Approved March 6, 1985
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative Joe Knopp at
Chairperson

3:30 ~~xxxx~~ p.m. on February 26, 1985 in room 526-S of the Capitol.

All members were present except:

Representatives Adam, Harper & Wunsch were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statute's Office
Becca Conrad, Secretary

Conferees appearing before the committee:

Representative Laird
John Yeats, Representing Christian Life Commission Committee
Rod Foster, Grocery Store Manager
Ron Stuart, Certified Public Accountant
Pastor Mike Conn, Youth President of United Pentecostal Church of Kansas
David Upchurch, Pastor of Christ Presbyterian Church
Brenda Hoyt, Attorney General's Office
Jim Clark, Kansas County & District Attorneys Association
Mr. Tatum, a Johnson County Prosecutor
Emil Tonkovich, Associate Professor of Law, University of Kansas Law School
Dennis Moore, District Attorney in Johnson County
Elizabeth Taylor, Kansas Association of Domestic Violence Programs
Robin Fowler, Assistant Attorney General

HB 2404 - Concerning crimes and punishments; relating to the crime of promoting obscenity harmful to minors.

Representative Laird sponsored this bill and said he was not objecting to the magazines themselves, but felt there should be a censorship from kids.

John Yeates, representing Christian Life Commission Committee, spoke in favor of this bill as shown in Attachment No. 1.

Rod Foster, a grocery store manager in Topeka, spoke in favor of this bill. He said they had recently taken all the obscene magazines out of their stores, and it had not caused them any problems at all. He said there have been no financial problems and no complaints since they have done this.

Ron Stuart, certified public accountant in Topeka, spoke in favor of HB 2404. He said he was concerned about the children of any age going to a store and purchasing whatever type of magazines they want. As a businessman he said he was concerned about the economy of Topeka. He deals with a number of businessmen who come into the city and State of Kansas, and he said most of the time the people he works with are concerned about what is the quality of this city or state. He believes they are loyal family people and he doesn't believe there is anything in pornography that improves family unity.

Pastor Mike Conn, Youth President of United Pentecostal Church of Kansas, spoke in favor of this bill. He said pornographypromotes infidelity in marriage which in turn breaks up homes and thus children grow up in broken homes. He said these children are usually abused and filled with hate which in turn causes more crime. The building blocks of our nation are families and it has been reported that 95% of the inmates at KRDC come from broken homes.

David Upchurch, Pastor of Christ Presbyterian Church in Topeka, testified in favor of this bill. See Attachment No. 2.

Brenda Hoyt, Attorney General's office, said they are in favor of the intent of this legislation. She said they had just received the bill yesterday and had not had a chance to review it as far as the constitutionality of it goes, but they are very much in favor of the intent of protecting children from this material.

Representative Solbach asked if the language in this bill was patterned after a successful piece of legislation in another state that has withstood constitutional challenge. Mr. Yeats said this had been designed after the State of Georgia's bill and has been before the George courts, but has not gone to the Supreme Court.

The Chairman said that the current standard for determining obscenity is what is offensive to the prevailing standards of the contemporary adult community and this bill is adding the language "with respect to what it suitable material for minors", which suggests that the standard of obscenity for adults would be a different standard than that for minors. Mr. Yeates agreed with this, and said that this bill would tighten down the definitions for prosecution.

Ms. Hoyt said that the most obscene material is that of sadomasochism and there is nothing in the current statute that makes that obscene. She hoped that this would be changed.

HB 2454 - Concerning criminal procedure; relating to preliminary examinations.

Jim Clark, Kansas County & District Attorneys Association, said this bill was introduced at the request of this association and it was also requested to be introduced by invitation from the Kansas Supreme Court in the case of State of Kansas v. Cremer. He presented Attachment Nos. 3, 4, and 5 concerning this bill.

Mr. Tatum, a Johnson County prosecutor, spoke in favor of this bill saying that it would save the courts considerable time and expense which is now spent in handling preliminary hearings. He said this would help to process defendants through trial much more rapidly than they currently are able to do. This would eliminate the defendants' bond, remaining in county jails for extended periods of time, the extra expenses of court time for the preliminary hearing, the prosecutor's time for preliminary hearing and the witness expenses for preliminary hearing as well, and allow the courts to concentrate their efforts in tearing down their trial dockets. He said this would have a positive effect on the entire criminal justice sytem.

Emil Tonkovich, Associate Professor of Law at the University of Kansas Law School, spoke in favor of this bill to permitting hearsay to be used in preliminary examinations. He had these basic arguments for permitting hearsay as follows: 1.) the Kansas procedure goes far beyond what is constitutionally required in preliminary examinations; 2.) there is a tremendous cost to the judicial system, a waste of time in the judicial system, court costs, prosecutors' time, police officers' time, inconvenience of state witnesses; and 3.) harassment and embarrassment of witnesses particularly in sensitive crimes. He said permitting hearsay in preliminary examinations will substantially remedy this problem and will do so with little or no cost to criminal defendants. The article he wrote concerning this is Attachment No. 6.

Dennis Moore, District Attorney in Johnson County, spoke in favor of this bill. He presented Attachment No. 7 which is a schedule of a typical Thursday's preliminary hearings (highlighted in pink). He said that every one of these are set for a further hearing or continuance. He also presented Attachment No. 8 which is a letter from a rape victim concerning her experience with a preliminary hearing. He also presented Attachment No. 9 in support of this bill. Mr. Moore stated that he does not support HB 2445 as related to HB 2454.

Elizabeth Taylor, Kansas Association of Domestic Violence Programs, spoke in favor of HB 2454. She said that in prosecuting defendants, the victims are revictimized when they testify. She said recounting the criminal incident during direct questioning is extremely hard and even more difficult when a victim has to go through cross-examination. She said they are in support of allowing hearsay. She said they are also concerned about the material being taken in preliminary hearing not being used at the trial as stated by Valerie in Attachment No. 8. She said they are for equal protection of the victim and defendant.

