requires the defendant to be held to answer to the charge if probable cause is found and if probable cause is not found or the specified time periods established in the rule are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which case the defendant shall be released on his or her own recognizance subject to the condition of appearance at all court proceedings, or released under a summons to appear before the appropriate court at a time certain. Such release does not however, void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. This is in accord with the concept that the hearing is purely for initial probable cause determination, and as explained in Baugus v. State, *supra*, a prosecution could be instituted and maintained regardless of a preliminary hearing. The prosecution may well have additional evidence to establish probable cause but does not desire to produce it at the time of the determination, in which case further prosecution by information or indictment may occur, but the release does prohibit any restraint on the defendant's liberty other than appearing for trial. It should be borne in mind that no longer does the distinction exist that the filing of the information (or indictment, although not disposed of in Gerstein v. Pugh, *supra*) obviates the necessity of a preliminary hearing, and the sole assessment by the prosecutor is no longer sufficient to es-

tablish probable cause. The magistrate is required to make a written finding of the existence or non-existence of probable cause and in the event of finding probable cause, the filing of the evidence to support same with the clerk of the court having jurisdiction of the offense for which the defendant is charged. Thus, if the preliminary hearing has taken place in the county court, the finding and the evidence must be transmitted to the clerk of the circuit court in the event a felony has occurred and to the clerk of the county court in the event a misdemeanor has occurred.

Paragraph (b) relating to an adversary preliminary hearing goes beyond Gerstein v. Pugh, *supra*, requirements and apparently represents a safety valve for those defendants not charged in an information or indictment within 21 days from the date of arrest or service of the capias. As initially adopted on March 26, 1975, by the Supreme Court of Florida on an emergency basis, it poses an interesting question in terms of paragraph (b)(1) to the effect that it is restricted to a felony charge, with no mention of misdemeanors or other custody restrictions. Paragraph (b)(1) establishes that a defendant who is not charged in an information or indictment within 21 days from the date of his arrest or service of the capias upon him, shall have the right to an adversary preliminary hearing on any felony charge then pending against him. The rule continues that the subsequent filing of an information or indictment shall not eliminate a defendant's entitlement to this proceeding, and thus, the right to a preliminary hearing now exists regardless of the filing of these charges in a formal manner, as opposed to the prior practice that the filing of an information or indictment did eliminate the right to a preliminary hearing. Gerstein v. Pugh, *supra*, makes no distinction between misdemeanors and felonies, whereas the newly adopted rule initially restricted the rule to felony charges. The Supreme Court of the United States was basically concerned with the fact that evidence of probable cause be decided by a neutral and detached magistrate whenever possible. The Supreme Court of the United States in 95 S.Ct. at page 863, recognized that even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty and that when the stakes are that high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish a meaningful protection from unfounded interference with liberty. The Court then set forth its holding in specific terms that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest. The Court, at pages 865–866 adhered to its prior holdings that a judicial hearing is not a prerequisite to a prosecution by information and did not retreat from the rule that an illegal arrest or detention would not avoid a subsequent conviction; and more specifically, that a conviction would not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. However, there appears to be no distinction between holding one charged with a felony and one charged with a misdemeanor insofar as the right to a preliminary hearing. The Supreme Court did not address itself to this

dichotomy, inasmuch as preliminary hearings are not required, whereas probable cause hearings are required.

Historically, when the preliminary hearing rule was first adopted in Florida as Rule 1.122 on March 1, 1967, in 196 So.2d 124, at page 129, there was no distinction between a felony or a misdemeanor. When the rule was amended in 272 So.2d 65, Rule 3.131(a) restricted the right to a defendant charged with a felony, whereas the prior rule was directed to any offense. Since the thrust of the holding in Gerstein v. Pugh, *supra*, is that the preliminary hearing has as its main purpose to determine whether or not probable cause exists to hold a person for trial, it would seemingly appear that a person charged with a misdemeanor should likewise have this basic right. Paragraph (b) of former Rule 3.131 was new to the rule and amended in 289 So. 2d 3, by relating to all cases where a defendant was in custody except in capital offenses or offenses punishable by life imprisonment.

There being no valid distinction between felonies and misdemeanors insofar as a preliminary hearing is concerned in view of the careful analysis of the Supreme Court of the United States as to the purpose of the detached neutral magistrate making a finding, the author has taken the liberty of suggesting to the Supreme Court of Florida that consideration be given to making the adversary preliminary hearing applicable to all offenses. A reasonable amendment has been suggested by the author to the effect that a defendant who is not charged in an information, indictment, affidavit or docket entry within 21 days shall have the right, since Rule 3.140(a)(2), *infra*, authorizes affidavit and docket entries as a means of prosecution for municipal ordinances and metropolitan county violations. The defendant in custody for these violations may often be forgotten and never tried, and when uncovered in a jail sweep and brought before a municipal or county judge, he has already in effect, served his sentence without being convicted of the offense.

It should be noted that in the adversary preliminary hearing rule, the subsequent filing of an information or indictment does not eliminate a defendant's entitlement to this proceeding, and thus counsel should bear in mind that the adversary preliminary hearing may prove very useful for initial discovery purposes.

Paragraph (b)(2) requires the magistrate to issue such process as may be necessary to secure attendance of witnesses within the state for the state or the defendant, and counsel should be alert to see to it that the magistrate has the list of necessary witnesses and their addresses in time for the service of process.

The rule is the same as prior Rules 3.131(d) and 3.122(g) and former F.S.A. § 902.07, repealed by Laws 1970, c. 70–339, § 180. At one time, as recognized in Bailey v. State, 1918, 76 Fla. 213, 79 So. 730, an insolvent prisoner who desired to have witnesses summoned in his behalf, was required to state in his affidavit of insolvency what he expected to prove by them, but such affidavit could not be introduced in evidence against him. A magistrate might require a showing of this nature to avoid unnecessary summons or witnesses.

Paragraph (b)(3) is derived from paragraphs (e), (f), and (g) of the former Rule 3.131. It had appeared in part in paragraphs (h), (i), and (j) of former Rule 3.122 and F.S.A. §§ 902.08 to 902.10, the statutes being repealed by Laws 1970, c. 70–339, § 180. It is in accord with Federal Criminal Rule 5.1 as well as the basic concept of an accused having the right to be confronted by his accuser. Here again, the defense has an excellent opportunity by means of listening and cross-examination to discover the nature of the evidence against him and to possibly destroy the validity of the charges against him to the satisfaction of the magistrate. The rule has no provision for waiving the presence of the defendant, and this appears to be for the reason that under the adversary preliminary hearing, the accused, although having a right to such hearing, would apparently have to initiate the request. Having initiated the request, his presence should be required and even if there were a procedure for waiving this, such might well be considered a tactical error.

The provision authorizing the defendant to testify in his own behalf after the testimony for the prosecution was found in former Rule 3.131(f). Such was similar to the original Rule 3.122(i) and the current rule reverts back to the original language and terminology of "warned in advance" as opposed to the 1972 change of "re-warned in advance". The rule re-phrases F.S.A. § 902.09, repealed by Laws 1970, c. 70–339, § 180, and it requires careful thought as to putting the accused on the stand. Counsel must weigh all of the intangible factors, bearing in mind that his witnesses present will be examined and cross-examined. Innocence or guilt will not be considered as the basis of the hearing, but only probable cause. Thus, the particular factual situation must be carefully viewed to determine if the prosecution has established probable cause, if the accused can dissolve the factors of probable cause to the satisfaction of the magistrate, and if the accused might be subjecting himself to incriminating cross-examination which records could be used against him at trial. Moreover, the fact that the prosecution may file an information, regardless of the preliminary hearing should be considered.

Former paragraph (g) of Rule 3.131 authorized the exclusion of witnesses at the defendant's request and also provided that the magistrate may cause witnesses to be kept separate and to be prevented from communicating with each other until all are examined. The current rule authorizes either party to request that the witnesses be sequestered.

Paragraph (b)(4) is the same as former Rule 3.131(h), having been taken from the original Rule 3.122(k), with its origin in F.S.A. § 902.-11, the latter being repealed by Laws 1970, c. 70–339, § 180. The rule provides for verbatim stenographic reporting or use of mechanical means for recording. The repealed statutory provision of offering the defendant the opportunity of signing his deposition, has been omitted in view of recent federal decisions and due process construction. In order for the rule to be activated so as to provide a defendant a free copy of the transcript, the prosecutor must request such testimony

to be reduced to writing. Such provision will not become operative upon a request made either by the magistrate or the defendant. The defendant could, of course, have his own court reporter present and obtain a copy of the transcript at his cost or could request and pay for a copy of the record. A cardinal rule of pre-trial practice is always to have means to obtain such a record for future purposes. The Committee Note adopting the same language in paragraph (h) to former Rule 3.131 at 272 So.2d at page 86, inadvertently labeled this a new rule when in fact it had prior history in Florida procedure.

Paragraph (b)(5) is the same as former paragraph (i) of the rule insofar as the initial sentence to the first semicolon. That portion of the rule was the same as the original Rule 3.122(*l*) except that the current rule designates the circuit courts as the court to which to answer, in view of the apparent restriction of this part of the rule to felony charges whereas the original rule merely referred to the trial court having jurisdiction. The rule had been derived from former Rule 3.122(*l*) which had been taken from former Rule 5(c) of the Federal Rules of Criminal Procedure and F.S.A. §§ 902.13 and 902.14, the latter statutes being repealed by Laws 1970, c. 70-339, § 180. It is covered in part by Federal Criminal Procedure Rule 5.1. See 1 Wright, Federal Practice and Procedure (West 1969). The new rule does not contain the language of the former rule as to discharging the accused if there is a lack of probable cause, but provides that the magistrate shall release the defendant from custody unless an information or indictment has been filed, in which event the defendant must be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or be released under a summons to appear before the appropriate court at a time certain. This type of release does not, however, void further prosecution by information or indictment but does have the effect of restricting any restraint on liberty other than appearing for trial. The new rule further provides that the existence or non-existence of probable cause must be made in writing, signed by the magistrate, and together with the evidence received in the cause filed with the clerk of the circuit court.

Upon the adoption of the new rule as an emergency measure and being temporary in nature, the author suggested to the Supreme Court that paragraph (b) be made applicable to the misdemeanor causes as well.

The original Rule 1.122(*l*) had no title or designation by inadvertence, and the current rule corrects that oversight. Paragraph (b)(5) underscores what the purpose of the preliminary hearing is, to determine if there is probable cause to believe that an offense has been committed and that the defendant has committed it. This is in accord with the test set forth by the Supreme Court of Florida and by the Supreme Court of the United States in numerous decisions.

Thus, the proof of whether probable cause does exist becomes of vital importance. Although the prosecutor may file an information, regardless of the outcome of the hearing, the preliminary hearing

affords the accused an excellent discovery device and a means of forcing the prosecution to decide whether or not to pursue the matter. It may well be that the state will be convinced of the futility of trying the accused in view of the quality of its own proof as opposed to the proof offered by the defense. Should the magistrate release the accused, immediate steps would have to be taken to commence the prosecution formally in order to have any custody over the defendant.

As noted in the Committee Note in the adoption of the 1972 amendments to the former rule, in 272 So.2d 85, 86, certain provisions of the original rule had been deleted in favor of the hearing provision now contained in Rule 3.130, *supra*.

The current rule provides no paragraph similar to former Rules 3.131(j) and 3.122(m) relating to the transmission of the papers by the magistrate in the event of a discharge of the defendant. The reason for the omission of this portion of the rule may be due to the decision of State v. Joseph, 1971, 253 So.2d 275, wherein the appellate court held that the period set by the rule governing transmission of bindover papers by the magistrate to the clerk of the court having trial jurisdiction, after discharging the defendant or holding him to answer is not jurisdictional and does not constitute a statute of limitation.

As noted in State ex rel. Hanks v. Goodman, 1971, 253 So.2d 129, if a defendant is in custody and there is no probable cause for holding him, he has the immediate remedy through habeas corpus proceedings or this rule to obtain a determination. The Supreme Court of the United States in 95 S.Ct. at page 864, further recognized that the initial determination of probable cause could be reviewed by higher courts on a writ of habeas corpus.

The rule does not reflect the statutory right of F.S.A. § 907.045, authorizing an application of a defendant charged by indictment, information, or affidavit and confined in jail 30 days after his arrest without trial for, and the allowance of, a preliminary hearing. However, the rule-making power of the Supreme Court apparently supersedes the statutory right, and an accused could initiate a preliminary hearing by several means to determine if there is probable cause and for discovery purposes. As noted above, such a hearing may serve to provide a great amount of information for more adequate preparation of a complete defense, although under the liberal discovery rules now existing, other means exist as well to obtain similar information.

The author cannot emphasize enough a careful reading of the entire set of decisions culminating in Gerstein v. Pugh, *supra*, including the ultimate decision by the Supreme Court of the United States. The requirement of a decision by a neutral and detached magistrate under the Federal Constitution also necessitates close analysis of the decision in terms of refusing to allow prosecutorial judgment standing alone. The question also arises as to what effect the failure to provide a preliminary hearing will have since the court quite specifically noted that a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.

Although not requiring an adversary hearing in Gerstein v. Pugh, *supra*, the Supreme Court of Florida went a step beyond in providing such a procedure. The Supreme Court of the United States further recognized the desirability of flexibility and experimentation by the states with the proviso that regardless of the procedure adopted, it must provide a fair and viable determination of probable cause as a condition for any significant pre-trial restraint on liberty, and this determination must be made by a judicial officer either before or promptly after arrest.

Historical Note

Derivation:

1972 Revision (272 So.2d 65).
1974 Amendment (289 So.2d 3).
1975 Amendment (309 So.2d 544).

Prior Provisions:

1971 R.Cr.P. 3.122.
Fla.St.1969, §§ 902.01 to 902.11, 902.13, 902.14, 902.18.
1967 R.Cr.P. 1.122.
Comp.Gen.Laws, Supp.1940, § 8663 (25 to 35, 37, 38, 42).
Laws 1939, c. 19554, §§ 25 to 35, 37, 38, 42.
Comp.Gen.Laws 1927, §§ 8328 to 8330, 8339.
Rev.Gen.St.1920, §§ 6031 to 6033, 6038.
Gen.St.1906, §§ 3931 to 3933, 3937.
Rev.St.1892, §§ 2874 to 2876, 2878.
Act No. 19, 1828, §§ 3, 5, 10.

Cross References

Compulsory process for witnesses, see F.S.A.Const. Art. 1, § 16.
Federal provisions, see 18 U.S.C.A. Fed.Rules Cr.Proc. Rules 5, 5.1.
Pre-trial intervention program, see F.S.A. § 944.025.
Pre-trial release, see Rule 3.130.
Witnesses, recognizance, see F.S.A. § 914.12.

Law Review Commentaries

Accepting indigent defendant's waiver of counsel and plea of guilty. 22 U.Fla.L.R. 453 (1970).

Comments on 1939 criminal procedure act. J. C. Adkins, 14 Fla.L.J. 48 (Feb.1940).

Exclusion of witnesses from courtroom while others testify. 9 Miami L.Q. 495.

Former testimony under the Uniform Rules of Evidence. Mandell Glicksberg, 10 U.Fla.L.R. 269 (Fall. 1957).

Master bond schedule: Equal justice under law? Steven Wisotsky, 24 U.Miami L.Rev. 808 (1970).

Preliminary hearing. Thomas A. Wills, 16 U.Miami L.Rev. 232 (1961).

Rules of criminal procedure. Thomas A. Wills, 22 U.Miami L.Rev. 240, 272 (Winter 1967).

Library References

Criminal Law ⇦223 et seq.
C.J.S. Criminal Law § 332.

Federal Rules of Criminal Procedure, rule 5, text, commentary, notes of decisions, see 18 U.S.C.A.

Rule 3.131 RULES OF CRIMINAL PROCEDURE

Notes of Decisions

I. ADVERSARY PRELIMINARY HEARINGS 1 TO 30
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I. ADVERSARY PRELIMINARY HEARINGS

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1. Validity

Procedure excluding misdemeanants faced with potential imprisonment from preliminary hearing was violative of Fourth Amendment and due process and equal protection clauses of Fourteenth Amendment. Pugh v. Rainwater, 1973, 355 F.Supp. 1286, affirmed in part and vacated in part 483 F.2d 778, certiorari denied 94 S.Ct. 595, affirmed in part and reversed in part 95 S.Ct. 854.

Procedure providing lengthier delay for preliminary hearings for those charged with capital offenses and those charged with offenses punishable by life imprisonment than for others held in custody was violative of due process and equal protection clauses of Fourteenth Amendment, and of Fourth Amendment. Id.

Failure of procedure to provide sanctions for failure to conduct preliminary hearing and refiling of information if defendant is discharged, although not unconstitutional of itself, violated Fourth and Fourteenth Amendments where it resulted in system denying preliminary hearings. Id.

Procedure excluding misdemeanants faced with potential imprisonment from preliminary hearing was violative of Fourth Amendment and due process and equal protection clauses of Fourteenth Amendment. Id.

Where court upheld criminal rule of procedure on ground that it was similar to federal rule which had not been impeached but where predecessor to rule had been found unconstitutional, court would, upon proper application, certify the question to the Supreme Court as being a question of great public interest. Cameron v. State, App.1974, 291 So.2d 222.

