Approved March 28, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Jeanne Hoferer at
Chairperson

10:00 a.m./~~p.m.~~ on March 21, 1986 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senator Hoferer, Feleciano, Parrish, Winter and Yost.

Committee staff present: Mary Hack, Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Matt Lynch, Kansas Judicial Council
Jim Clark, Kansas County and District Attorneys Association
Ron Smith, Kansas Bar Association
Steve Joseph, Wichita Bar Association
Representative Clinton Acheson
Byron Cerrillo, Shawnee County Sheriff's Department

Senator Jeanne Hoferer chaired the committee in the absence of the chairman, Senator Robert Frey.

Sub. for House Bill 2454 - Preliminary examinations and depositions in criminal cases.

Matt Lynch, Kansas Judicial Council, explained the judicial council was requested to make recommendations on the provisions contained in 1985 House Bills 2454 and 2445. The Criminal Law Advisory Committee recommended that the proposed legislation not be enacted. A copy of the report of the Judicial Council is attached (See Attachment I). He noted Elwaine Pomeroy, who was a member of the study committee, will be testifying on a bill in this committee on Monday, and if the committee had any questions on this bill, he would be glad to answer them.

Jim Clark, Kansas County and District Attorneys Association, testified his association originally requested introduction of House Bill 2454, and is in support of Substitute for House Bill 2454, with some qualification. Copies of his testimony and other material are attached (See Attachments II) During committee discussion, a committee member was concerned with video taped testimony of children. Mr. Clark said this is sort of a concern in that particular area, and Representative Heinemann had a bill concerning that. Considerable committee discussion was held.

Ron Smith, Kansas Bar Association, testified the bar was originally in favor of new Section 2 which was at the request of the Wichita Bar Association. He introduced Steve Joseph who is chairman of the legislative committee of the Wichita Bar Association.

Mr. Joseph testified the bar association supports the bill as a good compromise. He said there are five states that allow criminal discovery depositions, and he proposed the law committee adopt the Florida idea in Kansas. He explained Section 2 is to provide a tool for criminal defense to discover what the facts are so they can prepare for search for truth that the judge must have. He said he talked with the attorneys in his office, and they

Sub. for House Bill 2454 continued

have done 1600 preliminary hearings, and out of those 1600, the defense has not won one. Some say there is a great deal of expense in discovery depositions in criminal cases; only in front of the IDS board, both judge and prosecutor have a great deal to do with what happens with taking discovery depositions. Mr. Joseph stated the association supports this bill in combination. They don't support the hearsay provisions by themselves. If Section 1 is separated from Section 2, the Wichita Bar Association does not support preliminary hearings.

House Bill 2783 - Admission of forensic examiners report at a preliminary hearing.

Representative Clinton Acheson, prime sponsor of the bill, explained this bill was requested by the Shawnee County Sheriff's Department, and it is to amend the statute to include Shawnee County.

Byron Cerrillo, Shawnee County Sheriff's Department, stated the Shawnee County Sheriff's Department could save considerable expense by passage of this bill. A copy of his testimony is attached (See Attachment III).

Jim Clark, Kansas County and District Attorneys Association, testified his association supports the bill. He recommended two agencies be included in the bill, the Federal Bureau of Investigation and the Federal Bureau of Tobacco and Firearms.

A copy of a statement from Representative Joan Wagnon in support of the bill is attached (See Attachment IV).

The meeting adjourned.

Copy of the guest list is attached (See Attachment V).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-21-86

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Byron Cerrillo	200 E. 7th, Topeka, KS.	Shawnee County Sheriff Dept.
Richard Warrington	200 E 7th Topeka KS.	Shawnee County Sheriff Dept
Jim Clark	Topeka	KCDAA
Steve Joseph	105 S. Broadway Wichita	Wichita Bar Assoc.

A-V

3-21-86

REPORT OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE ON 1985 HOUSE BILLS 2454 AND 2445

* * * * * * * * * * * * *

APPROVED BY THE JUDICIAL COUNCIL
JANUARY 9, 1986

S. Jud.
3/21/86
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INTRODUCTION

In July of 1985, Robert G. Frey, Chairman of the Senate Judiciary Committee, requested that the Judicial Council study and make recommendations on the provisions contained in 1985 House Bills 2454 and 2445, concerning the use of hearsay evidence at preliminary examinations and discovery depositions in criminal cases. Following amendments by the House Judiciary Committee, the two bills were combined in substitute for House Bill 2454. The Judicial Council referred Senator Frey's request to the Criminal Law Advisory Committee.