HB 2445 - Relating to criminal procedure; providing for discovery depositions in criminal cases.

Robin Fowler, Assistant Attorney General, spoke against this bill. He said the process of depositions can really be abused and can open up the door for an enormous expense. A second concern they have is with the Kansas Bureau of Investigation lab people being

MINUTES OF THE House COMMITTEE ON Judiciary,

room 526-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on February 26, 1985.

called in for depositions. They proposed that on line 23 of HB 2445 that the language "except for forensic examiners", be inserted after the word person.

HB 2340 - Concerning crimes and punishments; relating to the crime of promoting obscenity.

Representative Duncan explained the origination of this bill.

A motion was made by Representative Buehler and seconded by Representative Snowbarger to approve the minutes of February 5 and 6.

The meeting adjourned at 5:05 p.m.

HOUSE BILL No. 2404

John Yeats
Christian Life Commission Committee
4335 S.E. 29th
Topeka, Kansas 66605

Any adult, with his/her eyes open, has seen little children in certain stores running loose without adult supervision. Some of us have even seen these children go to the magazine racks looking for a "funny book" only to see a child inadvertently pick up a magazine that's not so funny. The other day I went into a drug store for some breath mints. The magazine shelves were just across the aisle. There stood two boys not a day older than ten with a girl near the same age. They were thumbing through the latest issue of "OUI". One of the boys and the girl snickered as they looked at the fantasy photos of whores positioning their nude bodies to tantalize potential magazine purchasers.

The countenance of the other boy appeared sober and confused. His lips shaped a half snicker when the peer pressure was applied. But his eyes told a story of hurt and bewilderment. "Is this what sex is all about?" I wondered if he'd been the victim of some pediaphiliac's lust, lusts stirred by the child-porno periodical received in the mail the week before.

When the trio noticed someone was looking, they quickly closed the magazine and ran to the candy racks. Who knows the full impact the foul photos had on their young minds. What distorted behavior was spawned in their young memory banks? I thought,"Would they try to mimic what they'd seen?"

Something has to be done. Many concerned citizens all across the state of Kansas have rightly appealed directly to propriators. Any many family-oriented businesses have responded affirmatively. In Topeka

Attachment No. 1
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only one supermarket still carries the obscenity. All of the rest have responsibly chosen to remove even the so-called "soft-porn" from their stores. One reason is the potential damage on children. But many neighborhood convenience stores, book stores, and drug stores continue to openly place the material within access of a minor's eyes or hands and eyes. (The boards in front of the publications are easily put aside by an enterprising 14 year old looking for a fix for his lusts.)

Something must be done....

Something can be done state wide in Kansas. As you will hear in further testimony, House Bill 2404 is constitutionally sound. Federal Supreme Court rulings give you, as legislators, the authority to pass legislation prohibiting the display, exhibition, or exposition of pornographic materials in any place of business frequented by minors (18 years and younger).

A similar piece of legislation was passed in Georgia. The vast majority of citizens there welcomed it. Several citizens I've personally talked to felt it has improved the public image of their state. Even fellow Kansans touring Georgia have shared with me how impressed they were of the cleaner image portrayed in the retail market place.

Some people in Georgia and in Washington D.C. believe there is a direct link between the Atlanta child killings and "Kiddie Porn" and legislation, like HB2404, is a public reaction to deviate behavior stimulated by pornography. Certainly we hope nothing as devastating as the "Atlanta Killings" must occur before we Kansans take positive affirmative action.

Children who see the obscene material as defined in HB2404 receive false images of very deviate sexual behavior that is indelibly stored in the

memory banks of their young minds.

I'm certain, as knowledgable leaders, you know the pornography (including Playboy, Playgirl, and Penthouse) of today is not the "naughty magazines" of a previous generation. Far from the skimpy clad or bare-breasted models of yesterday, the more than 1,000 porno magazines available today openly depict coitus both heterosexual; explicit depictions of sex between people and various types of animals; sadomasochistic sex, including torture, rape and even death.

Can you imagine the devastating affect on a child whose mind is polluted with these images? Images which are formed from a magazine cover found in a home town pharmacy. Or confused thinking resulting from pulling a magazine off the top shelf of a grocery store and browsing through the pictures.

HB2404 is good for Kansas children. I trust you will quickly affirm it and move it to the full House for approval.

OUSE BILL NO. 2404

CHRIST CHURCH

PRESBYTERIAN CHURCH IN AMERICA

David Upchurch, Pastor
322 S.W. Fillmore
Topeka, Kansas 66606
(913) 232-4024

Larry Watkins, Assoc.
425 S.W. Lincoln
Topeka, Kansas 66606
(913) 235-0633

February 26, 1985

Testimony for the House Judiciary Committee, Topeka

Judeo-Christian ethics have always regarded human sexuality as a gift from God to be received and enjoyed. But, like all of God's gifts sexuality can be misused, distorted, and abused. Obscenity, as it is properly defined in House Bill No. 2404, is an abuse of human sexuality and, as such, is extremely dangerous to children and adolescents.

The photographers and editors of obscene publications recognize this fundamental danger to children by labeling themselves as "adult entertainment" or "for men". They see that the purpose of their photographs is to arouse and excite their male readers. Their advertising rates and their circulation numbers attest to their success in acheiving their goal. The danger to children is that children are not yet mature enough to properly handle the very strong emotions stirred up in them by obscene material. They do not yet have the discernment to reject the utterly false and distorted view of sexuality represented in what they see. Instead, as they consume such material their emotions and their thinking are deeply affected. As the saying goes "a picture is worth a thousand words." Also, studies have consistently indicated that obscene material leads to false expectations and therefore to great dissatisfaction in actual sexual relationships. And, it is common sense that, at the very least, obscenity must reinforce an existing distorted view of reality in those who commit sex-related crimes.