2. In general

Where state practices have been altered to provide preliminary hearings as required by district court order, sanctions contained in order would be vacated until such time as experience shows that procedure is not being followed. Pugh v. Rainwater, C.A.1973, 483 F.2d 778, certiorari denied 94 S.Ct. 595, affirmed in part and reversed in part 95 S.Ct. 854.

Preliminary hearing partakes of nature of inquiry and, outside of being conducted by magistrate, bears little or no resemblance to trial. State ex rel. Hardy v. Blount, 1972, 261 So.2d 172.

There are no issues, in a technical sense, in a preliminary hearing, there is no jury, strict rules of evidence are not enforced, and no formal charges are filed against defendant. Davis v. State, 1953, 65 So.2d 307.

A preliminary hearing is in the nature of an inquiry and is not in the nature of a trial. Id.

3. Federal decisions

When state court defendant seeks to challenge in federal court an aspect of criminal justice system which adversely affects him but which cannot be vindicated in state court trial, comity is no bar to his challenge. Pugh v. Rainwater, 1973, 483 F.2d 778, certiorari denied 94 S.Ct. 595, affirmed in part and reversed in part 95 S.Ct. 854.

State defendant who was charged with misdemeanor of assault and battery and who had been incarcerated prior to trial without benefit of probable cause hearing had standing to bring federal court action seeking declaratory and injunctive relief on claim that failure to provide preliminary hearing was unconstitutional. Id.

4. Purpose of hearing

Purpose of preliminary hearing is to determine if probable cause exists to hold accused for trial. Davis v. State, 1953, 65 So.2d 307; Palmieri v. State, 1967, 198 So.2d 633, certiorari granted 88 S.Ct. 1850, 391 U.S. 934, 20 L.Ed.2d 853, certiorari dismissed 89 S.Ct. 440, 393 U.S. 218, 21 L.Ed.2d 389, rehearing denied 89 S.

Note 4

Ct. 611, 393 U.S. 1045, 21 L.Ed.2d 596; State ex rel. Hardy v. Blount, 1972, 261 So.2d 172.

A preliminary hearing is in the nature of an inquiry with purpose being to determine if probable cause exists to justify holding accused for trial. Di Bona v. State, App.1960, 121 So.2d 192; Barton v. State, App. 1966, 193 So.2d 618.

Preliminary hearing is for purpose of determining if probable cause exists to hold one accused of crime for trial and it is not a prerequisite to criminal prosecution or filing of an indictment or information and ordinarily is not a critical stage in the proceedings. Anderson v. State, 1970, 241 So.2d 390.

In Florida, preliminary hearing serves only to determine whether or not probable cause exists to hold person for trial. Montgomery v. State, 1965, 176 So.2d 331, certiorari denied 86 S.Ct. 1955, 384 U.S. 1023, 16 L.Ed. 2d 1026.

Procedure of hearing a case preliminarily serves only to determine whether or not probable cause exists to hold one for trial, and prosecution may be instituted and maintained regardless of such an investigation. Hoffman v. State, App.1965, 169 So. 2d 38.

5. Right to hearing

Where information had been filed, defendant was not entitled to a preliminary hearing. Cameron v. State, App.1974, 291 So.2d 222.

District Court of Appeal had proper constitutional jurisdiction and power to decide question of whether defendant was entitled to a preliminary hearing where she was charged by information. Id.

Where defendant was charged by an information, he did not have right to preliminary hearing. Bradley v. State, App.1972, 265 So.2d 532, certiorari denied 93 S.Ct. 1543, 411 U.S. 916, 36 L.Ed.2d 307, rehearing denied 93 S.Ct. 1922, 411 U.S. 959, 36 L.Ed. 2d 419.

Preliminary hearing is not required if either an indictment has been returned or an information has been filed. Maxwell v. Blount, App. 1971, 250 So.2d 657, writ dismissed 261 So.2d 172.

Right to preliminary hearing is not limited to one who is arrested prior to filing of an information. State ex rel. Shailer v. Booher, App.1970, 241 So.2d 720.

Defendant was not prejudiced by denial of his motion for preliminary hearing, where grand jury by indictment found probable cause only two days thereafter. Anderson v. State, 1970, 241 So.2d 390.

Allegations of petitioner seeking to vacate judgment and sentence, that he was held in county jail without being given a right to a magistrate hearing and that he was denied a speedy trial because he was held for nine months and five days before going to trial were legally insufficient where petitioner did not demonstrate how he was prejudiced at trial by his failure to appear before a committing magistrate and by state's failure to try him before nine months and five days had elapsed. Alligood v. State, App.1967, 199 So.2d 515.

A preliminary hearing is not an indispensable prerequisite to the filing of an information, and it is not a necessary step in criminal proceedings. Palmieri v. State, 1967, 198 So.2d 633, certiorari granted 88 S.Ct. 1850, 391 U.S. 934, 20 L.Ed.2d 853, certiorari dismissed 89 S.Ct. 440, 393 U.S. 218, 21 L.Ed.2d 389, rehearing denied 89 S.Ct. 611, 393 U.S. 1045, 21 L.Ed.2d 596.

No preliminary hearing should be given by any judicial officer to a defendant who is brought before a judge of the magistrates court of Brevard county on a charge which such judge is empowered to try. 1968 Op.Atty.Gen., 068–18, Feb. 6, 1968.

6. Necessity of hearing

Failure to provide for preliminary hearing for defendants after information was filed was not reversible error, where only prejudice to defendants was that their applications for bail were rendered less effective. Scaldeferri v. State, App.1974, 294 So.2d 407.

Preliminary hearing is not essential stage in criminal proceeding and

is not, generally, absent showing of prejudice, critical step in prosecution. Conner v. State, App.1971, 253 So.2d 160.

Denial of defendant's motion for preliminary hearing made when she was incarcerated for more than 30 days awaiting trial after arrest on information was not reversible error, in absence of showing that denial of the motion prejudiced defendant's case at trial or otherwise. Evans v. State, App.1967, 197 So.2d 323.

Prosecution may be instituted and maintained regardless of whether preliminary hearing is held. Barton v. State, App.1966, 193 So.2d 618.

Preliminary hearing is not essential to due process. Johnson v. State, App.1966, 181 So.2d 667.

Prosecution may be instituted and maintained regardless of whether preliminary hearing is or is not held, and regardless of whether probable cause to hold accused for trial is or is not found. Montgomery v. State, 1965, 176 So.2d 331, certiorari denied 86 S.Ct. 1955, 384 U.S. 1023, 16 L.Ed. 2d 1026.

A preliminary hearing is not an essential stage in a criminal proceeding, and it is not a critical step in the prosecution. Dancy v. State, App.1965, 175 So.2d 208.

Denial of preliminary hearing cannot deprive defendant of due process of law and substance of fair trial. Gibson v. State, App.1965, 173 So.2d 766.

Preliminary hearing is not essential to due process and fair trial. Shannon v. State, App.1965, 172 So.2d 479.

Failure to conduct preliminary hearing for defendant who was represented by counsel at arraignment and at trial did not deprive defendant of substance of fair trial. Wilcox v. State, App.1965, 171 So.2d 427.

Failure to promptly grant preliminary hearing after arrest and before arraignment did not violate due process. Hoffman v. State, App.1965, 169 So.2d 38.

A preliminary hearing is not a necessary step in a criminal proceeding. Shea v. State, App.1964, 167 So.2d 796.

The procedure of hearing a case preliminarily is not a step in due process of law, is not a prerequisite to a criminal prosecution or the filing of an indictment, and it serves only to determine whether or not probable cause exists to hold a person for trial, and a prosecution may be instituted and maintained regardless of such an investigation. Baugus v. State, 1962, 141 So.2d 264, certiorari denied 83 S.Ct. 153, 371 U.S. 879, 9 L.Ed.2d 117.

Failure of arresting officer to take defendant before magistrate does not deprive county solicitor of right to file direct information. Simmons v. State, App.1961, 132 So.2d 235.

Where defendant was asked to come to police headquarters at 2 a. m. and after an accomplice had implicated defendant in aiding in disposition of stolen property, the defendant was retained or was not free to leave and was subsequently placed under arrest at about 4 a. m. and was permitted to contact his attorney after being advised of his constitutional rights and later on same day information was filed by solicitor charging defendant with crime of receiving or aiding in concealment of stolen property, a preliminary examination was not an indispensable prerequisite to prosecution, although defendant was taken into custody without a warrant. De Bona v. State, App.1960, 121 So.2d 192.

An information may be filed against a person arrested without a warrant without first having a preliminary hearing. 1943 Op.Atty.Gen. 497.

7. Delay

Procedure providing lengthier delay for preliminary hearings for those charged with capital offense and those charged with offenses punishable by life imprisonment than for others held in custody violated due process and equal protection clauses. Pugh v. Rainwater, C.A.1973, 483 F.2d 778, certiorari denied 94 S.Ct. 595, affirmed in part, reversed in part 95 S.Ct. 854.

Where during pendency of phases of case the state adopted plan to provide preliminary hearings to defendants' charge pursuant to informations filed by state attorney, and district court's order requiring such hearings conflicted with time period provided in state plan but no state defendant who was attacking failure to provide preliminary hearing was affected by time difference, that part of district court's order establishing maximum time period for preliminary hearing would be vacated. Id.

Procedure providing lengthier delay for preliminary hearings for those charged with capital offenses and those charged with offenses punishable by life imprisonment than for others held in custody was violative of due process and equal protection clauses of Fourteenth Amendment, and of Fourth Amendment. Pugh v. Rainwater, 1973, 355 F.Supp. 1286, affirmed in part and vacated in part 483 F.2d 778, certiorari denied 94 S. Ct. 595, affirmed in part and reversed in part 95 S.Ct. 854.

Eight-day delay between appearance and preliminary hearing is unreasonable, but four-day delay may be reasonable. Id.

While former F.S.A. § 901.23, requiring that an officer who arrests a person without a warrant "shall without unnecessary delay" take such person before a committing magistrate, is not in and of itself an essential element of due process in determining the admissibility of confessions obtained in state criminal proceedings; however, prosecuting officials and law enforcement officers should follow the procedures therein required as a precaution against the possibility that on some future occasion the rule might be extended to state courts as an aspect of 14th Amendment due process. Dawson v. State, App.1962, 139 So.2d 408.

8. Duty of magistrate—In general

In counties where there are criminal courts of record, justices of the peace have, in criminal cases, no trial jurisdiction, but, as committing magistrates, may inquire into criminal charges. Jackson v. State, 1894, 33 Fla. 620, 15 So. 250.

Where a defendant has already been lawfully arrested without a warrant and brought before a magistrate and a criminal charge placed against him, the magistrate thereby acquires jurisdiction over the defendant's person and may proceed to give him a preliminary hearing or, if the magistrate has trial jurisdiction over the case, may put him to trial, without issuing a warrant; and, in such a situation, a defendant is subject to being placed on bail to the same extent as though he had been arrested and brought in under a warrant. Op.Atty.Gen., 071–341, Oct. 13, 1971.

Only in a case which magistrate is not empowered to try and determine is county judge or other magistrate required to conduct a preliminary hearing. 1958 Op.Atty.Gen. 058–196, June 20, 1958.

The magistrate should examine the case, unless the defendant waives examination. 1947 Op.Atty.Gen. 162.

9. —— Warnings to accused, duty of magistrate

Failure of arresting officer to take defendant before committing magistrate for purpose of being advised of his rights did not deprive him of any rights due him in view of his previous experience with law resulting in his having been well so advised, and trial court's failure to permit withdrawal of guilty plea because of such failure was no abuse of discretion. Simmons v. State, App.1961, 132 So.2d 235.

Accused must be cautioned that his statement may be used against him. Coffee v. State, 1889, 25 Fla. 501, 6 So. 493, 23 Am.St.Rep. 525.

10. Waiver of hearing

Where preliminary hearing was held prior to filing of the information, even though defendant had waived preliminary hearing, where defendant made no statement at preliminary hearing as to his guilt or innocence and entered no plea at that time, and where no reference was made during the trial to the preliminary hearing or anything that tran-

spired at such hearing, preliminary hearing was not a critical stage of the criminal proceedings against defendant and alleged absence of counsel at preliminary hearing furnished no basis for postconviction relief. Cavanaugh v. State, App.1971, 249 So.2d 516.

Waiving of preliminary examination does not admit that either circumstances or character of defendant's offenses are different from what they really are or that his offense is more grievous or of a higher grade of criminality than evidence makes it in eyes of the law and defendant does not abandon any subsequent remedy given him by law. Anderson v. State, 1970, 241 So.2d 390.

Accused can not claim advantage because examination is not held after waiver. Benjamin v. State, 1889, 25 Fla. 675, 6 So. 433.

When a defendant voluntarily appears before magistrate and announces that he does not want a preliminary hearing, a legal waiver of preliminary hearing is effected. 1958 Op.Atty.Gen. 058–196, June 20, 1958.

11. Right to counsel

Failure to provide petitioner with appointed counsel at preliminary hearing during which robbery victim identified him as robber was not a denial of petitioner's right to counsel at a critical stage in criminal process. Harrison v. Wainwright, App. 1971, 243 So.2d 427.

Fact that defendant was not represented by counsel or counsel was not present at time of conversations with law officers did not violate defendant's constitutional rights in absence of showing that defendant was intimidated, threatened, coerced or forced in any manner to speak. Harris v. State, App.1968, 208 So.2d 108.

Fact that defendant did not have assistance of counsel at time that he voluntarily submitted to lie detector test, where defendant had been warned of all constitutional rights and prior to agreeing to test spoke to his attorney by telephone and was advised by attorney that he was not compelled to take test, did not deprive defendant of any constitutional rights. Id.

Lack of counsel at preliminary hearing is not denial of due process unless there is showing that such hearing was critical stage in criminal prosecution and that prejudicial harm resulted to defendant because of lack of counsel. Id.

Mere fact that defense counsel is appointed on day of trial does not establish deprivation to defendant of fair trial. Cappetta v. Wainwright, 1967, 203 So.2d 609.

Fact that defendant did not retain counsel until day before his trial did not establish deprivation of fair trial, in view of fact that defendant did not contend that failure to retain counsel until day before date set for trial was attributable to other than his own neglect. Id.

Prisoner who was adjudged guilty of offense of armed robbery and sentenced to serve 20 years in state prison, and who had been represented at arraignment by public defender, and by attorney of his own choosing at all subsequent stages of proceedings, was not entitled to post-conviction relief on grounds that he had been held eight days in jail before he could make telephone call to his mother, that at trial his guilt was not established beyond reasonable doubt, that he was not represented by counsel at his preliminary hearing, and that transcript of record of trial showed that state's witnesses testified falsely. Williams v. State, App.1967, 202 So.2d 821.

That defendant was not represented by counsel at preliminary hearing was not ground for reversal where no prejudice was shown in that defendant subsequently pleaded not guilty, waived jury and was tried before court and a transcript of proceedings at preliminary hearing was not presented in evidence. Diehl v. State, App.1967, 200 So.2d 240.

Preliminary hearing in Florida is not, ordinarily, a "critical stage" insofar as accused's right to legal counsel as due process requirement is concerned. Montgomery v. State, 1965, 176 So.2d 331, certiorari denied 86 S.Ct. 1955, 384 U.S. 1023, 16 L.Ed. 2d 1026.

Events may occur at preliminary hearing of such nature that lack of

counsel may result in denial of due process of law. Id.

Preliminary hearing is not an essential step in a criminal proceeding in absence of showing of prejudicial harm and lack of counsel at preliminary hearing does not constitute denial of due process of law. Brookins v. State, App.1965, 174 So.2d 578.

Assistance of counsel at preliminary hearing is not absolute requisite of due process of law. Abbott v. State, App.1964, 164 So.2d 243.

To constitute violation of due process, denial of counsel at preliminary hearing must be shown to have resulted in prejudice to defendant in some subsequent proceedings, or it must be shown that, under circumstances of case, preliminary hearing was critical stage in proceeding. Id.

Defendant was not entitled to have judgment of conviction vacated on basis that he was not represented by counsel at preliminary hearing, where record did not include anything indicating that preliminary hearing had been held or that circumstances attendant to arrest had been such as to require preliminary hearing. Id.

The preliminary hearing is not such a critical stage as to require that accused have counsel. Howard v. State, App.1964, 164 So.2d 229.

Preliminary hearing is not critical stage of criminal proceeding. Bell v. State, App.1964, 164 So.2d 28.

12. Summoning witnesses

Insolvent defendant must make affidavit as to what he expects to prove by his witnesses, in order that they may be subpoenaed. Bailey v. State, 1918, 76 Fla. 213, 79 So. 730.

The exercise of the right to have compulsory process for the attendance of witnesses is subject to legislative regulation that does not impair the right or deny its reasonable exercise for the benefit of the accused. Moore v. State, 1910, 59 Fla. 23, 52 So. 971.

A defendant, in a criminal case, is entitled to attachments for witnesses and to time for procuring their attendance. Green v. State, 1880, 17 Fla. 669.

13. Presence of defendant

The requirement that all witnesses at a preliminary hearing shall be examined in the presence of the defendant and may be cross-examined, is for the benefit of the defendant and confers a right upon him which he may waive with consent of the magistrate. 1960 Op.Atty.Gen., 060–58, March 24, 1960.

A committing magistrate has the power to conduct a preliminary hearing without the defendant being physically present where the defendant voluntarily waived his right to be present; however, such a defendant has the right to have his attorney represent him at such hearing. Id.