The members of the Criminal Law Advisory Committee are: Judge James J. Noone, Chairman, Wichita; Judge William D. Clement, Junction City; Michael Crow, Attorney, Leavenworth; A. Jack Focht, Attorney, Wichita; Judge Earle D. Jones, Olathe; Michael L. Lerner, Attorney, Kansas City; Judge Michael J. Malone, Lawrence; Steven L. Opat, Geary County Attorney, Junction City; Senator Nancy E. Parrish, Attorney, Topeka; Elwaine F. Pomeroy, Chairman of the Kansas Adult Authority, Topeka; and Loren L. Taylor, Police Legal Advisor, Kansas City.

THE PROPOSED LEGISLATION

Statutory provisions governing the procedure at preliminary examinations are contained in K.S.A. 22-2902 and K.S.A. 1984 Supp. 22-2902a. The Kansas Supreme Court has held that the rules of evidence are to be applied in preliminary examinations except to the extent they may be relaxed by other court rules or statutes applicable to a specific situation. State v. Cremer, 234 Kan. 594, 676 P.2d 59 (1984). Consequently, hearsay evidence is not

admissible in Kansas preliminary examinations unless it fits a recognized exception to the hearsay rule or the limited statutory exception for reports of forensic examiners contained in 22-2902a. As introduced at the request of the county and district attorneys association, the main thrust of H.B. 2454 would be to amend 22-2902(3) to provide that, "Hearsay evidence may be admitted as long as there is a substantial basis for crediting such evidence and may be relied upon and form the basis for a probable cause finding."

Proponents of H.B. 2454 note that the preliminary examination in Kansas exceeds the requirement of the fourth amendment to the U.S. Constitution for a nonadversarial judicial determination of probable cause to detain an arrested person and that the constitution does not prohibit the states from authorizing the use of otherwise inadmissible hearsay evidence to make such determinations of probable cause. Gerstein v. Pugh, 420 U.S. 103 (1975). Proponents of the bill contend that the use of otherwise inadmissible hearsay will result in savings of time and expense for courts, prosecutors, and witnesses and will aid in avoiding harrassment and embarrassment of victims.

House Bill 2445 would allow a defendant who waives the right to a preliminary examination to take the deposition of any person who may have information relevant to the offense charged. Under the bill, such depositions would typically be taken in the courthouse where the action is pending and would be governed generally by the code of civil procedure. Presently under K.S.A. 22-3211, the defense and the prosecution may depose a witness only

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upon court order and for the purpose of perpetuating the testimony of a prospective witness who may be unable to attend or prevented from attending a trial or hearing. In felony cases, the prosecution may also apply for an order to take the deposition of an "essential witness," as that term is defined in 22-3211(10).

At a hearing before the House Judiciary Committee, the county and district attorneys association requested that H.B. 2445 be amended to permit the defendant to take the deposition of any person whose statement was admitted as hearsay evidence at the preliminary examination. Although not adopting the exact language of the recommendation, subsection (a) was amended to read, "Any defendant who is charged by complaint with a felony may take the deposition on oral examination of any person listed as a witness on the complaint or information, other than a witness who testified at the preliminary examination." The House Committee combined H.B. 2445, as amended, with H.B. 2454 in substitute for H.B. 2454.

COMMITTEE RECOMMENDATION

The Criminal Law Advisory Committee recommends that the proposed legislation not be enacted. While there is not complete agreement among the Committee members as to the reasons set forth below, the Committee is unanimous in its recommendation.

The proposed legislation does not directly address whether or not the defendant can compel attendance at the preliminary examination by the use of subpoena of persons whose statements the prosecution introduces through hearsay evidence. In connection

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with 22-2902a which allows a forensic examiner's report to be admitted at a preliminary examination with the same force and effect as if the forensic examiner testified in person, the Kansas Supreme Court has indicated that the defendant can compel the attendance of the examiner at the preliminary hearing by the use of a subpoena. State v. Sherry, 233 Kan. 920, 930, 667 P.2d 367 (1983). It would seem likely that any person whose hearsay testimony was introduced at the preliminary examination to establish probable cause would be subject to subpoena by the defendant. This would seem to mitigate any savings or avoidance of inconvenience and harrassment promoted by H.B. 2454. Committee members also expressed concern about the possible consequences of the requirement that there be "a substantial basis for crediting" hearsay evidence which is admitted at the preliminary examination. Committee members were concerned that establishing the requisite basis for crediting the hearsay evidence may be as time consuming as calling the actual witness.