A second grave danger of obscenity to children is the false view of women presented in it. To state what is depicted visually, obscenity sees women as objects rather than as human beings. Women are victims whose only reason for existence is sexual pleasure for men. According to obscene publications, beauty is the only standard for measuring the worth of an individual. Children and adolescents need protection from such distortions so that they may have a chance to form a proper view of women from life, rather than from the warped fantasies of dealers in obscenity. All humans, men and women, are created in God's image; and we as a society must protect our children, as much as possible, from those who would treat people otherwise.

House Bill No. 2404, if enacted, will go far to change the climate of obscenity presently existing in stores that both sell obscene material and sell to children. One bookstore in Topeka sells comic books and coloring books ten feet from obscene magazines with graphic covers. Virtually all convenience stores sell candy five, ten, or fifteen feet from "adult entertainment". This bill will change that. This bill will put our state on record as opposing this material for children and adolescents. Our children need a chance to form healthy views of sexuality and of women before being tempted and assaulted by the obscene. This bill will help them. We need this law.

The Rev. David Upchurch

"In all things Christ and His Word Preeminent."

Attachment No. 2
House Judiciary
February 26, 1985

234 Kan. 594

The STATE of Kansas, Appellee,

v.

Jack B. CREMER, Appellant.

No. 54432.

Supreme Court of Kansas.

Jan. 13, 1984.

Defendant was convicted in the Shawnee District Court, Franklin R. Theis, J., of felony theft, and he appealed. The Court of Appeals, 8 Kan.App.2d 699, 666 P.2d 1200, affirmed, and petition for review was granted. The Supreme Court, Prager, J., held that: (1) rules of evidence contained in Code of Civil Procedure apply to a preliminary examination in a criminal case; (2) custodian of business records need not always be called to lay foundation facts for admission of business records into evidence; such foundation facts may be proved by any relevant evidence and the person making entries in the records need not be called to authenticate them if they can be identified by someone else who is qualified by knowledge of the facts; (3) bank statements made in regular course of business and presented to owner of account as record of account transactions are trustworthy source of information and may be admitted under business records exception to hearsay rule; thus, trial court properly admitted testimony of comptroller of oil company relating to bank records which showed that defendant had not deposited at bank receipts of filling station in amount of approximately $9,000; (4) absence of entry in records of oil company of a deposit or receipt of $9,000 earned by filling station three days before defendant left town was competent evidence that no deposit was made; and (5) evidence was sufficient to show probable cause that crime of felony theft had been committed and that defendant had committed it.

Affirmed.

Miller, J., concurred and filed opinion in which McFarland, J., joined.

1. Criminal Law ⇐234

Rules of evidence contained in Code of Civil Procedure are to be applied in preliminary examination in a criminal case, except to extent they may be relaxed by other court rules or statutes applicable to a specific situation. Rules of Evid., K.S.A. 60–401 et seq.; K.S.A. 22–2902.

2. Criminal Law ⇐444

Custodian of business records need not be called to lay foundation facts for admission of business records into evidence; foundation facts may be proved by any relevant evidence and person making entries in the business records need not be called to authenticate them if they can be identified by someone else who is qualified by knowledge of the facts. Rules of Evid., K.S.A. 60–460(m).

3. Criminal Law ⇐444

Policy of business records exception to hearsay rule is to leave it up to trial court to determine whether sources of information, method, and time of preparation reflect trustworthiness of the evidence. Rules of Evid., K.S.A. 60–460(m, n).

4. Criminal Law ⇐234, 436

Bank statements made in regular course of business and presented to owner of account as record of account transactions are a trustworthy source of information and may be admitted under business records exception to hearsay rule as part of financial records of owner of account; thus, trial court properly admitted at preliminary hearing testimony of company comptroller relating to bank records which showed that defendant had not deposited at bank receipts of filling station in amount of approximately $9,000. Rules of Evid., K.S.A. 60–460(m); K.S.A. 21–3701.

5. Criminal Law ⇐234

Absence of entry in records of oil company of a deposit or receipt of $9,000 earned by filling station three days before defendant left town was competent evidence under business records exception to hearsay rule to show that no deposit was

Evidence during the preliminary examination.

A preliminary examination is not a trial. Its primary purpose is to determine whether an accused should be *held* for trial. The initial determination of whether to issue an arrest warrant may be made upon reliable hearsay, and I see no reason why that should not be the standard for preliminary examinations.

We have some eighty nonlawyer district magistrate judges in Kansas. These are fine, conscientious people, and an asset to the Kansas judicial system; but they have but minimal legal training. We do give them instruction, provide them with manuals and—as the majority noted—we require all new district magistrate judges to take and pass an examination on the law and be certified as qualified before they may continue to serve. They have, at most, one or two hours of instruction on the laws of evidence. The majority believes that the magistrates "can apply the statutory rules of evidence without great difficulty."

Lawyers, on the other hand, spend perhaps five hours a week on the subject of evidence during one or two semesters in law school, plus outside reading and study. This case illustrates that even lawyers cannot apply the Rules of Evidence "without great difficulty." The trial judge—a lawyer—held the evidence admissible. The three-judge panel of the Court of Appeals—all lawyers—held it inadmissible. Seven justices of this court—all lawyers—now disagree with the Court of Appeals, and hold the same evidence admissible under two of the twenty-nine or more exceptions to the hearsay rule enumerated in K.S.A. 60–460.

This court should continue its century-old policy and relax the rules of evidence at preliminary examinations.

McFARLAND, J., joins the foregoing concurring opinion.

234 Kan. 636

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee,

v.