A defendant charged with a felony who wishes to waive his right to be physically present at his preliminary hearing should personally appear before the committing magistrate and request that his preliminary hearing be conducted in his absence, with such request to be made verbally or in writing as may be required by the magistrate; or, a written request to that effect, signed by the defendant, should be presented to the magistrate by the defendant's attorney. Where the defendant is charged with a misdemeanor either of the said courses mentioned above may be followed, or, if the defendant has specifically authorized his attorney to make such a request, the magistrate may permit such attorney to make it in behalf of the defendant. Id.

14. Transcript of hearing

Prosecuting attorney has the right or privilege to determine whether testimony taken at a preliminary hearing shall be transcribed. Newton v. State, App.1965, 178 So.2d 341.

Defendants in murder prosecution were not entitled to have made and delivered to them a transcript of all the testimony taken at preliminary hearing at the expense of the state where the prosecuting attorney had not requested that such testimony be reduced to writing. Baugus v. State, 1962, 141 So.2d 264, certiorari denied

83 S.Ct. 153, 371 U.S. 879, 9 L.Ed.2d 117.

This section provides for the testimony of witnesses at a preliminary hearing to be reduced to writing at the request of a prosecuting attorney by anyone of the three following methods: (1) by the magistrate, or (2) under the direction of the magistrate, or (3) by being taken in shorthand by a stenographer and transcribed. 1960 Op.Atty.Gen. 060–21, Jan. 29, 1960.

In order for this section to be activated so as to entitle the defendant to receive a free copy of the transcript of the testimony taken before the committing magistrate, the prosecuting attorney must request that such testimony be reduced to writing; such provision will not become operative upon such a request being made by either the magistrate or the defendant. Id.

Under provision of this section which provides for the testimony of witnesses at a preliminary hearing to be reduced to writing at the request of a prosecuting attorney, and for the furnishing of a copy of the transcript to the defendant without cost, a county would be liable for the per diem charged by a court reporter for attending a preliminary hearing before a committing magistrate at the request of counsel for the defendant when the testimony and proceedings of the preliminary hearing are reduced to writing by the said court reporter at the request of the prosecuting attorney. Id.

15. Evidence at hearing

Preliminary trial before a committing magistrate may require different degree of evidence than that required to convict in criminal court of record. Jefferson v. Sweat, 1955, 76 So.2d 494.

Preliminary trial before committing magistrate for purpose of determining existence vel non of probable cause is a "trial" and some evidence of corpus delicti must be thereat produced, to warrant further detention of accused. Id.

Evidence adduced before justice of peace on preliminary hearing is not required to be sufficient to sustain verdict of guilty, and evidence on preliminary hearing is sufficient if on whole it showed probable cause to believe defendant guilty of offense charged. Covey v. Sweat, 1939, 135 Fla. 536, 185 So. 337.

Court will take judicial cognizance of fact that county judge has jurisdiction as a committing magistrate in all felony cases arising within his county. Ex parte Sirmans, 1928, 94 Fla. 832, 116 So. 282.

16. Probable cause

"Probable cause" for criminal prosecution may be defined as reasonable ground for suspicion, supported by circumstances sufficiently strong to warrant cautious or prudent man in believing that accused is guilty of offense charged, as existence of such facts and circumstances as would excuse belief in reasonable mind acting on facts within knowledge of prosecutor, that accused was guilty, or such facts and circumstances as are sufficient to raise in generality of men of ordinary and impartial minds a belief of real, grave suspicion of guilt. Cold v. Clark, App.1965, 180 So.2d 347.

Where defendant signed affidavits charging the plaintiff, his estranged partner in used car business, with theft of automobiles and other property and plaintiff remained silent at preliminary hearing before justice of peace, the justice's ruling that plaintiff should be held for trial raised presumption of existence of probable cause to start the prosecution, notwithstanding that plaintiff was acquitted. Gallucci v. Milavic, 1958, 100 So.2d 375, 68 A.L.R.2d 1164.

In homicide cases, it is essential to existence of probable cause that death of person be established or that there be some evidence of the death of a person. Jefferson v. Sweat, 1955, 76 So.2d 494.

There can be no "probable cause" for larceny prosecution without some evidence that property has been lost by some one or has disappeared. Id.

In prosecution for being common gambler, possession of gambling stamp by accused was insufficient on preliminary trial before committing

magistrate to establish corpus delicti and, therefore, insufficient to establish probable cause for holding accused. Id.

Existence of probable cause is essential to magistrate's jurisdiction to make commitment. Sullivan v. State ex rel. McCrory, 1951, 49 So.2d 794.

Borrower's affidavit and examination of justice of peace leading justice to believe that there was just reason to believe that lender loaned money and wilfully and knowingly charged additional sum of money equal to more than 25 per cent. of money loaned, by loaning $12 for two days and accepting sum of $12.50 in repayment of loan, warranted justice of peace in binding lender over to await action of criminal court of record on charge of usury. Covey v. Sweat, 1939, 135 Fla. 536, 185 So. 337.

Judicial officer sitting as committing magistrate should not hold for bail and subsequent trial person accused of criminal offense where, on challenge duly made by appropriate legal procedure, it affirmatively appears that if trial were duly had, trial judge would be compelled to direct verdict of acquittal as matter of law. Ex parte Fortune, 1937, 126 Fla. 539, 171 So. 310.

Evidence was sufficient to hold accused to answer in preliminary examination stated. State ex rel. Stillman v. Merritt, 1924, 86 Fla. 164, 99 So. 230.

17. Transmission of papers

Period set by former Rule 3.122, now, this rule, governing transmission of bind-over papers by magistrate to clerk of court having trial jurisdiction of offense within seven days after discharging defendant or holding him to answer is not jurisdictional and is not statute of limitation. State v. Joseph, App.1971, 253 So.2d 275.

A justice of the peace has no jurisdiction to recall his decision and alter a charge after defendant has been remanded to a higher court. 1956 Op.Atty.Gen. 056-310, Oct. 25, 1956.

18. Confessions

Use of state prosecution of a voluntary confession given before defendant was taken before a magistrate and without defendant being advised of his constitutional rights did not constitute a denial of due process. Young v. Wainwright, C.A. 1964, 326 F.2d 255.

Where defendant's confession was obtained before date of Miranda decision, but his trial was subsequent to that date, and where it clearly appeared that exactions of Miranda were not met and that defendant's rights were thereby prejudiced, defendant's conviction would be reversed. Glover v. State, App.1967, 203 So.2d 676.

Admission of testimony of committing magistrate as to accused's judicial admission, without benefit of counsel, of truthfulness of his extrajudicial confession of rape denied due process. Harris v. State, 1964, 162 So.2d 262.

Voluntary confession not given as incident to any legal proceeding was admissible although coroner and committing magistrate, who was present, did not warn defendant of her constitutional rights. McCullers v. State, App.1962, 143 So.2d 909.

That defendants were arrested without warrant, were not taken immediately before committing magistrate, and were not advised of their constitutional rights would not render their extrajudicial confessions inadmissible. Young v. State, 1962, 140 So.2d 97.

If judge is satisfied that judicial confession was freely and voluntarily made, foundation for admission of confession is presented to jury who consider it as evidence in cause. Id.

Judicial confession must be proffered to trial judge in absence of jury to determine whether it was freely and voluntarily made. Id.

Trial judge resolves conflicts in evidence adduced at hearing for determination as to whether judicial confession was freely and voluntarily made. Id.

The McNabb rule as to admissibility of confessions is a rule of federal

procedure to be followed by federal courts and has no binding effect on state courts. Id.

Where state attorney gave defendant information as to his rights as required by statute when defendant was brought before committing magistrate, though statute required magistrate to give such information, but defendant was fully advised of his rights, error in admission of confession made when brought before magistrate was technical and harmless. Ezzell v. State, 1956, 88 So.2d 280.

Where record did not disclose when defendant was carried before a magistrate or when warrant for his arrest was secured, and deputy sheriff who made the arrest did not remember the date but believed the warrant was sworn out the day the arrest was made, and there was no showing that any harm resulted to defendant, presumption was that requirement that defendant was carried before a magistrate without any unnecessary delay, and that extra-judicial confessions were not erroneously admitted, on ground that defendant had not been carried before a magistrate. Rollins v. State, 1949, 41 So.2d 885.

When a sheriff or constable arrests a person under a warrant, and this person confesses his guilt to the arresting officer, the officer must take the person before the committing magistrate to issue the warrant for a preliminary examination, rather than notify the prosecuting attorney so that an information might be filed and defendant taken to plead guilty. 1947 Op.Atty.Gen. 592.

19. Juvenile proceedings

Where contention that confessions of 14-year-old defendant were inadmissible because defendant had not been brought before a juvenile judge prior to making of confessions and had not been afforded a preliminary hearing was not raised in trial court and was not raised by defendant's assignment of errors, district court of appeal could not consider the contention. Hernandez v. State, App.1973, 273 So.2d 130.

A juvenile court has no authority to try an adult for contributing to the delinquency of a minor, and therefore juvenile court, sitting as a committing magistrate, should bind the adult over to a trial court having proper jurisdiction. 1958 Op.Atty. Gen. 058–145, April 23, 1958.

20. Justice of peace court

Where justice of the peace filed bind-over papers past seven-day limit set forth in this rule providing that any magistrate who fails to transmit papers and articles as required may be ordered to do so by court having trial jurisdiction of offense charged, but there was no showing that defendant had been in any way prejudiced by such late filing, such late filing did not result in miscarriage of justice, and thus information should not have been set aside. State v. Joseph, App.1971, 253 So.2d 275.

Inasmuch as the justice of the peace courts for Osceola county are committing magistrates and have no trial jurisdiction over traffic cases, Florida Rules of Criminal Procedure, rules 3.120 through 3.130 govern the practice and procedures in said courts with respect to the issuance of arrest warrants and other related matters. Op.Atty.Gen., 071–125, May 26, 1971.

21. Perjury

A preliminary hearing is a "judicial proceeding" for purposes of perjury statutes. Bazarte v. State, App.1960, 117 So.2d 227.

22. Mandamus

Mandamus petitioners, all of whom had been charged by informations and none of whom had been held in custody for 30 days at time of denial of motions for preliminary hearings, were not entitled to preliminary hearings. Maxwell v. Blount, App.1971, 250 So.2d 657, writ dismissed 261 So. 2d 172; State ex rel. Hardy v. Blount, 1972, 261 So.2d 172.

23. Habeas corpus

If a defendant is in custody and there is no probable cause for holding him, he has immediate remedy through habeas corpus or provisions of rules of criminal procedure relating to preliminary hearing. State ex rel. Hanks v. Goodman, 1971, 253 So. 2d 129.

Rule against testing sufficiency of evidence on habeas corpus does not apply where one is held solely under process issuing from a magistrate, but such rule does not permit the court to examine sufficiency of evidence to determine guilt of accused and upon finding it insufficient to then grant judgment for him. Kelly v. State ex rel. Leonard, 1957, 92 So. 2d 172.

In habeas corpus to secure release of petitioner charged with conspiracy to commit grand larceny by removal of garage where circuit court did not hold information insufficient but held that in view of construction it placed on contract for removal of garage, which contract it had no right to consider, the garage was not on the property of the county but became the property of the mover who was required to remove it and that a removal thereof by the mover could not constitute larceny, the court improperly granted the discharge of the petitioners. Id.

Rule against testing sufficiency of evidence on habeas corpus does not prevent a court from examining evidence to determine whether guilt is evident or presumption great as bearing on right of an accused to bail where he is charged with a capital offense. Id.

Defendant accused of usury would not be released in habeas corpus proceeding on ground that facts were insufficient to show that he had committed usury, where charge was sufficient as basis for preliminary hearing before justice of peace and evidence adduced at such hearing was sufficient to warrant justice of peace in holding that there was probable cause to believe defendant guilty. Covey v. Sweat, 1939, 135 Fla. 536, 185 So. 337.

Waiver of examination does not waive writ of habeas corpus. Benjamin v. State, 1889, 25 Fla. 675, 6 So. 433.

24. Review

Supreme Court will not determine what will constitute sufficient evidence to sustain conviction before trial is had. Covey v. Sweat, 1939, 135 Fla. 536, 185 So. 337.

Discussion of occasions when Supreme Court would make examination. Ex parte Eagan, 1881, 18 Fla. 194.

II. PRE-TRIAL PROBABLE CAUSE DETERMINATIONS

Subdivision Index

31. In general

Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, the prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

A policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime and for a brief period of detention to take the administrative steps incident to arrest; however, once the suspect is in custody the reasons that justify dispensing with the magistrate's neutral judgment evaporates and the suspect's need for a neutral determination of probable cause increases significantly. Id.

State must give defendants charged in state court pursuant to filing of information by state attorney a preliminary hearing to determine probable cause for their arrests. Pugh v. Rainwater, C.A.1973, 483 F.2d 778, certiorari denied 94 S.Ct. 595, affirmed in part and reversed in part 95 S. Ct. 854.

32. Federal intervention

Ruling, on remand, that criminal procedural rule 3.130 as amended in 1972 continued the unconstitutional practice of retaining, without a judicial determination of probable

cause, an individual charged by information was not outside the jurisdiction of a single-judge district court since such ruling was in nature of declaratory judgment, in that the original complaint in Florida of prisoner's Civil Rights Act suit did not seek injunctive relief, practice of denying preliminary hearings was embodied only in judicial decisions and original injunctive decree was never amended to incorporate the holding on remand. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

The Younger doctrine, which imposes equitable restraints on federal intervention in state prosecutions, did not bar claims for federal relief as regards Florida procedures whereby a person arrested without a warrant and charged by information may be jailed without an opportunity for a probable cause determination since injunctive relief was not directed at state prosecutions as such but only at legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of a criminal prosecution; an order requiring such hearings could not prejudice the conduct of a trial on the merits. Id.

Not every unconstitutional pretrial procedure will entitle state court defendant to relief in federal court. Pugh v. Rainwater, C.A.1973, 483 F. 2d 778, certiorari denied 94 S.Ct. 595, affirmed in part and reversed in part 95 S.Ct. 854.

33. Procedure prior to rule

Florida procedure whereby a person arrested without a warrant and charged by information could be jailed or subjected to other restraints pending trial without any opportunity for probable cause determination was unconstitutional. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

Procedure whereby state attorney could file information and obviate requirement of determination of probable cause by neutral and detached magistrate was violative of Fourth Amendment and due process clause of Fourteenth Amendment. Pugh v. Rainwater, 1973, 355 F.Supp. 1286, affirmed in part and vacated in part 483 F.2d 778, certiorari denied 94 S. Ct. 595, affirmed in part and reversed in part 95 S.Ct. 854.

34. Constitutional safeguards

Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention. Id.

35. Necessity of determination

A judicial probable cause hearing is not prerequisite to prosecution by information. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

Neither due process nor Fourth Amendment requires probable cause determination by judicial officer for misdemeanants accused of violations which carry no possible imprisonment. Pugh v. Rainwater, 1973, 355 F.Supp. 1286, affirmed in part and vacated in part 483 F.2d 778, certiorari denied 94 S.Ct. 595, affirmed in part and reversed in part 95 S.Ct. 854.

Every arrested person who is to be proceeded against by direct information of the state attorney is entitled to immediate access to committing magistrate who shall conduct first appearance hearing for purpose of advising defendant of charges against him and of his rights under the Constitution and to appoint counsel if defendant is indigent and to set date and time for preliminary hearing to determine whether there is probable cause that defendant committed the offense with which he is charged. Pugh v. Rainwater (1972) 336 F.Supp. 490.

Preliminary hearing in cases in which information was filed by prosecuting officer without resort to magistrate was compelled by Fourth Amendment as well as by Fourteenth Amendment. Pugh v. Rainwater (1972) 332 F.Supp. 1107, supplemented 336 F.Supp. 490.

Under Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have constitutional right to judicial hearing on question of probable cause. Id.

Note 36

36. Nature of proceedings

There is no single preferred pretrial procedure for determining probable cause for detaining an arrested person pending further proceedings; nature of the determination usually will be shaped to accord with the state's pretrial procedure viewed as a whole; flexibility and experimentation by the state is desirable. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

The probable cause determination, as an initial step into criminal justice process, may be made by judicial officer without an adversary hearing. Id.

Whatever procedure a state may adopt for making a pretrial determination of probable cause for detaining an arrested person pending further proceedings, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint on liberty; such determination must be made by a judicial officer either before or promptly after arrest. Id.

37. Scope of inquiry

Single issue at a pretrial detention hearing is whether there is probable cause for detaining the arrested person pending further proceedings; such issue can be determined reliably by the use of informal procedures. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

38. Right to counsel

Because of its limited function and nonadversary character, the probable cause determination is not a critical stage in the prosecution that would require appointed counsel. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

39. Habeas corpus

Habeas corpus was not the exclusive remedy for challenging Florida procedure whereby a person arrested without a warrant and charged by information could be jailed without an opportunity for a probable cause determination where the suing Florida prisoner sought only declaratory and injunctive relief and release was neither asked nor ordered. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

40. Review

An arrestee may challenge the probable cause for his pretrial confinement; however, his conviction will not be vacated on ground that he was detained pending trial without such a determination. Gerstein v. Pugh, 1975, 95 S.Ct. 854.