While there is disagreement among Committee members concerning the frequency with which it occurs, it is the opinion of the Committee that preliminary examinations aid in the resolution of cases in that they enable the prosecution and the defense to more accurately assess the strength of cases and the probabilities for success at trial. Many defendants do not realistically appraise their situation until confronted with the state's witnesses. Conversely, prosecutions are often filed based on investigators' reports containing witness interviews which do not accurately reflect the strength of the witnesses' eventual testimony. The

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use of otherwise inadmissible and potentially unreliable hearsay would appear to detract from the likelihood of informed resolution of such cases.

The Committee views the present procedure of preliminary examinations as preferable to the use of inadmissible hearsay accompanied by expanded use of discovery depositions. The Committee suspects that a victim or other witness would experience more harrassment and embarrassment in being questioned at a deposition without the presence of a judge than in testifying at a preliminary examination. The Committee also questions any overall savings in time and expense. Several members of the Committee noted that defense attorneys will feel compelled, at least in part by the threat of later allegations of ineffective assistance of counsel, to depose virtually all of the state's witnesses. These depositions will require not only the attendance of the defense attorney and the witness but also that of a member of the prosecutor's staff.

A number of the members of the Criminal Law Advisory Committee would agree that there are problems with expense, loss of time, witness inconvenience, and victim harrassment associated with present procedures. However, it is not the opinion of the Committee that the proposed legislation represents an improvement in those procedures.

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HOUSE BILL No. 2445

By Committee on Judiciary

2-18

AN ACT relating to criminal procedure; providing for discovery depositions in criminal cases.

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

Section 1. (a) Any defendant who is charged by complaint with a felony and who waives the defendant's statutory right to a preliminary examination may take the deposition on oral examination of any person who may have information relevant to the offense charged. Except as provided in this section, the Kansas code of civil procedure shall govern the taking of discovery depositions in criminal cases.

(b) The deposition shall be taken in the courthouse where the action is pending, such other place on which the parties agree or where the court may designate by order on the application of a party. The defendant taking the deposition shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. For cause shown, the court may extend or shorten the time for taking the deposition. The attendance of witnesses may be compelled by the use of subpoenas as provided in K.S.A. 60-245 and amendments thereto. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(c) The parties may stipulate in writing or the court, on motion, may order that the testimony at a deposition be recorded by other than stenographic means, in which event the stipulation or order shall designate the person before whom the deposition shall be taken and the manner of recording, preserving and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If a method other than stenographic means is used, a party may nevertheless arrange to have a stenographic transcription made at the party's expense. A deposition recorded by nonstenographic means shall be accompanied by the following, which shall be set forth in writing: Any objection under subsection (c) of K.S.A. 60-230 and amendments thereto; any changes made by the witness; the signature identifying the deposition as that of the witness or the statement of the officer that is required if the witness does not sign, as provided in subsection (e) of K.S.A. 60-230 and amendments thereto; and the certification of the officer required by subsection (f) of K.S.A. 60-230 and amendments thereto.

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(d) A discovery deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness at the trial or at any hearing. A deposition to perpetuate testimony shall be taken in accordance with the provisions of K.S.A. 22-3211 and amendments thereto.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL No. 2454

By Committee on Judiciary

2-19

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. (1) Every person arrested on a warrant 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)~~ *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~~ *evidence* shall be examined in ~~said~~ *the* defendant's presence. *Hearsay evidence may be admitted as long as there is a substantial basis for crediting such evidence and may be relied upon and form the basis for a probable cause finding.* The defendant's voluntary absence after the preliminary examination has been begun in ~~said~~ *the* defendant's presence shall not prevent the continuation of the examination. The defendant shall have the right to crossexamine witnesses against the defendant and introduce evidence in ~~his or her~~ *the defendant's* 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 de-

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fendant 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~~, or as amended,~~ *and amendments thereto* 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 *and amendments thereto*.

(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.

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

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

Substitute for HOUSE BILL No. 2454

By Committee on Judiciary

3-7

AN ACT concerning criminal procedure; relating to preliminary examinations; providing for discovery depositions in criminal cases; 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. (1) Every person arrested on a warrant 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)~~ *10* days after the arrest or personal appearance of the defendant. Continuances may be granted only for good cause shown.