Peggy KROEKER, Appellant.

No. 55177.

Supreme Court of Kansas.

Jan. 13, 1984.

Automobile insurer which had paid personal injury protection benefits to its insured brought action to determine its right to subrogation or reimbursement after insured had entered into a partial settlement of her claim for her husband's death. The District Court, Sedgwick County, Michael Corrigan, J., entered judgment in favor of insurer, holding that it was entitled to reimbursement of PIP funeral and survival benefits from the liability settlement made with the tort-feasor's insurer, and the insured appealed. The Supreme Court, Prager, J., held that since the insured did not settle her total claim or release tort-feasor from all further liability, and since the insured's actual damages were in excess of the PIP benefits paid by the insurer, the PIP insurer was not entitled to be reimbursed for prior payments out of the proceeds of the settlement if the insured could show that the payment of settlement would not result in double recovery for same elements of damages.

Reversed and remanded with directions.

1. Insurance ⇐601.25

Right of personal injury protection insurer to be reimbursed for personal injury protection benefits paid is limited to those damages recovered by injured insured which are "duplicative" of those benefits. K.S.A. 40–3113a.

2. Insurance ⇐601.25

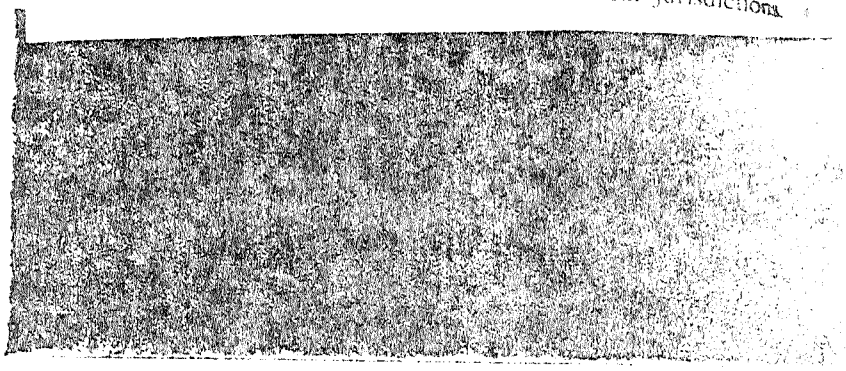
Damages recovered are duplicative when failure to reimburse personal injury

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.



Attachment No. 4
House Judiciary
February 26, 1985

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 ailing criminal justice program where e innocent go free and the guilty are it away in 60 days.

(No Jackson County statistics are pt 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 crimid justice trial process called "preninary 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 urth Amendment's probable cause undard to confront and cross-exam witnesses to believe a suspect has mmitted a crime," Justice Powell ote. "An informal determination n be made by a judicial officer her before or promptly after ar-st."

That means, of course, if a policean yanks you into a police station, a ge should see to it quickly that the icer had good reason ("probable use") to deprive you of your free-m.

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

Early this year Judge Cowart and . Reno put the kiss of death to the dversary" preliminary hearing in de County in favor of sworn documentation. 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 tice system that removes the tradinal first courtroom confrontation th prosecution witnesses?

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

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

"They don't buckle when they get sure 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 orking "fine" but he expressed his sonal belief that "a defendant has a stitutional right to an adversary liminary hearing."

Hank Adorno, chief trial assistant ier Janet Reno, said the refusal of de County's 12 felony judges to postse cases without good cause and e 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 sees a police court 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," "sensible," "energetic" and "innovative."

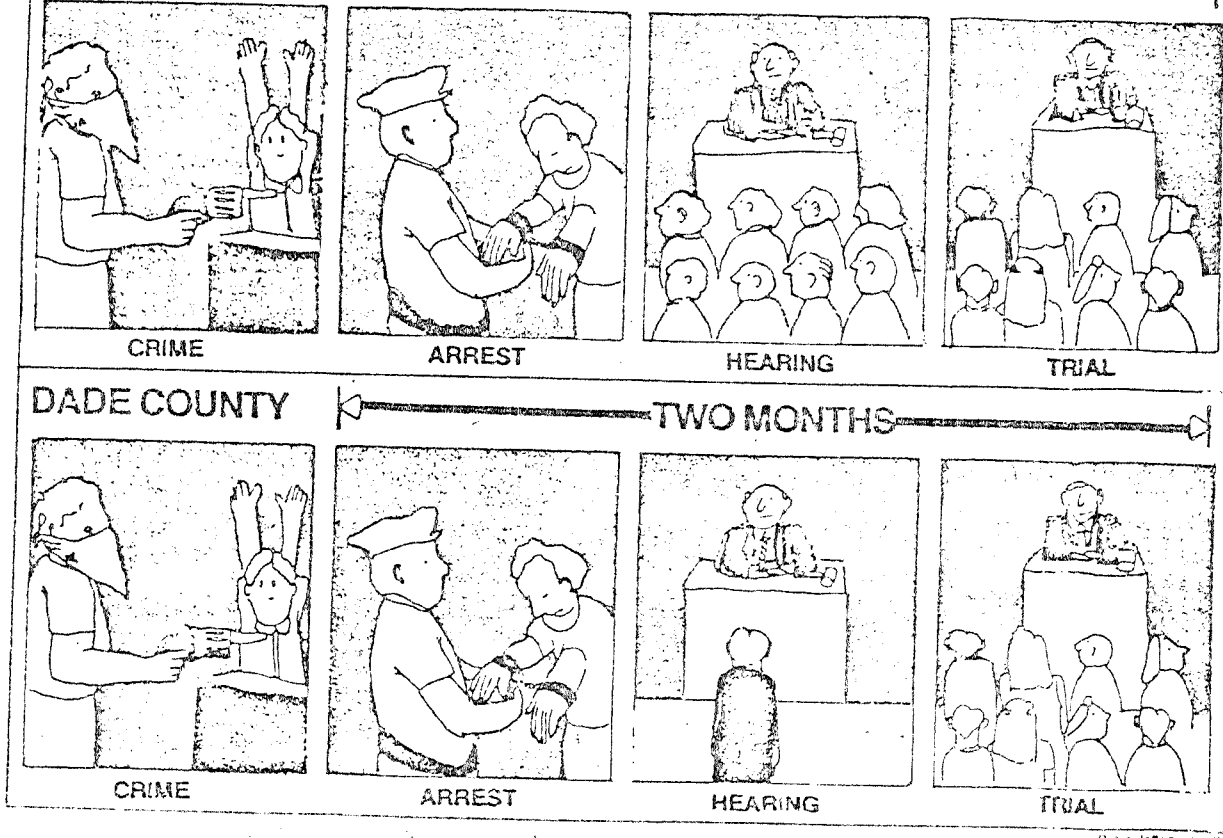
When I asked Ms. Reno how she has been able to achieve a right blend of efficiency and fairness in a sprawling criminal justice system involving 20,000 felony cases a year, she replied:

"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.

and post-arrest detention.[12] The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a reasonable person to believe that the defendant had committed or was committing a crime.[13] This standard represents a necessary balance between the individual's right to liberty and the state's duty to protect society against crime.[14] To implement the fourth amendment's safeguards, it is generally required that the probable cause determination be made by a neutral and detached magistrate.[15]

In the leading case of *Gerstein v. Pugh*,[16] the United States Supreme Court addressed the issue of whether an arrestee who is subjected to extended post-arrest detention is constitutionally entitled to a judicial determination of probable cause.[17] The Court recognized that, because of practical considerations, a police officer's probable cause determination may be legally sufficient to justify the arrest of a criminal suspect and the brief detention of the suspect to take administrative steps incident to arrest.[18] However, once the suspect is in custody, there is no longer any reason to dispense with the magistrate's probable cause determination.[19] Therefore, the Court held that the fourth amendment requires a timely judicial determination of probable cause as a prerequisite to extended post-arrest detention.[20]

The Court in *Gerstein*, however, also found that the fourth amendment does not require adversarial probable cause hearings.[21] The only issue in these post-arrest situations is whether there is probable cause for detaining the arrestee pending further proceedings.[22] This issue, the Court reasoned, can be determined without an adversarial hearing.[23]

While its holding was limited to the precise requirement of the fourth amendment, the Court in *Gerstein* recognized that state procedures may vary widely in satisfying this requirement.[24] An adversarial determination of probable cause, such as the Kansas preliminary examination, is not constitutionally required.[25] For example, the Court found that a probable cause determination at the arrestee's first appearance before a judicial officer will satisfy the fourth amendment.[26]

Although adversarial preliminary examinations are not constitutionally mandated, many jurisdictions provide for them in various forms and utilize them to different degrees.[27] A few states do not have any form of preliminary examination, but instead satisfy the *Gerstein* requirement through an *ex parte* probable

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[12] Cupp v. Murphy, 412 U.S. 291, 294-95 (1973).
[13] Beck v. Ohio, 379 U.S. 89, 91 (1964).
[14] Brinegar v. United States, 338 U.S. 160, 176 (1949).
[15] Johnson v. United States, 333 U.S. 10, 13-14 (1948).
[16] 420 U.S. 103 (1975).
[17] *Id.* at 105.
[18] *Id.* at 113-14. *But see* Payton v. New York, 445 U.S. 573, 576 (1980).
[19] 420 U.S. at 114.
[20] *Id.*
[21] *Id.* at 120, 123.
[22] *Id.* at 120.
[23] *Id.*
[24] *Id.* at 123.
[25] *Id.*
[26] *Id.* at 123.
[27] *See, e.g.*, FED. R. CRIM. P. 5.1(a) (adversarial preliminary examination permitting hearsay); KAN. STAT. ANN. § 22-2902(3) (1981); *Cremer*, 234 Kan. at 599-600, 676 P.2d at 63-64 (adversarial preliminary examination not generally permitting hearsay).

A PROPOSAL FOR THE USE OF OTHERWISE INADMISSIBLE HEARSAY IN KANSAS PRELIMINARY EXAMINATIONS

Emil A. Tonkovich *

In Kansas, persons arrested on a felony warrant are entitled to a preliminary examination before a magistrate, unless the warrant was issued pursuant to a grand jury indictment.[1] Preliminary examinations are formal, adversarial proceedings in which the defendant may cross-examine state witnesses and introduce evidence in his own behalf.[2] Hearsay evidence, however, is not admissible in Kansas preliminary examinations[3] unless it fits a recognized exception to the hearsay rule[4] or a limited statutory exception.[5]

The primary purpose of a preliminary examination is to judicially determine whether there is probable cause to believe that a felony has been committed, and whether there is probable cause to believe that the defendant committed it.[6] The preliminary examination is essentially a judicial inquiry into whether the defendant should be held for trial.[7]

Preliminary examinations in Kansas go beyond that which is constitutionally required of a judicial probable cause determination.[8] Kansans pay a high price for these unnecessary procedures.[9] Consequently, the Kansas preliminary examination has been the target of substantial criticism.[10]

Although more drastic remedies are arguably feasible, permitting the use of otherwise inadmissible hearsay in Kansas preliminary examinations would represent a conservative, yet significant, procedural improvement. This article will review the constitutional and legislative foundations for preliminary examinations and examine the status of hearsay in these proceedings. It will also suggest a proposal that hearsay be admissible in Kansas preliminary examinations.[11]

I. Constitutional and Legislative Foundations for Preliminary Examinations

The fourth amendment defines both the standards and procedures for arrest

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[1] Kan. Stat. Ann. § 22-2902(1) (1981).