Rule 3.140. Indictments; Informations

(a) Methods of Prosecution.

(1) *Capital Crimes.* An offense which may be punished by death shall be prosecuted by indictment.

(2) *Other Crimes.* The prosecution of all other criminal offenses shall be as follows:

In circuit courts and county courts, prosecution shall be solely by indictment or information, except that prosecution in county courts for violations of municipal ordinances and metropolitan county ordinances may be by affidavit or docket entries. A grand jury may indict for any offense. When a grand jury returns an indictment for an offense not triable in the circuit court, the circuit judge shall either issue a summons returnable in the county court, or shall bail the accused for trial in the county court, and such judge, or at his direction, the clerk of the circuit court shall certify the indictment and file same in the records of the county court.

Rule 3.131. Pretrial Probable Cause Determinations and Adversary Preliminary Hearings

(a) Nonadversary Probable Cause Determination.

[See main volume for text of (a)(1) to (3)]

(4) *Action on Determination.* If probable cause is found, the defendant shall be held to answer the charges. If probable cause is not found or the specified time periods are not complied with, the defendant shall be released from custody unless an information or indictment has been filed, in which event the defendant shall be released on his or her own recognizance subject to the condition that he or she appear at all court proceedings, or shall be released under a summons to appear before the appropriate court at a time certain. Any release occasioned by a failure to comply with the specified time periods shall be by order of the magistrate upon a written application filed by the defendant with notice sent to the state or by a magistrate without a written application but with notice to the state. The magistrate shall order the release of the defendant after it is determined that the defendant is entitled to release and after the state has a reasonable period of time, not to exceed 24 hours, in which to establish probable cause. A release required by this rule does not void further prosecution by information or indictment but does prohibit any restraint on liberty other than appearing for trial. A finding that probable cause does or does not exist shall be made in writing, signed by the magistrate, and filed, together with the evidence of such probable cause, with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

[See main volume for text of (b)]

(c) Additional Nonadversary Probable Cause Determinations and Preliminary Hearings. If there has been a finding of no probable cause at a nonadversary determination or adversary preliminary hearing, or if the specified time periods for holding a nonadversary probable cause determination have not been complied with, a magistrate may thereafter make a determination of probable cause at a nonadversary probable cause determination, in which event the defendant shall be retained in custody or returned to custody upon appropriate process issued by the magistrate. A defendant who has been retained in custody or returned to custody by such a determination shall be allowed an adversary preliminary hearing in all instances in which a felony offense is charged.

Added Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

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I. ADVERS

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Executive and Legislative Recommendation 3:
Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person.

Victims of crime are frequently required to come to court time after time in connection with a single case. Separate appearances are often required for the initial charging of the case, preliminary hearing, and grand jury testimony, in addition to repeated appearances for pre-trial conferences and the trial itself. The penalty for the victim's failure to appear at any court proceeding is usually dismissal of the case.

Requiring the victim to appear and testify at a preliminary hearing is an enormous imposition that can be eliminated. A preliminary hearing, as used in this context, is an initial judicial examination into the facts and circumstances of a case to determine if sufficient evidence for further prosecution exists. It should not be a mini-trial, lasting hours, days, or even weeks, in which the victim has to relive his victimization. In some cases, the giving of such testimony is simply impossible within the time constraints imposed. Within a few days of the crime, some victims are still hospitalized or have been so traumatized that they are unable to speak about their experience. Because the victim cannot attend the hearing, it does not take place, and the defendant is often free to terrorize others.

It should be sufficient for this determination that the police officer or detective assigned to the case testify as to the facts, with the defendant possessing the right of cross-examination. The defendant's right to pre-trial discovery of the government's case outside the courtroom and pursuant to local rules would remain intact. The sufficiency of hearsay at a preliminary hearing is firmly established in the federal courts, as well as in a number of local jurisdictions.

No. 54,830

STATE OF KANSAS,

Appellant,

v.

JERRY B. HUNTER,

Appellee.

SYLLABUS BY THE COURT

A magistrate conducting a preliminary examination serves a limited function: to determine whether it appears that a felony has been committed, and whether there is probable cause to believe that the accused committed it. The State need not establish guilt beyond a reasonable doubt at a preliminary examination.

Appeal from Douglas district court; JOHN MIKE ELWELL, judge. Opinion filed February 19, 1983. Reversed and remanded with directions.

Jerry L. Harper, district attorney, argued the cause, and Robert T. Stephan, attorney general, was with him on the brief for appellee.

Michael E. Riling, of Riling, Norwood, Burkhead & Fairchild, Chartered, of Lawrence, argued the cause, and Wesley M. Norwood, of the same firm, was with him on the brief for appellant.

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

ATTACHMENT # 2

DENNIS W. MOORE
District Attorney

Johnson County Courthouse
P.O. Box 728, 6th Floor Tower
Olathe, Kansas 66061
913-782-5000, Ext. 333

February 25, 1983

To Whom it May Concern:

The preliminary hearing has been expanded far beyond the boundaries the legislature originally intended. Many times it resembles a "mini-trial", often taking a day or more of the Court's time. It is my opinion that the preliminary hearing is a cumbersome and unnecessary vehicle for determining probable cause. It is a primary cause (at least in the counties where I have prosecuted) of the inordinate delays in disposition of cases.

Currently, the preliminary hearing is used by the State as a "testing ground" for evaluating their witnesses and overall soundness of their case. The preliminary hearing is used by the defense as a "discovery tool" to obtain information about the case and to build a record which can be used at trial to cross-examine and impeach the State's witnesses. Neither purpose is a good reason to take up valuable Court time. Both should be accomplished outside the courtroom. The proper procedure for discovery is utilization of the discovery statutes. The proper "testing ground" for evaluating a criminal case by the prosecution is through investigation and preparation.

As a prosecutor, I am acutely aware that many times the Courts, with all good intentions, in protecting the rights of the defendant, allow the rights of the victim and society as a whole to take second place. This is especially clear in the case of preliminary hearings. A preliminary hearing requires the presence of the victim to testify. If evidence or property is involved that cannot be released to the victim, the victim is denied use of his property for an additional period of time. The victims are not compensated adequately for testifying and they must miss work. Many times the victim is seen by the defendant at the preliminary hearing and feels that the defendant, who usually is on bond, may seek some type of retribution. Some victims are absolutely traumatized by those fears.

In short, all of the afore-mentioned problems are accentuated because of the way we proceed with the preliminary hearing. There is no constitutional requirement that it be conducted as it is in Kansas. Gerstein v. Pugh, a 1975 United States Supreme Court decision, considers what is required at the preliminary hearing. The preliminary hearing can (and should) be a brief proceeding conducted at or near the time of the first appearance. I envision a short hearing where the investigating officer testifies regarding his knowledge of the case; or where the reports concerning the case are submitted to the Judge. Then the Judge makes a determination as to whether or not the offense charged has occurred and whether or not there is probable cause to believe the defendant committed the offense. The matter can then be set immediately for arraignment and trial.

A change in procedure would result in time savings to the Court, money savings to the taxpayers, a quicker trial for the defendant, and less victimization for victims and witnesses.

Sincerely,

Dennis W. Moore
District Attorney

Stephen R. Tatum
Assistant District Attorney

ATTACHMENT # 3

AGE DISCRIMINATION IN EMPLOYMENT: A GROWING PROBLEM IN AMERICA

A Report by Chairman Claude Pepper
Select Committee on Aging
U.S. House of Representatives

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I. THE EXTENT AND NATURE OF AGE DISCRIMINATION IN EMPLOYMENT

Age discrimination in the workplace is a clear and pervasive problem. Employers and the American public believe beyond a doubt that discrimination against older workers is a major problem. Long-term unemployment, in part caused by discrimination, is more common among older persons than younger, and formal age discrimination charges are on the rise.

The problem of age discrimination stems from a complex set of factors. Among these are:

- persistent negative stereotypes of aging and productivity held by employers;
- a lingering cultural belief in the virtues of youth over age;
- increased foreign competition and a declining economy, both of which cause some employers to seek ways of cutting costs by terminating higher paid, older employees;
- rapid technological change, which in the absence of adequate retraining programs can result in skill obsolescence among some older workers;
- inadequate and poorly administered performance evaluation procedures to judge accurately the productivity of individual workers, independently of age.

Trends in Age Discrimination Complaints

- The number of age discrimination charges filed with the Equal Employment Opportunity Commission has increased by 76 percent since 1979.
- In FY 1981, 9,479 age discrimination charges were filed with the Federal EEOC and an additional 3,231 charges were filed with State and local agencies.

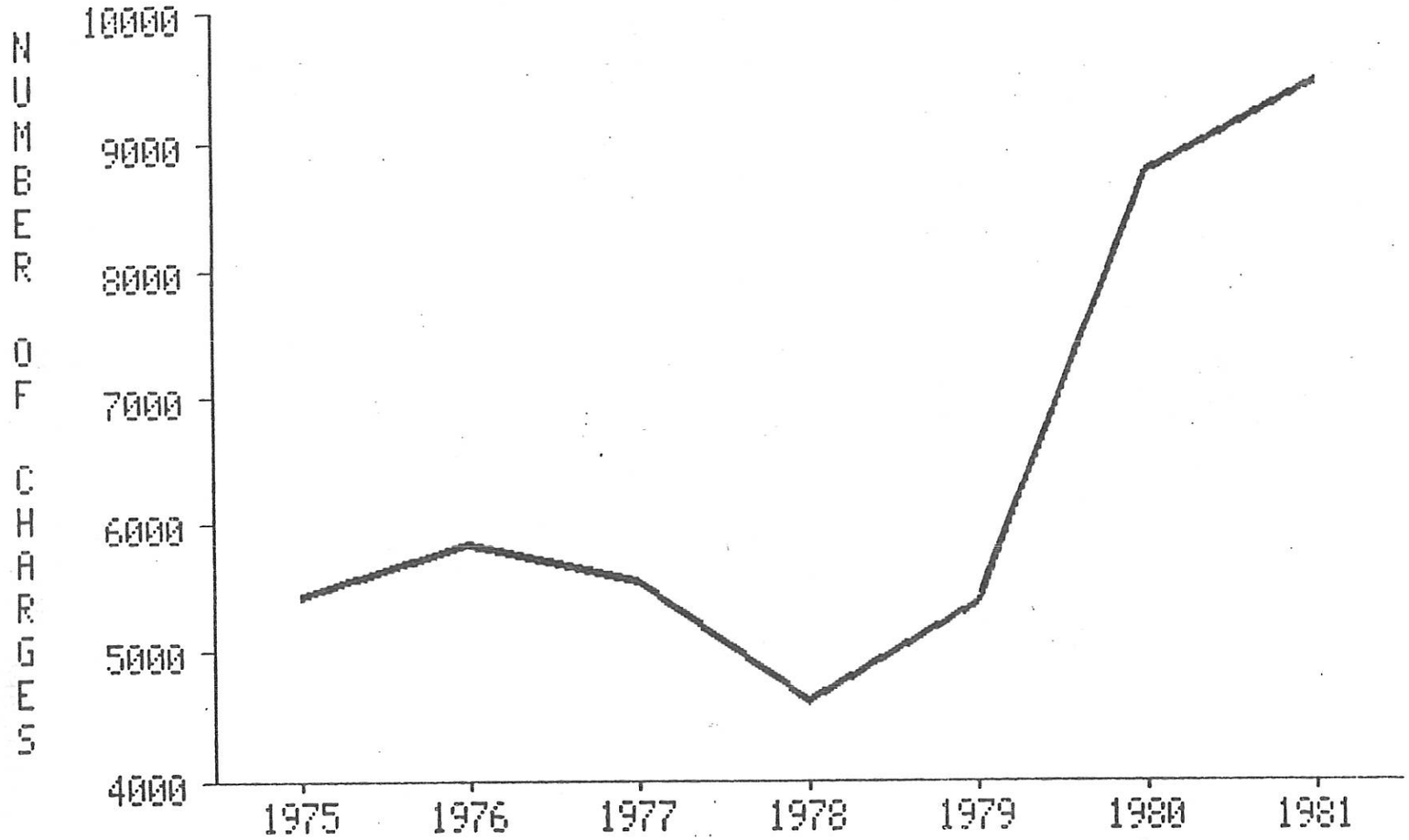
In 1969, two years after the ADEA was enacted, the Labor Department, then charged with enforcement responsibilities, reported 1,031 charges of age discrimination. This number grew steadily through 1978, at which time the enforcement duties were transferred to the EEOC. By 1981, the annual number of age discrimination charges had risen to 9,479. Since 1979, the number of charges has grown by 76 percent. (See Figure 1.)

The increase in age charges may be the result of intensified discriminatory activity by employers, but no studies are available to document this. The transfer of enforcement to the EEOC also may have drawn some attention to the Act, and thereby increased the number of Americans who are aware of their rights under the Act. Again, no studies have been conducted to verify or refute this notion.

The most likely explanation for the increased number of age charges may have been the Amendments to the ADEA enacted with great public fanfare in 1978. The 1978 Amendments were widely debated and publicized, largely because they were to alter the institution of retirement, moving the permissible mandatory retirement age upward to 70 from 65. The public discussion around mandatory retirement issues served to increase the nation's awareness of age discrimination as a problem. And, at the same time, heightened older workers' knowledge of their rights under the ADEA. Even so, only two in five Americans are even aware of the ADEA. Unless age discrimination is significantly reduced, we will, no doubt, see a further rise in age discrimination charges as awareness of the age discrimination statute increases in the future.

FIGURE 1:

NUMBER OF AGE DISCRIMINATION CHARGES PER YEAR, 1975 - 81



Source: Equal Employment Opportunity Commission and Department of Labor.

Characteristics of Persons Filing Age Discrimination Charges

- The typical person filing an age discrimination charge is age 50-59 and male.
- The typical charge filed against an employer is "unlawful termination due to age."

All persons seeking relief under the ADEA must file a timely charge with the EEOC or with the appropriate State enforcement agency. As noted in the previous section, 75 percent of all charges filed are processed by the EEOC; the remainder are handled by State or local agencies.

Beginning in late 1980, the EEOC began codifying all age charges and making them computer accessible. Preliminary data for FY 1981 provided to the Committee show several interesting patterns.

First, the vast majority (65 percent) of all age charges are filed by persons in the age range 50-64, with a strong clustering in the 50-59 age grouping. (See Table 1.) While only 5 percent of the charges were made by individuals over 65, nearly one-third (30 percent) were made by "middle-aged" workers age 40-49. Thus, seeking relief against age discrimination is not exclusively, or even largely, a concern of those over 65. Rather, it is the middle-aged and so-called "young old" who are most likely to file age charges. Furthermore, the age of charging parties is declining, according to some observers.

Table 1. Age Discrimination Charges Filed with the EEOC in FY 1981, by Age

	Number of Age Charges Filed		
Age	Men	Women	Both
40 - 44	663	459	1122
45 - 49	968	626	1594
50 - 54	1219	786	2005
55 - 59	1501	808	2309
60 - 64	1121	477	1598
65 - 69	312	139	451
70 +	13	7	20
Total	5797	3302	9099

A second finding is that forced termination because of age is the most common basis for filing an age discrimination charge; nearly half of all charges are filed for this reason. Discrimination based on an employer's failure to admit a person into a training program is the least frequent charge. Other types of charges — such as failure to hire, wage and benefit discrimination or denial of promotions and demotions — occur more frequently than discrimination in training, but less often than forced termination. (See Table 2.)

Table 2. Types of Age Discrimination Charges Filed with the EEOC in FY 1981

Type of Charge	Number	Percent
Termination*	7443	49
Hiring**	1915	12
Terms and Conditions	1188	8
Wages/Benefits	1134	7
Promotion	825	5
Demotion	540	4
Training	136	1
All other	2130	14
Total	15,311***	100%

* Discharge, layoff, involuntary retirement
** Hiring, recall
*** Total adds to more than 9,479 because charging parties can file more than one type of charge

Certain types of charges occur more frequently among specific age groups. For example, the vast majority of alleged discrimination in hiring and training occurs among the younger age groups, those who should expect greater ease in finding jobs and of being trained. In contrast, charges of discrimination in benefits are most common among the oldest workers, perhaps because this is when benefits become more valuable to the employee and, at the same time, are perceived by some employers to be more expensive.

Age charges are still predominantly filed by aggrieved males. Nonetheless, more than one-third of all charges in FY 1981 were made by females. The general patterns of female-initiated charges do not differ greatly from those of males.

Survey of Age Discrimination Victims

- Results of a 46-State survey shows age-based discrimination in employment affects every type of industry and every level of employee.
- The manufacturing industry is most often cited for age discrimination.
- Termination, forced retirement and resignation under pressure were the most common forms of discrimination reported.
- 71 percent reported that theirs was not an isolated case; they were part of a larger group of employees who were subjected to discrimination by their employer.
- Supervisory or management personnel were the most likely victims of age discrimination.

The results of a study conducted by the House Select Committee on Aging indicate that employment discrimination due to age exists in every type of business and industry and is perpetrated against employees at every level of responsibility and company operation. From the foreman of a concrete manufacturing plant to the president of a well-known marketing corporation, no one at any level of seniority or skill is immune from the effects of age discrimination.

The study results reported here are based on a survey mailed to 550 individuals in 46 States who had contacted a prominent law firm in Detroit, Michigan specializing in age discrimination litigation. The survey sample encompasses former or present employees of 318 corporations; the average age of the employees was 52.8 years, the average length of service was 18.2 years. While the sample cannot be considered representative of the nation as a whole, the data from this survey closely parallels that of the EEOC reported earlier.