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(3) The defendant shall not enter a plea at the preliminary examination. The defendant shall be personally present and the ~~witnesses~~ *evidence* shall be examined in ~~said~~ *the* defendant's presence. *Hearsay evidence may be admitted as long as there is a substantial basis for crediting such evidence and may be relied upon and form the basis for a probable cause finding.* The defendant's voluntary absence after the preliminary examination has been begun in ~~said~~ *the* 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~~ *the defendant's* 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~~, or as amended,~~ *and amendments thereto* 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 *and amendments thereto.*

(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.

New Sec. 2. (a) Any defendant who is charged by complaint with a felony may take the deposition on oral examination of any person listed as a witness on the complaint or information, other than a witness who testified at the preliminary examination. Except as provided in this section, the Kansas code of civil procedure shall govern the taking of discovery depositions in criminal cases.

(b) The deposition shall be taken in the courthouse where the action is pending, such other place on which the parties agree or where the court may designate by order on the application of a party. The defendant taking the deposition shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. For cause shown, the

court may extend or shorten the time for taking the deposition. The attendance of witnesses may be compelled by the use of subpoenas as provided in K.S.A. 60-245 and amendments thereto. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(c) The parties may stipulate in writing or the court, on motion, may order that the testimony at a deposition be recorded by other than stenographic means, in which event the stipulation or order shall designate the person before whom the deposition shall be taken and the manner of recording, preserving and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If a method other than stenographic means is used, a party may nevertheless arrange to have a stenographic transcription made at the party's expense. A deposition recorded by nonstenographic means shall be accompanied by the following, which shall be set forth in writing: Any objection under subsection (c) of K.S.A. 60-230 and amendments thereto; any changes made by the witness; the signature identifying the deposition as that of the witness or the statement of the officer that is required if the witness does not sign, as provided in subsection (e) of K.S.A. 60-230 and amendments thereto; and the certification of the officer required by subsection (f) of K.S.A. 60-230 and amendments thereto.

(d) A discovery deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness at the trial or at any hearing. A deposition to perpetuate testimony shall be taken in accordance with the provisions of K.S.A. 22-3211 and amendments thereto.

Sec. 3. K.S.A. 22-2902 is hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

STATE OF KANSAS

R(T G. FREY
SENATOR, THIRTY EIGHTH DISTRICT
412 N. WASHINGTON
LIBERAL, KANSAS 67901
316 624 8138
316 624 7575

TOPEKA

COMMITTEE ASSIG
CHAIRMAN JUDICIARY
MEMBER ASSESSMENT AND TAXATION
JOINT COMMITTEE ON SPECIAL
CLAIMS AGAINST THE STATE
GOVERNMENTAL ORGANIZATION
TRANSPORTATION AND UTILITIES
JUDICIAL COUNCIL

SENATE CHAMBER

July 2, 1985

Honorable David Prager, Chairman
Kansas Judicial Council
301 W. 10th St.
Topeka, Kansas 66612

re: Criminal Procedure

Dear Judge Prager,

During the 1985 session of the legislature House Bill 2454 and House Bill 2445 were considered by the Senate Judiciary Committee which provided for expansion of discovery procedure in criminal cases. The purpose of House Bill 2445 was to reduce the time which is now spent on criminal preliminary hearings through the use of hearsay evidence under certain circumstances. House Bill 2445 provided for expanded use of criminal discovery depositions.

These concepts have been considered by the legislature in a limited manner for several years but have always met with substantial resistance from the defense bar and thus never passed. It is my feeling that we are operating under an unnecessarily complicated preliminary hearing process in Kansas and that we could make it a more streamlined and efficient process with very little effect upon the rights of the State or the Defendant.

I am requesting that this matter be studied by the Judicial Council and that a report be made along with possible recommendations for changes in the law.

I have not enclosed copies of the two bills mentioned above since I do not have them available but I am certain copies can be obtained from the office the Legislative Administrative Services by simply calling and asking.

Sincerely,

Robert G. Frey

RGF/gf

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3-21-86

Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351

EXECUTIVE DIRECTOR • JAMES W. CLARK

Substitute for HOUSE BILL 2454

The Kansas County and District Attorneys Association originally requested introduction of HB 2454, and is in support of Substitute HB 2454, with some qualifications. The thrust of the original bill is contained in lines 36 - 38, which amend the statute to allow hearsay evidence to be admitted in the preliminary examination.

I. **Constitutionality.** Both the U.S. Supreme Court and the Kansas Supreme Court have ruled that the Constitution does not prohibit the use of hearsay evidence at the preliminary hearing. Gerstein v. Pugh, 420 U.S. 103; State v. Sherry, 233 Kan. 920 (1983).