[2] *Id.* § 22-2902(3).

[3] State v. Cremer, 234 Kan. 594, 599-600, 676 P.2d 59, 63-64 (1984).

[4] Kan. Stat. Ann. § 60-460 (1983).

[5] *See id.* § 22-2902a (Supp. 1983) (regarding forensic examinations).

[6] State v. Jones, 233 Kan. 170, 172, 660 P.2d 965, 968-69 (1983).

[7] *Id.*

[8] Adversarial preliminary examinations are not constitutionally mandated. Gerstein v. Pugh, 420 U.S. 103, 119-25 (1975).

[9] The unnecessary costs to society are apparent and do not need elaboration. However, beyond the obvious waste of judicial, prosecution, and police resources, it is worth noting that victims and witnesses are often subjected to unnecessary harassment, embarrassment, and inconvenience.

[10] *Criminal Procedure Relating to Preliminary Examinations; Amending K.S.A. 22-2902 and Repealing the Existing Section, 1984: Hearings on House Bill No. 2522 Before the Kansas House Committee on Judiciary (1984)* (unpublished minutes of testimony on February 7-8, 1984) [hereinafter cited as *Hearing*].

[11] *Id.* (testimony by Professor Emil A. Tonkovich on February 7, 1984).

cause affidavit at the initial appearance.[28] Only Kansas and ten other states provide for a full adversarial preliminary examination in which hearsay is not generally admissible to support the probable cause finding.[29] The source of this right to a full adversarial preliminary examination in Kansas is statutory.[30]

II. HEARSAY IN PRELIMINARY EXAMINATIONS

In *Gerstein*, the Court stated that the Constitution does not prohibit states from authorizing the use of otherwise inadmissible hearsay evidence to determine probable cause at the preliminary examination.[31] Furthermore, the Court found that the accused has no constitutional right to confront State witnesses at the preliminary examination.[32] Noting the distinctions between trial findings of guilt and probable cause determinations, the Court reasoned that the accused's confrontation and cross-examination of State witnesses at preliminary examinations might only slightly enhance the reliability of probable cause determinations.[33] This speculative benefit, the Court concluded, was outweighed by the burden these procedures place on the already overburdened criminal justice system.[34]

In two recent cases, *State v. Sherry*[35] and *State v. Cremer*,[36] the Kansas Supreme Court addressed the issue of the admissibility of hearsay evidence in preliminary examinations. *Sherry* involved a limited statutory exception to the hearsay prohibition, while *Cremer* concerned the general admissibility of hearsay.

In *Sherry*, the issue was the constitutionality of section 22-2902a of the Kansas Statutes Annotated. This statute provides for the admission of specified forensic examiners' reports at preliminary examinations without the testimony of the forensic examiner.[37] Relying on *Gerstein*, the court upheld the validity of the statute.[38] Recognizing that while the Constitution does not prohibit the use of hearsay evidence in determining probable cause at preliminary examinations, the court acknowledged that the state statute requires the application of the rules of

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[28] The following five states use this procedure: Florida, Indiana, Iowa, Vermont, and Washington.

[29] A June 1983 survey of state attorneys general conducted by Mr. Ken Peterson, Assistant Chief Deputy District Attorney in the Sacramento, California District Attorney's Office, indicated that as a matter of law or practice hearsay is generally not admissible in preliminary examinations in the following states: Arkansas, California, Hawaii, Idaho, Kansas, Missouri, Oklahoma, South Dakota, Tennessee, Virginia, and Wisconsin. Peterson, *The Preliminary Hearing: A Time for Modification*, PROSECUTORS BRIEF, July-Aug. 1983, at 13, 17, 20.

[30] *See* State v. Boone, 218 Kan. 482, 543 P.2d 945 (1975).

[31] *Gerstein*, 420 U.S. at 120.

[32] *Id.* at 121-122.

[33] *Id.*

[34] *Id.* at 122 n.23.

[35] 233 Kan. 920, 667 P.2d 367 (1983).

[36] 234 Kan. 594, 676 P.2d 59 (1984).

[37] KAN. STAT. ANN. § 22-2902a provides:

> At any preliminary examination in which the results of a forensic examination, analysis, comparison or identification prepared by the Kansas bureau of investigation, the secretary of health and environment, the sheriff's department of Johnson county or the police department of the city of Wichita are to be introduced as evidence, the report, or a copy of the report, of the findings of the forensic examiner shall be admissible into evidence in the preliminary examination in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person.

[38] *Sherry*, 233 Kan. at 929-32, 667 P.2d at 375-78.

evidence to Kansas preliminary examinations.[39] Therefore, the court reasoned that the legislature could provide for the admission of the hearsay reports of forensic examiners.[40] In reaching its decision the court noted that in federal preliminary examinations the usual rules of evidence are not applied, and the finding of probable cause may be based on hearsay.[41]

In *Cremer*, the Kansas Supreme Court faced the issue of whether inadmissible hearsay may generally form the basis for a finding of probable cause at a preliminary examination.[42] The court of appeals had held that certain bank statements, although technically inadmissible hearsay at a trial, could be admitted and considered in determining probable cause at a preliminary examination.[43] Reasoning that the rules of evidence have traditionally been relaxed at preliminary examinations, the court of appeals held that if there is a substantial basis for crediting the hearsay it may be relied upon and form the basis of a probable cause finding in a preliminary examination.[44]

The supreme court affirmed, although not for the reasons stated by the court of appeals.[45] The court held that the bank statements were admissible hearsay under the business records exception to the hearsay rule.[46] Regarding the general hearsay issue, the court concluded that the rules of evidence contained in the Kansas Code of Civil Procedure are to be applied to preliminary examinations,[47] "except to the extent that they may be relaxed by other court rules or statutes applicable to a specific situation."[48] Noting that there are no procedural rules which make the rules of evidence inapplicable to preliminary examinations,[49] the court held that hearsay evidence is generally inadmissible in preliminary examinations.[50]

Although it rejected the use of hearsay evidence in preliminary examinations, the Kansas Supreme Court in *Cremer* based its decision on statutory, not constitutional, grounds. Furthermore, the court recognized a statutory exception to this hearsay prohibition in *Sherry*.