Manufacturing, Service and the Wholesale/Retail Industry Cited Most Often. Respondents reported discrimination in all industries, but several were singled out more often than others. For example, over half of the respondents reporting discrimination had worked in manufacturing companies (52%). The service industry (17%) and the wholesale/retail industry (14%) were also frequently charged with discrimination. The finance/insurance/real estate (6%), transportation (6%), government (3%), mining/agriculture (1%) and construction (1%) industries were the least likely to be cited for discrimination. It may be that industries facing the greatest financial difficulties (manufacturing and wholesale/retail trade), and whose workforces are non-unionized, are most likely to discriminate against older workers in an attempt to cut costs.

Forced Termination Most Common. Most respondents were subjected to more than one type of discrimination because of age. Many were harassed, treated unfairly at promotion time, then terminated. The most frequent complaint, however, was forced termination. More than three-fourths of all respondents claimed they were terminated, forced to retire or coerced into resigning. Says one victim:

> . . . after having attained the country's best sales records, I was terminated during a 20-minute airport meeting. (a 50 year old branch manager with 20 years of service at a steel and aluminum distribution plant)

Many employers (34%) were accused of harassment. A 56 year old foreman at a manufacturing plant for lawn and garden equipment tells it this way:

> . . . [my supervisors] displayed animosity and made derogatory remarks about older employees by stating that they are over the hill, do not earn their pay, and that they take too much time in doing their job.

Twenty-eight percent of employees claimed they were not fairly compensated for their work, nor allowed to obtain their earned employment benefits. Another 24 percent reported being passed over for promotion. An assistant vice-president of a savings and loan told of his experience:

> . . . after 21 years I was forced to go to an industrial psychologist and was told I should be in administration, not management. No administrative jobs were available so I was asked to resign.

Eleven percent of respondents named "other" types of discrimination, such as forced demotion. As one older security officer put it:

> . . . although I was the oldest (seniority) most experienced sergeant in plant security [of an auto parts supplier] and had outstanding evaluation reports for 11 years, I was demoted because I did not fit into the new younger clique.

Most People Don't File Suit. Nearly two-thirds of all respondents had not filed suit against their employer for age discrimination. Reasons stated for not filing include the excessive expense and hassle involved, requirements by their unions to follow a specific grievance procedure, and fear of losing acquired severance pay or, worse yet, losing their current job.

For the 41 percent of respondents who had filed suit, nearly one-half are demanding back-pay and/or double damages. While fully one-third desire reinstatement to their past job or a new job in the same company, most are too bitter to return to work for their previous employer. In the words of a 58 year old government worker:

> . . . I seek retribution for the hurt of degradation, income reduction, and sense of uselessness dumped on me.

Three of Four Employers Accused of Widespread Age Discrimination. Most respondents (71%) believed their employer practiced age discrimination against more than a few employees. They felt they were not singled out, but were part of a larger pattern of age discrimination. Ironically, the enforcement strategy of the EEOC has increasingly emphasized individual charge processing, rather than pursuing large pattern and practice cases.

Supervisors and Managers Likely Victims. Nearly half (43%) of the respondents felt that discrimination was most often directed against supervisors and managers (especially middle-managers). Non-union workers were also likely targets. Fourteen percent said engineers were victims, while secretaries (15%) and salespeople (7%) were also perceived to be victims.

II. PUBLIC AND EMPLOYER ATTITUDES ABOUT AGE DISCRIMINATION IN EMPLOYMENT

Public Attitudes About Age Discrimination

- Eight of ten Americans believe most employers discriminate against older workers.
- Nine of ten Americans oppose age discrimination in the form of forced retirement because of age. And, this sentiment has grown stronger in recent years.
- There is only minimal support for the idea that older people should step aside and retire to make room for the young.
- Very few Americans are aware of their rights under the Federal statute protecting them against age discrimination in the workplace.

Despite 15 year old Federal legislation banning age discrimination from the workplace, most Americans still believe that employers discriminate against older people. Furthermore, nine out of ten also believe that such discrimination should be stopped, but very few are aware of the Federal law which is supposed to achieve this end.

Discrimination Viewed as Widespread. In 1974, Louis Harris and Associates conducted a nationwide survey of attitudes about aging issues. The public was asked to express their opinion about the following statement:

> Most employers discriminate against older people and make it difficult for them to find work.

The response: 80 percent agreed that most employers discriminate; 49 percent strongly agreed. Only 13 percent of the population in 1974 and 16 percent in 1981 felt that employers do not discriminate against older people.

A follow up survey by Louis Harris and Associates, conducted seven years later — in 1981 — discovered virtually no change in attitudes about the extent of age discrimination by the nation's employers. (See Figure 2.) Thus, despite legislative amendments in 1978 strengthening the Age Discrimination in Employment Act, and despite a wealth of evidence disputing the myth of the unproductive older worker, the vast majority of Americans still perceive that employers treat their older workers unfairly.

Strong Opposition to Age Discrimination. The most visible form of age discrimination is, of course, mandatory retirement. To assess whether the public believes this type of age-based discrimination is justified, the 1974 and 1981 Harris surveys asked people to respond to the following statement:

> Nobody should be forced to retire because of age, if he wants to continue working and is still able to do a good job.

The response: 86 percent agreed in 1974 that forced retirement is unjustified; this grew to 90 percent by 1981. More importantly, those who felt strongly that forced retirement is unjustified rose by 12 percentage points between 1974 and 1981 (66 percent to 78 percent). Thus, while public attitudes about the existence of age discrimination have not changed much over the past seven years, opposition to such discrimination has grown stronger.

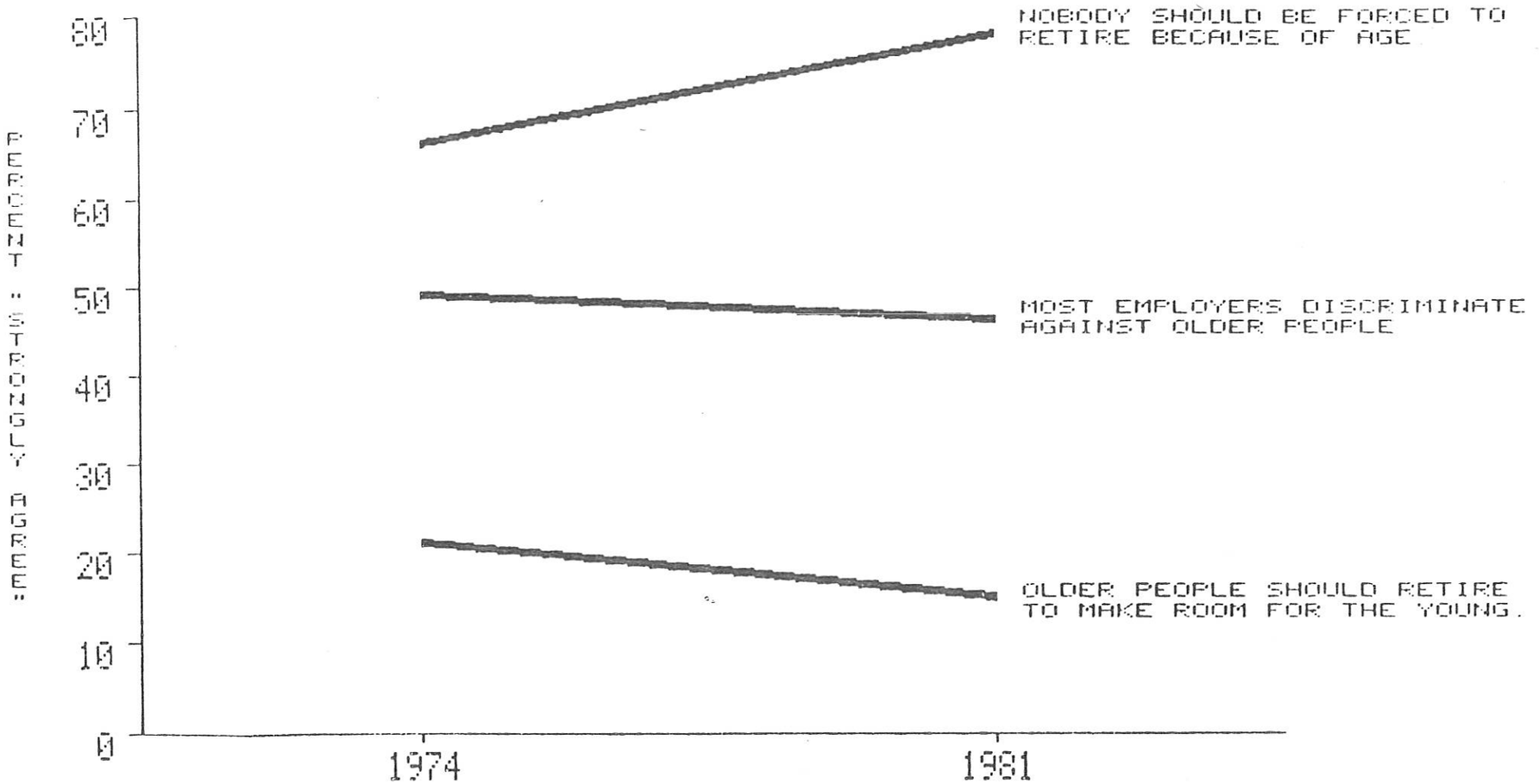
Not a "Young vs. Old" Conflict. As a partial justification for age discrimination, considerable attention has been given to the so-called generation war that allegedly pits young and old in a battle for limited jobs. The solution to this problem, according to some, is for older workers to relinquish their jobs to younger people.

Apparently, this solution is viewed as discriminatory and is not very popular, even among younger people. When the Harris surveys asked for reactions to the following statement,

> Older people should retire when they can to give younger people more of a chance on the job,

only 21 percent strongly agreed in 1974 and by 1981 only 15 percent strongly agreed. Moreover, younger people (age 18-64) were less likely to agree with this idea than were

FIGURE 2. CHANGE IN ATTITUDES ABOUT FORCED RETIREMENT AND AGE DISCRIMINATION
1974 vs 1981



SOURCE: LOUIS HARRIS AND ASSOCIATES FOR THE NATIONAL COUNCIL ON THE AGING: "AGING IN THE EIGHTIES" - 1981.

older people (age 65+). (See Figure 3.) Thus, to the extent there is competition for scarce jobs between young and old, it is not viewed by most Americans as a justifiable basis for discriminating against the old.

Many are Unaware of Federal Law. Although Federal legislation outlawing age discrimination has been on the books since 1967, only two in five Americans have heard or read something about the law, according to the 1981 Harris Survey. Furthermore, one-third of those who have heard or read something about the law have only limited or no awareness of its implications.

In summary, the American public believes age discrimination is practiced by employers, but that under no circumstances is it justified. Most, however, are unaware that a Federal law exists prohibiting such discrimination.

Employer Attitudes About Age Discrimination

- Age discrimination has been a part of the American workforce for 200 years, but has become institutionalized since 1915.
- Most employers believe discrimination against older workers exists in the marketplace
- Employers still exhibit widespread negative stereotypes about older workers.

Age discrimination, according to historian William Graebner, dates from the last quarter of the 18th Century. Up until 1915, age discrimination tended to be impersonal. Industrialization, increased market competition and the increasing popularity of the shorter workday brought demands for greater technology and, more importantly, for greater speed on the job. According to Graebner, the obsolescence caused by rapid technological change and the speed-up of the work pace was contrary to the interests of older workers and had the effect of discriminating against them.

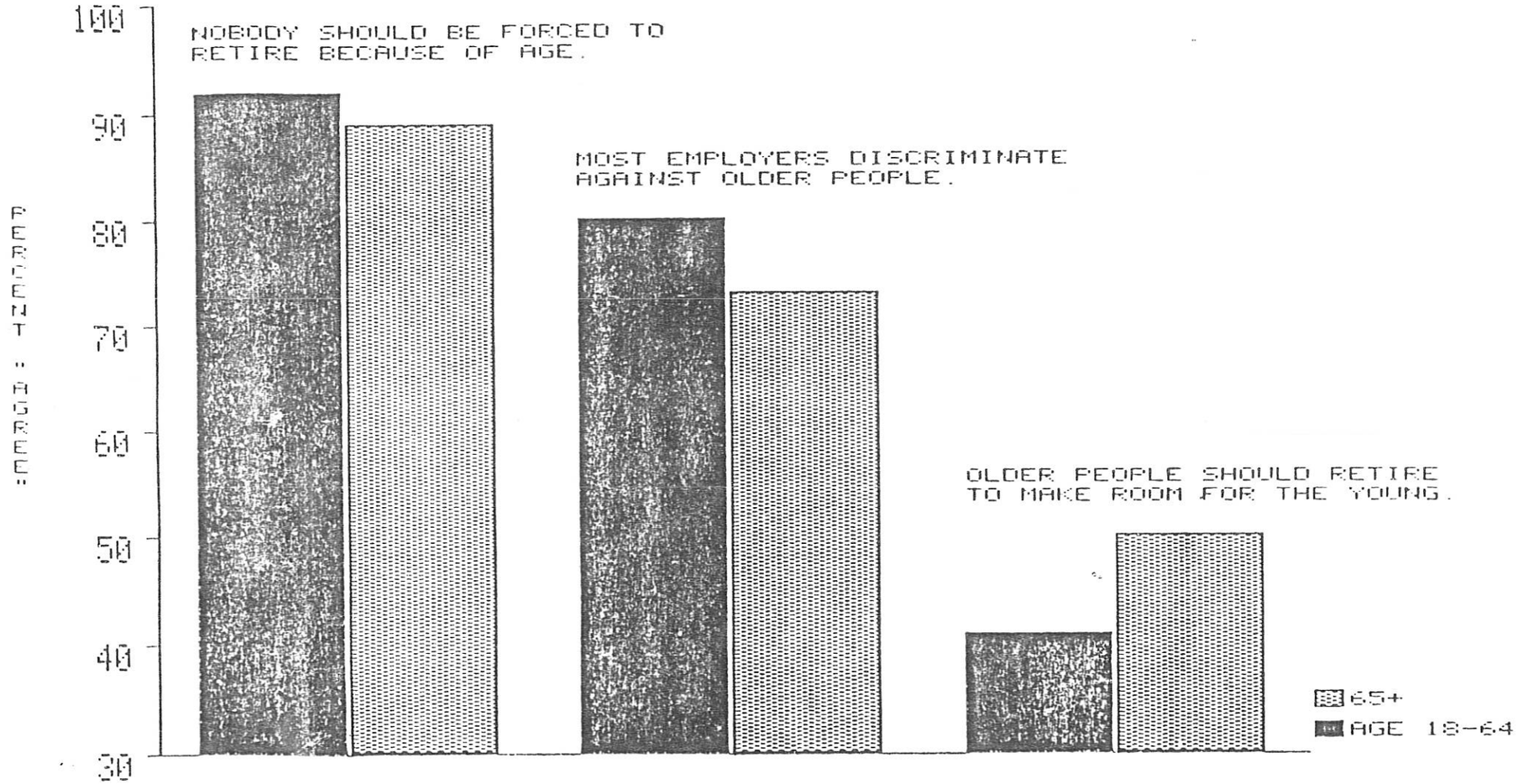
After 1915, age discrimination worsened, largely because of what Graebner calls the "youth cult" of the 1920s and because of the unemployment of the Depression. At the same time, age discrimination became more personal. Societal and employer attitudes after 1915 characterized the older worker as dispensable in favor of younger workers. The myth of declining productivity and obsolescence with age became institutionalized into American culture. For example, a 1938 survey by the National Association of Manufacturers found that older and younger workers were perceived to be substantially alike, but employers still expressed a clear preference for the younger workers.

The only factor which tempered these negative forces toward older workers was a belief, born during the early days of the trade union movement, that some older workers ought to be retained for their conservative influence on "hot-headed" younger workers. Graebner writes, "Excessive radicalism, associated in the public mind with youth and immaturity, could be countered with age."

Perceptions of Discrimination. Today, employers are aware of discrimination and most admit it is a serious problem. In a 1981 survey of 552 employers nationwide, conducted by William M. Mercer, Inc., it was discovered that most employers believe age discrimination exists; many would not hire a person over age 50, and salary discrimination is an admitted problem in some companies. The survey results are summarized below:

- 61 percent of employers believe older workers today are discriminated against in the employment marketplace;
- 80 percent predict there will be a significant increase in age discrimination lawsuits;
- 22 percent claim it is unlikely that, without the present legal constraints, the company would hire someone over age 50 for a position other than senior management;
- 20 percent admit that older workers (other than senior executives) have less of an opportunity for promotions or training; and
- 12 percent claim that older workers' pay raises are not as large as those of younger workers in the same category.

FIGURE 3: ATTITUDES ABOUT AGE DISCRIMINATION AND FORCED RETIREMENT 1981



SOURCE: LOUIS HARRIS AND ASSOCIATES FOR THE NATIONAL COUNCIL ON THE AGING: "AGING IN THE EIGHTIES" - 1981.