II. **Legislative Determination.** When the Kansas Court of Appeals ruled that hearsay evidence was admissible, it did so in reliance on earlier Kansas cases decided prior to the recodification of the Code of Civil Procedure, saying that such sweeping changes did not intend to prevail over case law. State v. Cremer, 8 Kan. App. 2d 694. The Supreme Court, however, reversed that decision, finding that the general revisions to the Code of Civil Procedure made the rules of evidence applicable to every civil or criminal proceeding, **except where specifically relaxed by procedural rule or statute.** State v. Cremer, 234 Kan. 594. In short, determination of whether hearsay evidence is admissible at a preliminary hearing is a legislative determination.

III. **Policy Question.** At issue is whether Kansas wishes to join the majority of states, and the Federal government, in allowing hearsay evidence at the preliminary, as recommended by the President's Task Force on Victims of Crime. The obvious benefit is reducing the inconvenience, expense and anguish of witnesses; as well as reducing delay and congestion in the court dockets. On the other hand, we have heard that the present system allows attorneys to better prepare their cases, and provides discovery to criminal defendants. Neither of these reasons is the intended purpose of the preliminary hearing, which is to determine probable cause to hold a defendant for trial. State v. Jones, 233 Kan. 170 (1983). The concerns of the defense bar, however, are obvious, and these concerns are dealt with at New Section 2 of the bill, which allows defendants to take depositions of witnesses listed on the complaint or information, who have not testified at the preliminary hearing. On balance, the Substitute Bill passed by the House seemed a workable compromise between concern for both victims and defendants. Since passage by the House, however, two studies by the U.S. Department of Justice National Institute of Justice suggest that the taking of depositions of child victims may be even more frightening than the preliminary hearing, since it often places the child in a smaller room, in close physical proximity to the alleged abuser, and without the protection afforded by a presiding magistrate. These findings, coupled with the suggestion of Professor Tonkovich that the State should enjoy reciprocal discovery rights of defense witnesses, give us some reservations regarding the present wording, however, we continue to support the bill.

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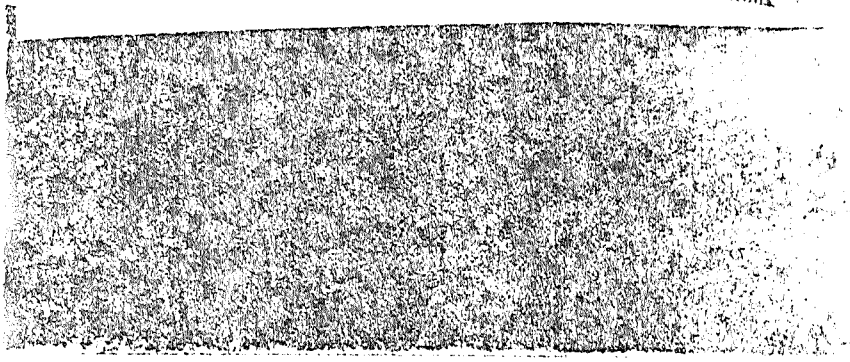
Executive and Legislative Recommendation 3:
Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person.

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.



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The University of Kansas Law Review

Summer 1984 Volume 32, no. 4

A Proposal for the Use of Otherwise Inadmissible Hearsay in Kansas Preliminary Examinations

Emil A. Tonkovich

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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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* Associate Professor of Law, University of Kansas, J.D. 1977, *summa cum laude*, Notre Dame. The author acknowledges the assistance of James P. Gerstenlaur, third year law student at the University of Kansas, in this article's preparation.

[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).

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

[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).

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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 121-22.

[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 that 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 62.

[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.

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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 harassment 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.

[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.

U.S. Department of Justice
National Institute of Justice

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National Institute of Justice / Research in Brief

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Prosecution of Child Sexual Abuse: Innovations in Practice

Debra Whitcomb

Child sexual abuse occurs with alarming frequency. The National Center on Child Abuse and Neglect (a division of the U.S. Department of Health and Human Services) estimates that in 1983 nearly 72,000 children were reported as sexually maltreated by a parent or household member.[1] Local law enforcement agencies also receive a large and growing number of reports of child sexual abuse although the FBI's Uniform Crime Reports do not tabulate sexual assaults by age of victim.

Perhaps even more disturbing is that an unknown number of similar cases never reach the attention of authorities.

1. U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *National Study on Child Neglect and Abuse Reporting* (Denver: American Humane Association, 1984).