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[39] *Id.* at 931, 667 P.2d at 377.

[40] *Id.*

[41] *Id.*

[42] *Cremer*, 234 Kan. at 598, 676 P.2d at 62.

[43] *Id.* at 597, 676 P.2d at 63.

[44] *Id.*

[45] *Id.* at 603, 676 P.2d at 65.

[46] *Id.* at 602, 676 P.2d at 64.

[47] *Id.* at 600, 676 P.2d at 64.

[48] *Id.*

[49] *Id.*

[50] *Id.* The court added that Kansas judges, including the nonlawyer magistrate judges, "can apply the statutory rules of evidence without great difficulty." *Id.* This case, however, illustrates the difficulty that even experienced judges have in applying the rules of evidence, particularly the hearsay rule. The trial judge held the evidence admissible; the court of appeals then held it inadmissible; and finally, the supreme court held it admissible. *Id.* at 603-04, 676 P.2d at 65-66 (Miller, J. concurring)

The court also noted that "great changes in the concept of due process" support its holding. *Id.* at 600, 676 P.2d at 64. It is interesting, however, that despite this gratuitous statement, the court has fully embraced the *Gerstein* decision. *Sherry*, 233 Kan. at 931. The United States Supreme Court in *Gerstein*, a 1975 case, held that confrontation and cross-examination at preliminary examinations are not required. *See supra* notes 31-34 and accompanying text. Furthermore, thirty-nine states and the federal courts have not noticed these "great changes" in due process and do not follow the Kansas procedure. *See supra* notes 28 & 29 and accompanying text.

III. PROPOSAL

It is clear that the Constitution does not prohibit the use of hearsay in preliminary examinations.[51] It is also apparent that the hearsay prohibition in Kansas is statutory.[52] Consequently, any modifications regarding the use of hearsay in Kansas preliminary examinations must be statutory. Section 22-2902 could be effectively amended to include the following language: "The finding of probable cause may be based upon hearsay evidence in whole or in part."[53]

This amendment would be a conservative, yet significant, step toward alleviating the unnecessarily high costs Kansans pay under the present preliminary examination procedure. Rather than call several witnesses, the prosecutor could establish probable cause through the hearsay testimony of one or two witnesses. Furthermore, in many cases, this practice would avoid harrassment of and inconvenience to victims and witnesses.[54] Permitting the use of hearsay in preliminary examinations will substantially benefit society with very little, if any, prejudice to criminal defendants.[55]

A more drastic modification, such as abolishing preliminary examinations, is constitutionally sound. The Kansas legislature could abolish preliminary examinations and rely on the *ex parte* probable cause determination at the initial appearance.[56] Such a modification, however, would provide only marginally greater societal benefits with a potential cost of increased prejudice to defendants. Rather than risk these costs, the Kansas legislature should adopt the amendment set forth above.

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[51] *Gerstein*, 420 U.S. at 119-25.

[52] *See supra* notes 35-50 and accompanying text.

[53] This is the exact language used in FED. R. CRIM. P. 5.1.

[54] *See Hearings*, *supra* note 10.

[55] The Court in *Gerstein* recognized that the benefits of this practice outweigh any possible prejudice to defendants. 420 U.S. 121-25.

[56] *See supra* notes 21-26 and accompanying text.

def	courtno	ada	ct	cat	Hearing	Mo	Da	Yr	Time

THURSDAY - January 3, 1985

Any man who doesn't want what he hasn't got
has all he wants.