Employer Sterotypes of Older Workers. Numerous studies about employer (and future employer) attitudes toward older workers substantiate the existence of widespread negative stereotypes. In some cases, these stereotypes are based on incorrect factual evidence. For example, a study of business students and realtors disclosed a perception of older workers as "more accident prone." The facts suggest just the opposite is true: recent Labor Department data indicate that accident rates decline rather than increase, with age. Presumably, such factual misperceptions can be corrected with educational programs or experience.

Not all negative perceptions of older workers can be checked against the facts. These are the most difficult to change. Some employers hold diffuse attitudes about the general "employability" or "productivity" of older workers. For example, when 304 participants in an executive development program were presented with descriptions of hypothetical employees of different ages (all other characteristics were exactly the same) the participants were much less willing to hire the hypothetical employee if the age listed was 60 or above. No common reasons were given for this reluctance.

Other studies have discovered the following:

- When readers of the Harvard Business Review were asked to assume an administrative role in a fictitious organization and screen job applicants of varying ages, the results showed a clear bias against the older worker.

- When supervisors of older employees at the New York Department for the Aging were asked to rate the performance of their employees, researchers discovered that employees described as older also received the lowest job performance ratings.

The William Mercer survey of 552 firms described earlier, also asked employers to indicate the "concerns" they have about older workers. The results are telling. Nearly one-half of the employers were concerned that older workers were more costly or that they blocked promotional channels for younger workers. One-third were concerned about productivity-related problems, which may, in part, be the result of negative stereotypes about aging.

"Which of the following most closely approximates your management's greatest concern about older workers?"

Productivity-related issues	37%
Pension/welfare benefit costs	21%
Blockage of younger workers up the executive ladder	27%
Discrimination suits	3%
Other/no answer	12%
Total	100%

III. EFFECTS OF AGE DISCRIMINATION IN EMPLOYMENT

Surprisingly, very little is known about the impact of age discrimination on individuals or the larger society. Information is available about the individual effects of mandatory retirement, showing some health declines and premature death, but mandatory retirement is a special institutionalized form of age discrimination that, no doubt, has a less severe impact on older workers than other less predictable forms of discrimination. Unfortunately, these other forms have not been systematically studied.

In an attempt to shed some light on the effects of age discrimination, this section reviews variations in unemployment patterns by age, then extrapolates from research on non-elderly populations about the impact unemployment and job loss is likely to have on older individuals. Similarly, the effects on the larger society are analyzed in terms of unemployment patterns.

Unemployment Among Older Workers

- In 1980, there were 1.2 million unemployed workers age 45 and over, or 16 percent of all unemployed persons.
- Although the unemployment rate is lower among older than younger workers, the duration of unemployment among older workers is nearly twice that of young workers.
- 2.1 million persons aged 45 and over applied to the U.S. Employment Service for job-seeking assistance in 1980; only 17 percent were placed in jobs.
- One-half of all "discouraged workers" — those who have given up searching for a job — are age 45 and over.

Unemployment is caused by several factors, only one of which is discrimination in the workplace. Unemployment among teenagers for example, tends to be "frictional." That is, because jobs for teenagers are often temporary, seasonal or entry-level, there are frequent periods of unemployment as these young people jump from job to job. However, unemployment is also of limited duration among this age group.

Older workers, on the other hand, are generally well into a career, or at least they have moved up the ladder of seniority. Thus, they are both more experienced and more valuable. But, they also are more expensive. The older worker is less likely to be out of work at any given point in time, but when he or she becomes unemployed it often takes much longer to locate another job.

In 1967, the year the ADEA was enacted, 39 percent of the U.S. labor force was age 45 and over, but this group comprised only 23 percent of the unemployed. Today, 30 percent of the U.S. labor force is 45 and over, and they comprise 16 percent of the total unemployed. Thus, the proportion of older workers in the labor force has declined by 23 percent, while their proportion among the unemployed has dropped by 30 percent. This small drop in unemployment could be a reflection of the effectiveness of the ADEA in protecting older workers. But, it may also reflect the trend toward earlier retirement among many people who would have otherwise faced unemployment problems.

Table 3. Number of Older Persons Employed and Number Unemployed, 1967, 1980

	Civilian Labor Force (in millions)			Unemployed (in millions)		
Year	Total	45+	% of total	Total	45+	% of total
1967	77.3	30.1	39%	3.0	.7	23%
1980	104.7	31.7	30%	7.4	1.2	16%

Source: Employment and Training Report of the President, 1981.

Duration of Unemployment. The average duration of unemployment for workers age 45 and over was 17.4 weeks in 1980; for teenage workers the average was only 9.3 weeks. Thus, once unemployed, older workers remain out of the labor force nearly twice as long as young workers. The duration of unemployment for older workers (age 45+) is 26 percent longer than for all age groups combined. (See Table 4.) As Figure 4 illustrates, long-term unemployment (27 weeks or more) increases with age up to age 65.

Table 4. Mean Number of Weeks Unemployed by Age

	Annual Averages		
Age	1979	1980	1981
16 - 19	7.4	8.0	9.3
20 - 24	9.7	11.1	13.0
25 - 34	11.1	13.1	14.8
35 - 44	13.3	13.5	16.1
45 - 54	14.5	15.2	17.0
55 - 64	17.0	15.5	18.4
65 +	16.1	14.1	16.3
16 +	10.8	11.9	13.8
45 +	15.5	15.3	17.4

Source: Bureau of Labor Statistics, unpublished CPS Base Tables, Table 51A.

Discouraged Workers. In 1980, there were 971,500 "discouraged workers." These are individuals who want jobs but are not actively looking for work because they believe they will not find any. They are not counted in the labor force, nor are they counted among the unemployed. However, when unemployment rises, so also does the number of discouraged workers.

There were 1.1 million discouraged workers in 1980, of which 377,000 were age 45 and over. Thus, more than one-third of all discouraged workers are older. This is, in part, the result of age discrimination in the labor force. Moreover, many older persons do not show up as discouraged or unemployed; they simply retire when eligible and remove themselves from the job market entirely. Therefore, the official statistics on discouraged older workers significantly underestimate the extent of this problem.

Older Workers and the Employment Service. The U.S. Employment Service is a Federal-State cooperative effort to provide job assistance to various segments of the population, including older workers. In 1980, there were 16 million applicants to the Employment Service, 2.1 million of which were age 45 and over. The Service placed 24 percent of all its applicants, but only 17 percent of its older applicants, age 45+. Thus, of the 2.1 million older applicants, only 355,000 were placed in jobs.

Societal Costs of Age Discrimination

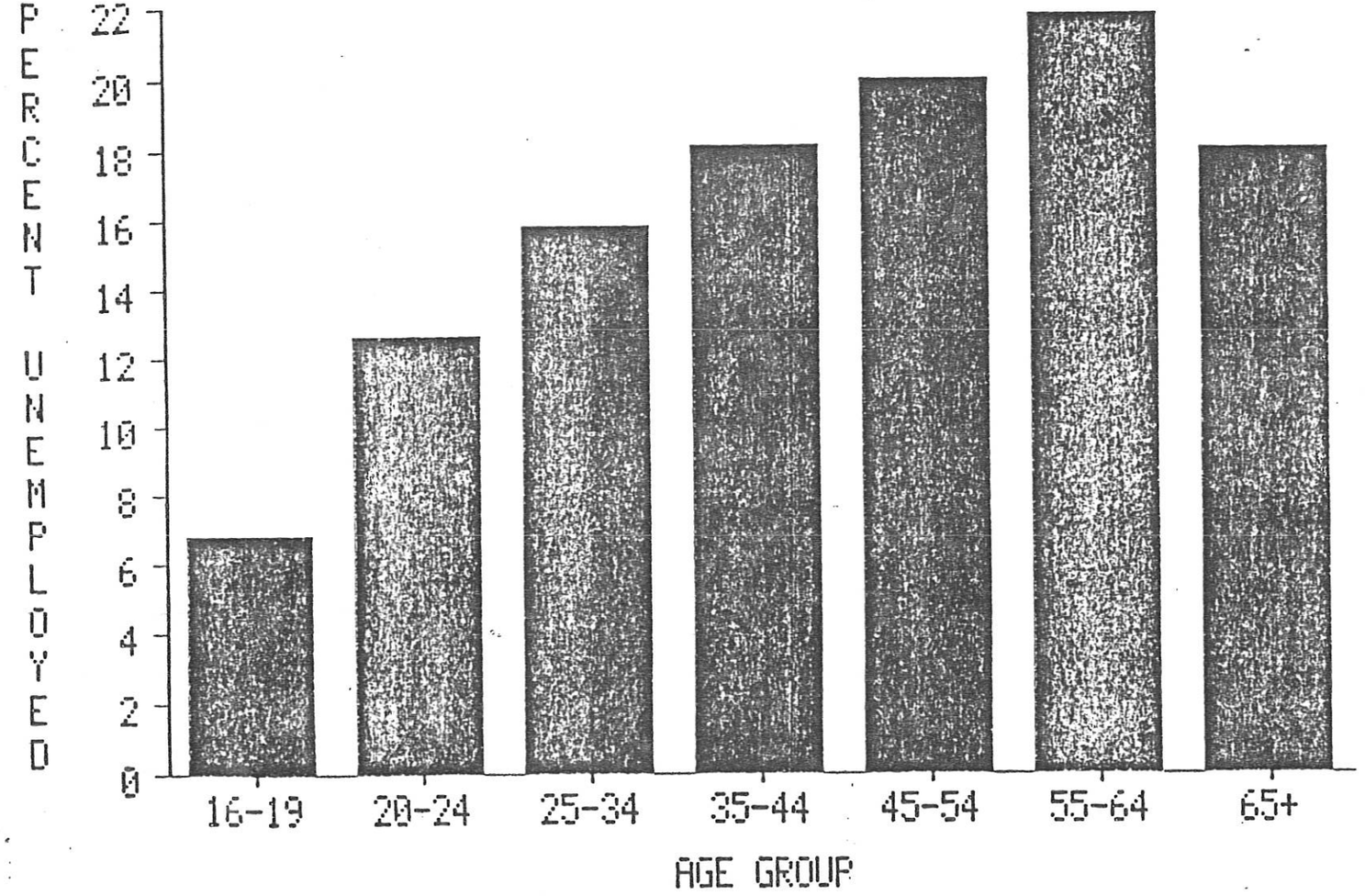
- Nearly 2 million person years of productive time are lost to the workforce because of unemployment among older workers.
- Unemployment insurance benefits paid to older workers exceeds $2.2 billion annually.

It is a reasonable estimate that approximately two million person years of productive time are lost due to unemployment among older workers. It is also safe to assume that much, if not most, of long-term unemployment is caused by age-based discrimination. Therefore, age discrimination is a major contributor to losses in productivity by older workers.

In addition to the indirect losses of productivity to society caused by unemployment, there are also direct costs associated with age discrimination. At present, for example, unemployment insurance payments to older workers exceed $2.2 billion annually. The early retirement costs of Social Security and private pensions also increase when able-bodied older workers are unable to find jobs because of their age.

FIGURE 4:

PERCENT OF UNEMPLOYED WHO ARE OUT OF WORK 27 WEEKS OR MORE BY AGE -- 1981



Eliminating the remaining vestiges of age discrimination, rather than allowing it to whittle away the older working population, would be beneficial to the nation's economy. In a September 8, 1981 hearing before the Select Committee on Aging, Dr. Lawrence Olson of Data Resources, Inc. testified that encouraging greater labor force participation among older workers would be beneficial to the economy. On the contrary, allowing the labor force rates of older workers to decline, as it has for the past 40 years, would be detrimental to the economy.

Individual Costs of Age Discrimination

- Forced termination from one's job is considered to be among the most stressful events a person can face in life.

- Because of the fewer options available to them, older workers who become unemployed experience much greater emotional, physical and financial problems.

The experience of forced termination at work is among life's most traumatic events. In a study of the effects of plant closings, Dr. Harold Sheppard interviewed older former employees of the Studebaker Corporation shortly after they lost their jobs. Their comments are indicative of the impact of job loss:

> I felt like someone had hit me with a sledge hammer.
>
> I felt way down in the mouth, depressed, I was looking forward to 6 or 7 more years. (59 year old worker)

Researchers who have studied major life events have discovered that being "fired at work" is ranked among the top eight most stressful events. It is exceeded only by death of spouse or close family member, divorce, jail term, and personal injury.

The psychological and physical effects of job termination are pronounced, especially among older persons. Generally, there is an overall increase in deprivation, depression, anxiety, anger, resentment and identity loss. These often contribute to physical ailments, such as heart problems, hypertension, and even high cholesterol levels. Suicide can result in extreme cases.

The problem of job loss for older workers is complicated by the existence of age discrmination. The elderly are the most vulnerable because very few options remain open for them. A terminated Studebaker plant worker summed it up best when he said,

> Where will this old man look for a job? I'm too old for a job and too young to retire!

IV. BASIC PROTECTIONS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

When the Civil Rights Act of 1964 was enacted, age was specifically excluded as a protected category because, unlike discrimination based on race and sex, age discrimination had not yet been well documented as a major national problem. Instead, the Civil Rights Act directed the Secretary of Labor to "make a full and complete study" of age discrimination in employment and its consequences on individuals and the economy, and to report the results to Congress.

The Labor Department study was submitted to Congress on June 30, 1965 and two years later the Age Discrimination in Employment Act of 1967 (ADEA) was enacted to prohibit employment discrimination against persons age 40 to 65. In 1978, the Act was amended to extend protections beyond age 65 — with no upper age limit for Federal workers and up to age 70 for non-Federal workers.

Basic protections

The ADEA prohibits employers, employment agencies or labor organizations from discriminating on the basis of age in such matters as hiring, job retention, compensation and other terms, conditions and privileges of employment. The Act prohibits employment-related advertisements that show preference, limitation or discrimination based on age. And, labor organizations may not classify or refer persons based on their age.

In the 1978 Amendments, mandatory retirement was specifically outlawed for most Federal workers at any age and for private sector and State and local employment before age 70. Furthermore, the 1978 Amendments to the ADEA specifically prevent employee benefit plans — such as retirement, pension or insurance plans — from including mandatory retirement provisions for protected workers.

Exemptions

The 1978 Amendments contained several important exemptions. First, executives and policymakers are protected only to age 65, if the individual has been employed in a "bona fide executive or a high policymaking position" for at least two years and is entitled to an annual retirement benefit provided by the employer of at least $27,000. Such high-level executives and policymakers can, therefore, be mandatorily retired upon their 65th birthday.

A second exemption applies to tenured employees in institutions of higher education. Such employees (generally professors and teachers) also are protected only to age 65, after which they too can be forcibly retired or otherwise discrminated against based on age. Unlike all other exemptions in the ADEA, however, the tenured employee exemption automatically expires on July 1, 1982.

A third exemption applies to employee benefits. The legislative history of the 1978 Amendments left room for a subsequent Labor Department interpretive bulletin allowing employers to reduce certain employee benefits for workers age 65 and over. For example, pension contributions can be reduced or discontinued when an employee reaches age 65. Life insurance and health benefits may also be reduced if the employer can demonstrate that such benefits are more expensive for workers over age 65 than for those under 65. Employers are allowed to reduce such benefits provided the employer's contributions for workers 65 and over are not less than for those under 65.

Last, certain Federal occupations were excluded from the Act — air traffic controllers, airline pilots, Federal law enforcement officers, prison guards and firefighters, employees of the Alaska Railroad, Panama Canal Company, Canal Zone Government, Foreign Service and Central Intelligence Agency. These occupations are covered by provisions in separate statutes.

Procedural Issues

Several significant procedural changes were added to the ADEA in 1978, largely because of concern that the courts were dismissing lawsuits on procedural grounds, without consideration for the merits of the complaints.

Before going to court, an aggrieved individual must first file a "charge alleging unlawful discrimination" with the Federal enforcement agency within 180 days of its occurance (or 300 days if the alleged violation occurred in a State which has an agency empowered to grant or seek relief from age discrimination). After 60 days from the date of filing, or after conciliation efforts by the appropriate enforcement agency have failed, the charging party may file a private suit.

The statute of limitations — two years for nonwillful violations and three years for willful violations — may be tolled (extended) for up to one year, to allow the Federal agency more flexibility to attempt conciliation. The tolling provision was added to the ADEA in 1978 to prevent those employers who may have violated the law from delaying conciliation with the idea of avoiding back pay liabilities because of the statute of limitations.

One of the most important procedural amendments of 1978 was that providing for a jury trial option. A jury trial is available to individuals in cases when alleged discrimination involves potential monetary liabilities, usually in the form of back pay.

Enforcement of the Act

Until 1979, the Department of Labor had jurisdiction over all aspects of the ADEA. With "Reorganization Plan No. 1 of 1978" the responsibility for ADEA enforcement shifted to the Equal Employment Opportunity Commission (EEOC). Enforcement responsibility by the EEOC for the Federal sector became effective on January 1, 1979, and for private sector and State and local government employment it became effective on July 1, 1979.

Number of Employees Protected by the Act

- Recent Labor Department statistics estimate that 28 million persons are covered by the ADEA. This is 7 out of every 10 Americans aged 40 to 70 in the civilian labor force.

The population protected by the Age Discrimination in Employment Act has grown dramatically since it was enacted 15 years ago. At that time there were 57 million men and women age 45 and over; today there are 69 million — a 21 percent increase — and by the year 2000 there will be 91 million. According to the Labor Department, 28 million workers (age 40-70) are presently covered by the ADEA.