Hampton, Kenneth	K-46466	SKS	08		Sent.	01	03	85	08:30
Hall, Karen	K-47593	SKS	08		P.H.	01	03	85	08:30
Brooks, Tracy	K-47698	BW	02		P.H.	01	03	85	09:00
Fuester, James	K-47415	RG	02		P.H.	01	03	85	09:00
Lovern, Carl	K-47342	TE	08		Plea	01	03	85	09:00
Webb, Quinton	K-47701	BW	08		P.H.	01	03	85	09:30
Lloyd, Kenneth	K-47603	SP	08		P.H.	01	03	85	10:00
Heffernon, James	K-44254	SP	02		Prob Rev	01	03	85	11:00
Clark, Brian	K-47187	TE	08		Plea	01	03	85	11:30
Clark, Brian	K--47187	TE	08		Plea	01	03	85	11:30
Barker, Paul	K-47813	BW	02		P.H.	01	03	85	11:30
Folsom, Jimmie	K-47541	SKS	02		P.H.	01	03	85	11:30
Nouriani, Farzad	K-47328	RL	02		P.H.	01	03	85	11:30
Welborn, Kevin	K-47677	SP	02		Trial	01	03	85	01:30
Carl, Daniel	K-47660	BW	02		P.H.	01	03	85	01:30
Horton, Ron	K-47521	BW	02		Trial	01	03	85	01:30
Seve, Louis	K-47742	RG	08		P.H.	01	03	85	02:00
Brown, Kelly	K-44740	RL	08		Hearing	01	03	85	02:30
Morris, Marion	K-47571	TE	08		P.H.	01	03	85	03:00
Stanford, Russell	K-47693	TE	02		P.H.	01	03	85	03:15
Call, Danny	K-47751	SP	08		P.H.	01	03	85	03:30
Turner, Lawrence	K-47877	PJM	04		P.H.	01	03	85	03:30
Richardson, C.	K-47794	RL	04		P.H.	01	03	85	03:30
McDonald, J.	K-46813	BWB	04		P.H.	01	03	85	03:30
Alley, Donald	K-47869	SKS	04		P.H.	01	03	85	03:30
Newkirk/Bailey	K-47888	SP	04		P.H.	01	03	85	03:30
Parrick, Jeffrey	K-47358	RG	04		P.H.	01	03	85	03:30
Johnson, Wynona	K-41954	RG	04		Trial	01	03	85	03:30
Mitchell, David	K-47744	SP	04		P.H.	01	03	85	03:30
Hoglund/Gragg	K-47866	RG	04		P.H.	01	03	85	03:30
Harper, Chad	K-47867	RG	04		P.H.	01	03	85	03:30
Geiger, Randy	K-47870	PJM	04		P.H.	01	03	85	03:30
Jacquez, Juan	K-47863	SP	04		P.H.	01	03	85	03:30
Williams, Charles	K-47888	SP	04		P.H.	01	03	85	03:30
Lusso, Kevin	K-47861	RL	04		P.H.	01	03	85	03:30
Brunner, S.	K-47884	BW	04		P.H.	01	03	85	03:30
Glaze, Ronald	K-47910	BW	04		P.H.	01	03	85	03:30
McDonald, James	K-47895	BWB	04		P.H.	01	03	85	03:30
Patton, Jeff	K-47363	SKS	04		P.H.	01	03	85	03:30
Johnson/Alexander	K-47896	SRT	04		P.H.	01	03	85	03:30
Slinkard, Chas.	K-47056	SP	02		Prob Rev	01	03	85	03:30
Flippin, Pettie	K-47719	SRT	08		P.H.	01	03	85	04:00
Walker, Oscar	K-45829	BB	02		Sent.	01	03	85	04:00
Bertrand, Rich.	K-47717	TE	02		P.H.	01	03	85	04:30
Francis, Terry	K-47716	TE	02		P.H.	01	03	85	04:30
Ferrell, Michael	K-47760	SKS	08		Trial	01	03	85	04:30

Attachment #7
House Judiciary Committee
February 26, 1985

February 24, 1985

The House Judiciary Committee
Topeka, Kansas

RE: House Bill 2454 to amend KSA 22-2902

Members of the House Judiciary Committee:

Last year at this time I came to Topeka to testify before you as a victim of crime. This year I am unable to personally testify, but again I am asking you to amend the preliminary hearing statute KSA 22-2902 by adopting House Bill 2454.

I was a victim of rape four years ago at the age of twenty. Due to very strong evidence in my favor, and my belief in our system of justice, I felt very confident and unafraid about going to trial---until the preliminary hearing. I was asked humiliating, irrelevant, detailed questions about my past that no attorney would have dared to ask before a jury. It was insinuated that because I lived alone, I was promiscuous; because I jogged in shorts, I had asked for it. I left the preliminary hearing stunned and disillusioned. I was mortified at the thought of going through this again at the trial. By the trial date I was so afraid and upset I literally almost could not walk into the courtroom. As I found out, none of what was said in the preliminary carried over to the trial, which made the preliminary hearing almost useless as a means of discovery.

The primary use of a preliminary hearing for the defense attorney seems to be to upset and intimidate the victim and to try to frighten them into not being able to testify at the trial. By intentionally putting the victim under extreme pressure, they are able to elicit answers that may not be interpreted the way the victim intended. These senseless, degrading questions leave the victim feeling used and defeated by our system.

Considering all the other detrimental aspects of the preliminary hearing, such as time and money spent, it seems senseless to put victims and witnesses through this added emotional trauma.

On behalf of victims and witnesses, I ask for your careful consideration in eliminating these traumatic, time-consuming, and costly preliminary hearings.

Sincerely,

Valerie

Valerie

Attachment No. 8
House Judiciary
February 26, 1985

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

DENNIS W. MOORE
District Attorney

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

February 26, 1985

House of Representatives
Judiciary Committee
Capitol Building, Room 526S
Topeka, Kansas 66603

Dear Members of the House Judiciary Committee:

Please consider this letter as written in support of H.B. 2454, amending the preliminary hearing statute, K.S.A. 22-2902. The purpose of this amendment is to remove the adversary element from preliminary hearings, therefore alleviating the victim/witness need to testify.

I have worked for the past eight years with crime victims in the Johnson County District Attorney's Office. In my work, I have seen the devastating effects that testifying has on the victims/witnesses. They are victimized initially when the crime occurs and then by asking them to cooperate with our office in prosecuting the defendant, we open up their chances of being re-victimized when they testify. Recounting the criminal incident during direct questioning is extrememly hard and it gets even more difficult when the victim has to endure cross examination.

The stages of victimization include: denial, anger, fear of retaliation, paranoia, intimidation, and a feeling of lack of protection. We as professionals have a duty to protect the victims of crime from being revictimized. This can be accomplished by eliminating calling victims to testify at preliminary hearings.

I consider H.B. 2454 as a bill for victims' rights and I do not believe that it infringes on the rights of the accused. The benefits of this bill far outweigh the constitutional requirements of the defendant in the determination of probable cause.

In the 1983 session, I testified in front of the House Judiciary Committee in support of a similar bill. I spoke to you on how this amendment would correspond with the recommendations of

Attachment #9
House Judiciary Committee
February 26, 1985

President Reagan's Task Force on Victims of Crime. I also commented that if Kansas passed this bill, it would join five other states which have redefined the purpose of the preliminary hearing. Therefore, Kansas would be considered one of the top states that recognize the rights of the crime victim.

Please give H.B. 2454 your strong consideration for passage. Thank you.

Very truly yours,

Georgia Nesselrode

Georgia Nesselrode
Victim/Witness Coordinator

GN/ks