When the ADEA was enacted, half the population was under 29. Despite predictions at that time that the median age would drop to 26 by 1975, it actually has risen, such that half the population is now over 30. The population is aging faster than predicted. And, as a result, the number of persons who fall within the protected age group has risen sharply.

Although the total population age 45 and over has grown by 21 percent since enactment of the ADEA, the number of persons in this age group who are working has grown by only 5 percent. Early retirement, the greater availability of adequate retirement benefits and age discrimination on the job have all contributed to declines in labor force participation rates among older workers. Thus, the older population has grown dramatically, but the number of working persons who might benefit by the ADEA has increased only slightly.

H.B. 2523

KANSAS AGE DISCRIMINATION IN EMPLOYMENT ACT
HOUSE JUDICIARY COMMITTEE
FEBRUARY 25, 1983

Bill Summary: Establishes as Kansas Age Discrimination in Employment Act by prohibiting certain employment related practices based on age.

Bill Provisions:

1. Prohibits the use of age as the sole criterion for employment decisions for workers between the ages of 40-70.
2. Establishes unlawful employment practices based on age for employers, labor organizations, and employment agencies:
   - hiring, termination, compensation
   - classification
   - terms, conditions and privileges.
3. Establishes what can not be considered an unlawful practice
   - Bona-Fide occupational qualification
   - Seniority system
   - Observation of qualified pension or retirement system
   - Mandatory retirement age of 70 years or above.
4. Designates the Kansas Civil Rights Commission to investigate and handle complaints.

Further states "Nothing in the Act...shall mean that an employer shall be forced to hire unqualified or incompetent personnel."

Testimony: Kansas Department on Aging

Age discrimination in employment is a continuing and serious problem which prevents Older Kansans from achieving full and equal employment. It occurs when older people, because of their age are not hired, are passed over for promotions, forced to retire, or are terminated solely because of age.

For every other type of discrimination, with one exception, the Kansas legislature has developed statutes to prohibit those discriminatory practices. That one exception is age discrimination in employment.

The position of the Kansas Department on Aging is that Kansas statutes should be amended so that older workers are protected from discriminatory employment practices solely because of age, and that the state's position be made clear. Kansas is opposed to Age Discrimination in employment.

Kansas is one of only 5 states that has no Age Discrimination in Employment statute.

H.B. 2523 provides those protections:

1. By prohibiting discriminatory employment based on age as they presently are for race, sex, nationality, etc.
2. Designates KCCR to receive and investigate those complaints as they do for all other protected groups.
3. Outlines those practices that are not unlawful.

It does not in any way, prevent an employer from employment normal, personnel practices. They can still fire incompetent personnel and hire qualified people. The employer does not have to hire an incompetent older person any more than an incompetent younger person.

Age Discrimination in Employment is a common and relatively widespread occurence. The problem of being laid off or fired is especially difficult for the older worker with cost consequences to the individual, the state, and the economy. Although older workers have high employment, once unemployed they are unemployed longer. The duration of their unemployment is almost twice that of younger workers, and 26% higher than all other workers. Placement for those aged 45+ and over through the Kansas Department of Human Resources is ½ that of other workers (12.5% 55+, 22.1% all others).

Not all unemployment is due to age discrimination. But age discrimination is a signficant factor in long-term unemployment. Age discrimination resulting in unemployment and forced early retirement creates an increased financial burden on state and federal government in unemployment benefits ($2.2 billion nationally), early retirment benefits and on the state's welfare system let alone the cost to the individual.

Some form of employment allows older persons to remain independent, self-sufficient and allows them the dignity of feeling useful and contributing to their own well-being as well as the country's productivity.

Fear that older workers will replace younger workers has not borne out. The U.S. Department of Labor found the effect of older worker employment on younger worker displacement was minimal, less than ½ of 1%.

Because age is not protected category in our employment discrimination laws, KCCR has no jurisdiction to receive or investigate or resolve complaints or enter into "worksharing agreements" with the federal government which would defray state cost.

Kansans must file complaints under federal law with the EEOC Commission with the nearest office in Kansas City, Missouri and most investigations done from St. Louis. The relatively inaccessibility and time delays often deter many older persons from seeking protection against illegal discrmination.

The regional office indicated 325 age discrimination cases were filed; approximately 25% of their case load. Not all cases required field investigation; however, the average number of investigations in ADEA cases was 112 investigated annually.

With a state law a citizen could file with either the federal or state government, if the employer had 20 or more employees, and with the state for 4-19 employers.

As with other protected classes, a 'worksharing' agreement could possibly be entered into between KCCR and EEOC which would reimburse KCCR at $375 per joint case. By passing H.B. 2535 some additional resources could be made available. KCCR indicated they received approximately $200,000 under this contractual arrangement for other protected groups.

We also checked with surrounding states of Oklahoma, Nebraska and Iowa about their case loads. They indicated that Age Discrimination comprised between 5-8% of their total filings. With the first year being between 3.5%.

In Kansas with approximately 800 cases, that would be an increased case load of approximately 40-64 cases. The fiscal note estimated in 1981 for S.B. 143, passed by the Senate 38-0, was approximately $19,000 for one additional investigator and part-time support staff.

A state enforcement mechanism would afford every Kansan greater access to file complaints and more effective investigation due to local familiarity and shorter travel distances. Kansans, I believe, have more confidence in state based solutions and in the greater quality of that enforcement. State procedures also offer greater efforts for conciliation and mediation than do federal procedures.

The investigation and review process of KCCR would essentially be the same by adding age, except that only employment would be covered.

Older Kansans deserve equal opportunity and state protection against employment. It is a high cost to society in lost talents and income when older people are not allowed to work because of their age.

KDOA urges passage of H.B. 2325:

-Because its fair.
-Because its time.
-Becuase older people deserve to have equal opportunity to work, based on their merits.

AGE DISCRIMINATION IN KANSAS
NEED FOR A STATE ANTI-DISCRIMINATION IN EMPLOYMENT ACT

INTRODUCTION:

Age discrimination in employment is a continuing and serious problem which prevents Older Kansans from achieving full and equal employment opportunities. This problem was recognized at the national level by the passage of the 1967 Age Discrimination in Employment Act. The federal ADEA applies to federal and state governments, private employers with over 20 employees, labor unions and employment agencies, protecting most of those aged 40-69, from job bias in hiring, firing, and other conditions of employment. The Equal Employment Opportunity Commission (EEOC) is the independent federal agency charged with enforcement of the ADEA. The ADEA also authorizes private lawsuits by individuals subjected to age discrimination.

THE RIGHT AND NEED TO WORK

Age discrimination in employment is a common and relatively widespread occurrence. It occurs when older people because of their age are not hired; are terminated, passed over for promotion, or forced to retire.

A report released in February of 1982 by the House Select Committee, notes that age discrimination affects all types of workers and workers of all ages. The EEOC reports that most age discrimination charges pertain to hiring and termination; most complainants are under 60; one-third are under 50. The typical victim is age 50-59, male, and has been forcibly terminated.

Perhaps its most common form is pressure to retire, or mandatory retirement. Even though many older persons retire voluntarily, a large number retire because they cannot find work. Although mandatory retirement does not mean automatic withdrawal from the labor force, the search costs and reluctance of firms to hire new employees in their mid-sixties may make a retirement situation permanent.

The problem of being fired or laid off late in life is especially difficult for the dislocated older worker, taking a heavy toll emotionally and physically. After age 40, finding a new job becomes more difficult. A House Select Committee February, 1982 report indicated that it takes those 45 and over, an average of 17.4 weeks longer to find new employment. Employers may consider them too old to be worth the investment of retraining or selectively rehire younger workers on call back for the future good of the company.

Also it becomes harder for older workers to keep their jobs as companies consider the increased financial pension/benefit costs of employing those closer to retirement age.

The Kansas Department of Human Resources reports that for those aged 55 and over seeking the agency's assistance, 12.5% compared with a 22.1% placement rate for all ages.

One severe effect of age discrimination is long-term unemployment. Older workers (55+) suffer the greatest problem with extended periods of unemployment. For older workers, it takes nearly twice as long to find a job as for their younger counterparts. The National Council on Aging reports that 36% of older workers were unemployed for 15 weeks or longer in 1981 compared with 26% for those aged 20-24.

In 1980, there were 1.2 million unemployed workers age 45 and over, and the average duration of their unemployment (20 weeks) was twice that of young workers. One half of all "discouraged workers," those who have given up the job search, are age 45 and over. Many are forced to turn to public assistance.

Official statistics seriously underestimate the unemployment rate among the elderly, because long unemployment causes many older persons to give up the job search. According to the Bureau of Labor statistics, if discouraged workers aged 60 and over are counted as unemployed, the number of unemployed among this older group rises to more than one quarter million in 1980, prior to the impact of this recession.

Age discrimination is jointly employee and employer based. There are myths and stereotypes about the relationship between age and productivitity and the trainability of older workers which still persist despite the overwhelming evidence refuting them. There is also an expected adverse impact on employment opportunities for younger and minority employees assumed due to the retention of older workers. However, retention of older workers does not necessarily displace or inhibit promotional opportunities for younger workers. A Department of Labor study addressed what would happen if more older workers were employed and estimated that less than 1/2 of 1% of the younger workers would be affected.

The majority of these people have ten to thirty years more to stay active and work, since Older Americans are living longer and healthier lives. Work may in fact keep older people healthier longer. Studies have indicated that age discrimination has harmful effects on the mental and physical well-being of older individuals. Workers who have experienced age discrimination in the form of involuntary retirement are more likely to die prematurely. Unemployment caused by age discrimination contributes to poor mental health, suicides, and higher incidences of death due to cardiovascular diseases. Some form of employment allows older persons to remain independent, self-sufficient, and allows them the dignity of feeling useful and contributing to their own well being as well as the country's productivity.

Older workers are also a valuable asset to the economy. Older workers are capable, conscientious and productive employees. Studies show that absenteeism can be reduced and productivity increased by hiring older workers. National Institute on Aging research has indicated that older workers have fewer on-the-job accidents, less stress on the job and more satisfaction from their jobs. Department of Labor and private studies show that:

1. Older workers' attendance is likely to be better than that of younger persons.

2. In production jobs, the output of older persons up to age 65 compares favorably with that of younger workers.
3. In office jobs, there were minimal differences in output by age group.
4. Older workers are highly motivated as evidenced by their job stability and their attitude of job responsibility.
5. Learning ability does not decline significantly with age. Ability to learn at ages 50 and 60 is about equal to that at age 16.
6. Even though some older workers may have longer spells of illness, they are apt to be ill less frequently than younger persons.
7. Older workers were less prone to change jobs.

Older workers have been shown to have higher performance ratings than younger workers. Any decrease in speed is offset by improved skill and dependability. According to a Harvard researcher, older workers "excel because of their judgment, experience, and safety of performance."

The demographic implications of the aging baby boom generation indicates a developing shrinking supply of younger workers. A recent study by Data Resources, Inc. on "The Elderly and the Economy," speculates that with the expected slower population growth, the economy will need elderly (65+) and near elderly (55-64) to meet the country's productivity needs. Changes will have to be made to accommodate the labor pool of the future with growing numbers of older workers. According to a recent survey conducted by William Mercer, Inc. of "Employer Attitudes and Implications of an Aging Workforce," many employers believe that by 1990, they will have to develop plans to maintain older workers.

Unemployment among older workers results in lost productivity and an under-utilization of national resources, since often their skills are in scarce supply. Yet the past trend has been toward early retirement, partially due to the forces of age discrimination which generate weak incentives to continue to work. Since 1950, participation in the work force among persons aged 65+ has declined by 50%. Today, only 20% of older men and 8% of older women are still working.

As the U.S. population ages, society will face the financial difficulty of supporting many retirees by a reduced workforce. We now realize that Social Security is overburdened and not able to carry the whole responsibility of providing good and sufficient retirement income.

Age discrimination resulting in unemployment and forced early retirement creates an increased burden on the younger working population and on state, local and federal governments and businesses. Unemployment insurance benefits paid to older workers exceed $2.2 billion annually. Eliminating unemployment for those 45 and over would result in a savings of millions of dollars to state unemployment compensation funds alone.

It is cheaper for society to permit elderly individuals to keep working and supporting themselves and paying taxes to support others, rather than having them drop out of the workforce and having them draw from the already financially eroding Social Security system.

PROBLEMS WITH TOTAL FEDERAL ENFORCEMENT

Since age is not a protected category in the Kansas Acts Against Discrimination, K.S.A. Chapter 44, the Federal Equal Employment Opportunity Offices must handle age discrimination cases for Kansans between the ages of 40 and 70.

The federal EEOC office in Kansas City receives discrimination complaints from the entire State of Kansas and the western third of Missouri. In 1982 they received 325 age discrimination cases, of which 99 % were related to age discrimination in employment practices. The State of Nebraska EEOC office reported 97 cases in age discrimination in 1982 which represented 12.7% of the total cases filed in 1982.

While the federal ADEA covers 28 million workers between the ages of 40 and 70, only a fraction of those workers are aware of the law, and few of those have an accurate understanding of its protections. Only 2 in 5 Americans are even aware of the ADEA. It seems to be more commonly understood by white males aged 50+ while minorities and women have unusually low consciousnesses about their rights under the law.

Aging advocates have felt that the ADEA has not been vigorously enforced at the federal level. The EEOC is also charged with enforcement of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on account of race, sex, religious beliefs or national origin.

In July, 1979 jurisdiction over age was transferred to the EEOC from the Department of Labor by Executive Reorganization Order, to consolidate civil rights enforcement in a single agency. Age became one protected group among many. It remains questionable whether the ADEA is minimized in EEOC activities. The experience of the Department of Labor in ADEA enforcement was lost; the EEOC is understaffed in terms of training and expertise in the age discrimination field.

It is obvious that federal enforcement, evidenced by funding and staffing levels, has never fulfilled the whole need; and impending cuts have even further reduced the EEOC's ability to enforce the Age Act.

The EEOC has been forced to stretch existing resources to cover some of the increased workload; a stop-gap measure at best. Hard-pressed Title VII resources transferred to ADEA work, sacrifice protection of other categories.

Resources are a major factor influencing where individuals can file complaints and what kind of attention their cases will receive. When jurisdiction was transferred to the EEOC, access was reduced by 35% from the 300+ Department of Labor Wage & Hour Division offices (with over 900 compliance officers) authorized to take age discrimination charges, to the EEOC's 22 district and 27 area offices. It was originally intended for the EEOC to expand up to 69 offices, but due to reduction in funding, this would be impossible to do wihout staff transfer; thus increasing the case backlog at existing offices.

The EEOC is also interested in filing "practice and pattern" cases. Although individual cases of age discrimination are also technically covered under the ADEA, and even though EEOC tries to "mix" the kind of caseload; since they receive more than enough individual complaints, they can select from among them. Thus, many worthy cases important to individuals, slip through; this may be especially true for Older Kansans who have no other redress other than through federal enforcement.

The need for state involvement in the area of age discrimination appears to be growing. In fact, the federal government intends for a program of cooperation between federal and state civil rights enforcement agencies. This takes place at present through "Worksharing Agreements" between the EEOC and the Kansas Commission on Civil Rights, in regards to other Title VII protected classes. In these cases, individual charges are filed jointly at the federal and state levels.

The federal long-range plan, which assumes sufficient "revenue sharing" kinds of funding, calls for state agencies to investigate and resolve as many jointly filed individual charges as possible, freeing the EEOC to concentrate on class actions, directed investigations, and targeted enforcement programs.

STATE ENFORCEMENT: State enforcement mechanisms in age discrimination would afford Older Kansans greater access to file complaints and more effective investigation due to local familiarity and shorter travel distances. Kansas residents may have more confidence in state-based solutions.

There would most likely be a statutory division between federal and state enforcement jurisdictions. The state would have sole authority to enforce if the employer has fewer than 20 employees (minimum limit at which ADEA applies), but not less than 4 employees (minimum limit at which Kansas Discrimination Acts apply). This is significant since many age discrimination charges are against small employers. Due to a more personal employer-employee relationship, it becomes easier to ascertain the cause of possible discriminatory action.

Federal enforcement attempts voluntary compliance through informal methods of persuasion, negotiation, and conciliation/conferences; however, we know the EEOC time and travel resources are limited. State procedures would allow for greater efforts at conciliation.

In the event of failure to resolve at the lower levels, they may have to resort to court action for compliance. Suit by the agency and aggrieved individuals could be filed in state courts rather than the more involved and costly federal court system. This too would increase access for redress since Kansas citizens presently can file age discrimination suits only in federal district courts located in Topeka, Wichita, and Kansas City; state courts are located in nearly every Kansas county.

Major cases could still be referred to the federal level. Quality of enforcement need not be sacrificed; since under workshare agreements, the charges are jointly filed and the EEOC can act in a more

preferable oversight capacity. The state would also be able to exert quality control over state enforcement performance (as at present with the KCCR).

The investigation and review process of the Civil Rights Commission would be essentially the same by adding age as the process that currently exists for the other protected categories under the Kansas Acts Against Discrimination, except that employment would be the only area covered.

The Executive Director of the KCCR in 1981 indicated in reference to SB-143 that there would be an estimated increase of 3-5% in caseload the first year, as a result of adding age as a protected category, and 5-8% in succeeding years. In 1981, the estimated fiscal impact was $19,030 for enactment of SB-143, including "age" as a protected category under Chapter 44.

KANSAS DEPARTMENT ON AGING
FEBRUARY 1983

BACKGROUND PAPER:

Why do older persons need to be protected against discrimination in employment practices:

Older persons, just like younger persons, want, need, and have a right to, employment opportunities. A person should be able to work based on qualifications and functional capacity, not chronological age. Age discrimination in employment is a common and widespread occurrence. It occurs when qualified older persons are not hired; are terminated, passed over for promotions, or forced to retire.

EEOC reports that most age discrimination charges pertain to hiring and termination, with the typical complainant being a 50-59 age male, being forcibly terminated. After the age of 40, finding a new job becomes difficult. The House Select Committee, February 1982 report indicated that it takes those 45 and over, an average of 17.4 weeks longer to find new employment. The Kansas Department of Human Resources reported in 1982 that for those 55 and over seeking the agency's assistance, 12.5% were placed, compared with a 22.1% placement rate for all ages.

One severe effect of age discrimination is long-term unemployment. Older workers (65+ suffer the greatest problems with extended periods of unemployment. For older workers it takes nearly twice as long to find a job as for their younger counterparts. The National Council on Aging reports that 36% of older workers were unemployed for 15 weeks or longer in 1981 compared with 26% for those aged 20-24.

In 1980 there were 1.2 million unemployed workers age 45 and over, and the average duration of their unemployment (20 weeks) was twice that of young workers. One half of all discouraged workers or those who have given up the job search are age 45 and over. Many are then forced to turn to the already overburdened public assistance programs.

Nationally, a 1981 Lou Harris Poll indicated that 79% of the retired persons polled would have liked to continue some kind of part-time work. Labor analysts estimate that as many as 5.3 million retirees would return to work on a temporary or part-time basis if requested. The 1979-80 Kansas Department on Aging Needs Assessment Survey showed that approximately 10%, or 41,000, Older Kansas would like to work if the opportunity were available. This number would no doubt increase if modified work schedules (part-time, flex-time, shared jobs) or graduated retirement programs existed to allow older workers some flexibility. These figures are significant because of the growing number of persons (aged 55-64) who are nearing the usual "retirement age" and seem increasingly interested in postponing it.

KANSAS DEPARTMENT ON AGING

BACKGROUND PAPER

FEBRUARY 1983

Why Kansas Needs Specific Age Discrimination in Employment Act:

Currently, older persons who are discriminated against in employment because of age have no protection under Kansas law. Because age is not a protected category in our state employment discrimination laws, the Kansas Civil Rights Commission has no jurisdiction to receive, investigate, or actively pursue age discrimination complaints.

The 1967 Federal Age Discrimination in Employment Act protects persons between the ages of 40 and 70 against age discrimination in employment. The federal law applies to employers with 20 or more employees; whereas the Title VII, Kansas Acts Against Discrimination applies to employers with 4 or more employees.

Persons must file age complaints under the federal law with the Equal Employment Opportunity Commission. However, the nearest regional office is in Kansas City, Missouri, which covers the entire State of Kansas and the western third of Missouri. The relative inaccessibility of this office often deters many older persons from seeking protection against illegal discrimination.

Age discrimination in employment does exist. At the federal level, the number of age discrimination charges filed with the EEOC increased dramatically by 76% over the last 2 years. In 1979, there were 5,374 charges of age-based employment discrimination filed; this increased by 63% to 8,779 in 1980. By 1981, there were 9,479 age discrimination charges filed with the EEOC and more than 3,000 filed with sta e and local agencies.

The Regional EEOC office reported 325 age discrimination cases in 1982, 24.9% of thetotal caseload investigated in 1982. The State of Nebraska EEOC reported that in FY 82, 97 age discrimination cases were filed, representing 12.7% of the total EEOC caseload filings. However, according to Mike Bailey, Executive Director of the KCCR, in most states with age discrimination employment laws, the average number of age-related employment cases is 5-8% of the total filed.

It is clear that the problem of age discrimination is larger than the number of charges received would indicate.

While the federal ADEA covers 28 million workers between the ages of 40 and 70, only a fraction of these workers are aware of the law, and few of those have an accurate understanding of its protections. Only 2 in 5 Americans are even aware of the ADEA. Existing laws seem to be inadquately enforced. Unless age discrimination is signficantly reduced, there will no doubt be a further increase in age discrimination charges as the proportion of older workers increases in the future.

For every type of discrimination that has been prohibited by the federal government with one exception, the Kansas Legislature has amended its statutes to similarly prohibit that category of discrimination. That one exemption is Age Discrimination in Employment.

KANSAS DEPARTMENT ON AGING

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JOHN CARLIN
Governor

SYLVIA HOUGLAND
Secretary of Aging

OLDER EMPLOYMENT FACT SHEET

FEBRUARY 1983

* In 1980 there were 1.2 million unemployed workers age 45 and over.

* The average duration of unemployment for workers age 45 and over was twice that of young workers.

* One-half of all discouraged workers, those who have given up the job search are age 45 and over.

* Unemployment insurance benefits paid to older workers exceeds $2.2 billion annually.

* Nearly 2 million person years of productive time were lost to the workforce each year because of unemployment among older workers.

* A 46-State survey by the Committee reveals that no industry or occupation is immune from age-based discrimination. However, the manufacturing, service and wholesale/retail industries are cited most often, and itis management or supervisory personnel who are the most likely to experience age discrimination.

* In 1981, 9,479 age discrimination charges were filed with the Federal EEOC. This represents a 76 percent increase over the number of charges filed in 1979.

* The typical person filing an age discrimination charge is age 50-59 and male. The typical charge is "unlawful termination due to age."

* Eight of the ten Americans believe most employers discriminate against older workers.

* Nine of ten Americans oppose age discrimination, and their opposition has brown stronger in recent years.

* Six of ten employers believe older workers today are discriminated against in the market place.

* Eight of ten employers predict a significant increase in the number of age discrimination lawsuits in the future.

* National demographical data shows that a transition in the composition of the labor force is inevitable as the average age of the population and workforce is increasing.

* A House Select Committee on Aging reports that the national labor force participation of males age 60 and over has decreased:

  Males age 60-64, in 1960--81% were in the workforce.
  in 1980--61% were in the workforce.

  Males age 65-69, in 1960--47% were in the workforce.
  in 1980--29% were in the workforce.

* 1980 population Census figures indicate that:

  Total population age 65 and over - 306,263
  ESTIMATE 65 and over in workforce - 79,518*

  (* not adjusted for changes in retirement or work patterns)

* Kansas Department on Aging 1979-1980 Needs Assessment showed 10% of retired Kansans(approximately 41,000) would like to work if the opportunity was available.

* The Kansas Department of Human Resources in 1982 reported for those 55+ seeking their assistance, 12.5% are placed in jobs, compared with 22.1% of all ages who are placed.

* In January 1982 the unemployment rate for older workers (age 55+) jumped to 4.6%, the highest level of unemployment in nearly 20 years.

* Kansas has the eighth highest proportion of elderly (persons age 60 and over) in the United States.

* Of Kansas' total population, 412,296 or 17.4% are age 60 and over, compared to 15.7% nationally.

DEMOGRAPHIC FACT SHEET ON OLDER KANSANS
KANSAS DEPARTMENT ON AGING
January, 1983

POPULATION BY ALL AGE GROUPS IN KANSAS: 1980

Total Population: 2,363,208

Age Group	Population	% of Total	% of 60+
60+	412,296	17.44%	100.00%
65+	306,263	12.96%	94.28%
75+	132,852	5.62%	32.22%
85+	33,455	1.42%	8.11%

MALE AND FEMALE POPULATION BY AGE GROUP:

	Male		Female	
	Number	% of Age Group	Number	% of Age Group
60+	171,675	41.6%	240,624	58.4%
75+	46,683	35.1%	86,169	64.9%

PERCENTAGE CHANGE IN POPULATION BY AGE GROUP IN KANSAS 1970-80:

	1970 Population	1980 Population	Increase	% of Change
Total	2,249,071	2,363,208	114,137	5.1%
60+	265,329	306,263	40,263	15.4%
75+	90,555	132,832	42,297	46.7%
85+	23,899	33,453	9,556	40.0%

KANSANS 65 YEARS OF AGE AND OLDER AS A PERCENTAGE OF THE POPULATION IN KANSAS: 1980

AREA		% OF POPULATION
STATEWIDE		12.96%
Urban and Rural and Size of Place		
URBAN		12.0%
Inside Urbanized Areas	10.2%	
Central Cities	11.0%	
Urban Fringe	9.3%	
Outside Urbanized Areas	14.2%	
Places of 10,000 or More	12.2%	
Places of 2,500 to 10,000	18.1%	
RURAL		14.9%
Places of 1,000 to 2,500	19.5%	
Other Rural	13.6%	

Source: U.S. Census General Population Characteristics
Kansas: 1980 PL 80-1-B18 Vol. 1

DEMOGRAPHIC PROFILE OF OLDER KANSANS

Kansas has significant numbers of older persons. According to the 1980 Census information, Kansas has the eighth highest proportion of elderly (i.e. age 60 and above) residents among the states. Of Kansas' total population of 2,363,208 persons, 412,296 or 17.4% are age 60+, compared to 15.7% nationally.

At the time of the 1970 census, 16.3% of Kansas' population or 366,838 persons were elderly. Thus, on the surface, the growth rate of Kansas' older population looks small, 12.4% in ten years. However, when the 60+ population is broken into smaller age groups, significant growth is seen in older subgroups.

The 75+ population in Kansas grew 46.7% between 1970 and 1980. The 85+ group grew 40%. This high growth is significant as it is these groups which are most likely to require services to assist them in carrying out the activities of daily living that enable them to remain in their own homes. The institutionalization rate for those age 75+ is 13.7%, almost double the rate for the entire 65+ group. The institutionalization rate for the 85+ groups is 21%, approximately triple the rate for the 65+ group.

The older population in Kansas is predominantly female. In 1980, 58% of the 60+ population was female and 64.9% of the 75+ population was female. Minority elderly comprised 4.5% of the total 60+ population in 1980. The majority of older Kansans (60%) live in the 97 rural counties, i.e. counties with less than 50,000 residents. These counties have 51% of the total Kansas population.

The institutionalized 65+ population in Kansas numbers 21,782 which is 7.1% of the total 65+ population. Of this group, approximately 3/4 are female. As previously mentioned, the institutionalization rate for the 75+ group is 13.7%. Nationally, the institutionalization rate for those age 65+ is about 5%. Proportionately, Kansas has substantially more long-term care beds than the nation as a whole. Kansas has 93.3 long term care beds per 1,000 elderly (65+) while the United States as a whole has only 59. Kansas' occupancy rate is only slightly below the national rate (90.5% vs. 93%). The 1982 Plan for the Health of Kansans, which is prepared by the Kansas Department of Health and Environment (H & E) and the Statewide Health Coordinating Council (SHCC), estimates that between 4,000 and 9,000 elderly Kansans are inappropriately placed in adult care homes.

SELECT COMMITTEE ON AGING
U.S. HOUSE OF REPRESENTATIVES
CLAUDE PEPPER, CHAIRMAN

MEMORANDUM

FACTS ABOUT AGE DISCRIMINATION IN EMPLOYMENT

Age discrimination in employment is on the rise, despite recent legal developments protecting older workers. This form of discrimination is a pervasive and subtle force that results in lost productivity, greater burdens on state and local governments, and negative effects on the mental and physical well-being of older individuals.

Below are selected facts on the extent and costs of age discrimination, providing evidence of the need for expanded state protections for older workers.

Costs of Age Discrimination

- Workers who have experienced age discrimination in the form of involuntary retirement are more likely to die prematurely. Epidemiological studies report mortality rates among involuntary retirees to be 30 percent higher than expected.

- Unemployment caused by age discrimination contributes to poor mental health, suicides and higher incidences of death due to cardiovascular diseases. For example, in a study of the effects of unemployment on the health status of older persons, researchers found higher self-reports of heart problems and hypertension among the steadily unemployed than among the steadily employed.

- Age discrimination resulting in unemployment and forced early retirement creates an increased burden on the younger working population and on state, local and Federal governments. Eliminating age discrimination and unemployment for those 45 and over would result in a savings of millions of dollars to state unemployment compensation funds alone.

- Unemployment among older workers results in lost productivity. Older workers have been shown to have lower absenteeism, lower accident rates and higher performance ratings than younger workers. In many cases, according to a Harvard researcher, older workers "excel because of their judgment, experience, and safety of performance."

- Retention of older workers does not displace or inhibit promotional opportunities for younger workers. Economists conducting research for the Department of Labor found that the increase in permissible mandatory retirement age from 65 to 70 would result in only a negligible delay in promotions for younger workers. This is confirmed by a 1978 Conference Board Survey of corporate business managers which found that raising the mandatory retirement age would result in little or no impact on promotional opportunities for younger workers or equal employment opportunity goals for women and minorities.

Extent of Age Discrimination

- The Chair of the Equal Employment Opportunity Commission (EEOC), the Federal agency charged with enforcement of the Age Discrimination in Employment Act, stated at a June 1980 hearing by the House Select Committee on Aging that, "the problem of age discrimination is stunning — it is practiced by well-intentioned people and appears to enjoy wide acceptance in society."

- During fiscal year 1980, the EEOC received 8,000 charges of age discrimination, a 50 percent increase over the previous year. Despite this increase, the agency reports that, "the problem of age discrimination is larger than the number of charges received would indicate."

- The EEOC reports that most age discrimination charges pertain to hiring and termination, with an increasing number of discriminatory promotion and merit evaluation cases appearing in the past two years.

- A 1973 survey of middle-aged and older blacks, Mexican Americans and whites in Los Angeles County found age discrimination to be more prevalent than race discrimination. Two-thirds reported knowing someone who had experienced age discrimination and one-fifth reported personal experiences with discriminatory employment practices because of their age.

Older Workers in the Labor Force

- Since 1950 participation in the work force among persons aged 65 and over has declined by 50 percent. Today only 20 percent of older men and 8 percent of older women are still working. Similarly, fewer men aged 45-64 are employed today compared to 30 years ago, but labor force participation among women has increased somewhat.

- Although many older persons retire voluntarily, a large number "retire" because they cannot find work.

- In 1979, Labor Department statistics indicated that persons 45 and older accounted for 17 percent of the unemployed. Thus, nearly 1 million persons in this age group were without jobs.

- Older workers (65+) suffer the greatest problem with extended periods of unemployment. Once they are unemployed, finding a job becomes extremely difficult. Older persons remain unemployed an average of 20 weeks, twice the average for younger persons.

- Official statistics seriously underestimate the unemployment rate among the elderly because long unemployment causes many older persons to give up the job search. The Bureau of Labor Statistics reports 180,000 "discouraged workers" 60 years of age and over who have dropped out of the labor force because they feel no jobs are available to them. If discouraged workers 60 and over are counted as unemployed, the number of unemployed among this older age group rises to more than one quarter million.

- Discouragement and job dissatisfaction also cause many older workers to retire, rather than seek other jobs, because they feel there are no other job opportunities.

ATTACHMENT NO.4

202 Fiscal Note 1983 Session February 24, 1983

2523 Bill No.

The Honorable Robert Frey, Chairperson
Committee on Judiciary
House of Representatives
Third Floor, Statehouse

Dear Representative Frey:

SUBJECT: Fiscal Note for House Bill No. 2523 by Representatives Peterson, et. al.

In accordance with K.S.A. 75-3715a, the following fiscal note concerning House Bill No. 2523 is respectfully submitted to your committee.

This act prohibits age discrimination in certain employment related practices. The term "age" is defined as persons who are at least 40 years of age but less than 70 years of age.

The Commission has been advised by the United States Equal Employment Opportunity Commission that approximately one-fourth of all employment discrimination complaints processed by that agency allege discrimination on the basis on age alone, while another ten percent of the complaints allege age as one of two or more basis for discrimination. Information received from state agencies in the surrounding area whose civil rights acts include age indicate that such complaints comprise from five to ten percent of their total case load. In FY 1982 the Kansas Commission on Civil Rights received 883 cases and processed 1,007 cases. The Commission anticipates an increase in the total number of complaints filed with the agency by 50 to 80 complaints per year.

The following cost estimates are based on the premise that the investigation of complaints based on age will require exactly the same type of investigation as do complaints based on race, religion, color, sex, physical handicapped, national origin or ancestry presently received by the Kansas Commission of Civil Rights. The Commission believes that the current staff and operating funding are not adequate to process additional complaints based on age. To attempt to process the additional complaints without additional staff and expenditures would result not only in inferior investigations and processing of the age complaints, but inferior investigation processing of all complaints filed with the Commission. The dollar effect upon the budget would be as follows:

Salaries and wages	$31,000
(1 Civil Rights Investigator I)	
(1 Clerk Typist)	
Other operating expenditures	2,500
	$33,500

The Commission will be able to contract with EEOC for any additional cases based on age in October 1983. The Commission will receive $375 per case if a contract is agreed upon concerning age discrimination. This may result in the Commission receiving between $18,000 and $26,000 in federal monies. The Commission anticipates that after approximately one year this proposed addition to the act would be reflected in an increased number of public hearings, thereby increasing the cost of communications, travel and subsistence and contract services of the Hearing Examiner's Office by approximately 15 percent.

Susan K. Schroeder

Susan K. Schroeder
Budget Analyst
For the Director of the Budget

SKS:sr