Very young children may lack the verbal capacity to report an incident or the knowledge that an incident is inappropriate or criminal; older children may be too embarrassed. Many child victims are threatened into silence. When they do confide in a trusted adult, their reports may be dismissed as fantasy or outright lies.

Even if the child's story is believed, parents and health and social services professionals have been reluctant to enlist the aid of enforcement agencies, largely for fear of the adverse effects of the criminal justice process on child victims and their families.

Even cases that are filed with police may not result in prosecution for a variety of reasons. These include inability to establish the crime, insufficient evidence, unwillingness to expose the child to additional trauma, and the belief that child victims are incompetent, unreliable, or not credible as witnesses. Yet, public sentiment increasingly favors criminal justice intervention in these cases.

This Research in Brief discusses some problems faced and posed by child victims in the criminal justice system. It reviews legislative revisions, local reforms, and new techniques to alleviate these problems.

Child victims in the criminal justice system

By definition, children are immature in their physical, cognitive, and emo-

From the Director

More than 90 percent of all child abuse cases do not go forward to prosecution. In many of these cases, the decision not to proceed is based on concerns about the child's possible performance on the witness stand or the impact of the court process on the child victim's recovery. The unfortunate result is that many suspects are released without the imposition of justice. They not only escape any penalty but have the opportunity for further abuse of their initial victim or other children.

Both community members and criminal justice professionals are increasingly concerned about our apparent ineffectiveness in dealing adequately with the crime of child sexual abuse.

The National Institute of Justice commissioned Abt Associates, Inc., to review research and experience in dealing with child victims. This *Research in Brief* summarizes the findings discussed in an *Issues and Practices* report, *When the Victim Is a Child*. Included in this *Brief* is a 50-State analysis of relevant statutes enacted as of December 1984.

The *Brief* also suggests new and creative ways of reducing the trauma of trial preparation and court appearances on child sexual abuse victims. At the same time, the approaches outlined maintain the rights of the accused and the integrity of the judicial system.

James K. Stewart
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tional development. This immaturity takes its toll when children are involved in court proceedings. From the time an incident of child sexual abuse is revealed, the victim is interviewed repeatedly by adults representing different agencies with overlapping information needs. Continuances are freely granted, causing delays that erode the children's memories and undermine therapeutic efforts to help them get on with their lives.

Children often do not understand the reasons for repeated interviews and delays. Many choose to end the process by recanting the accusation before their cases can be adjudicated.

When these cases do go to court, an entirely different set of problems arises for children who are called to testify. Judges may seem to loom large and powerful over small children who may feel isolated in the witness stand. Attorneys often use language children do not understand and seem to argue over everything the children say. Defense attorneys ask questions intended to confuse them for reasons children cannot comprehend. Many people are watching every move the child witness makes—especially the defendant.

Under such conditions, children cannot be expected to behave on a par with adults. It is not unusual for them to recant or freeze on the witness stand, refusing to answer further questions. At best, this behavior weakens the Government's case; at worst, it leads to dismissals for lack of evidence.

The problems of immaturity are compounded when the child is a victim of sexual abuse. Generally, the child is the only witness to this abuse, and often there is no physical evidence. Consequently, the case becomes a matter of the child's word against the adult's. This fact is all too obvious to offenders and is very simple for defense attorneys to exploit.

Incest, in particular, traps the child in an extremely precarious position. Children are taught to obey and respect their elders, and incestuous offenders often command secrecy with threats that range from withdrawal of love to death of the child, mother, or other loved ones.

Visions of the father in jail, the mother distraught, the family on welfare, and the children placed in foster care typically suffice to prevent a victim from divulging the incestuous situation, often for years, sometimes forever. A child who reports promptly is by far the exception, not the rule.

If the child's situation becomes known and the child protection or law enforcement authorities intervene in the family, the child may be under intense pressure to retract the allegation. Regardless of whether the father or the child is removed from the home, dissolution of the family appears imminent and the child may shoulder the blame. Such pressure to recant is further intensified the longer the case is delayed, becoming strongest when the child faces the defendant from the witness stand.

A call for change

If child victims are treated insensitively while their allegations are investigated and adjudicated, their participation in the process is likely to suffer, in turn weakening the government's case.

Victim advocates and prosecutors across the country are experimenting with a variety of measures intended to reduce the stress on child victims who become entangled in the complexities of the child protection and criminal justice systems. Several States have already adopted laws that permit alternative—and some very controversial—techniques.

Included in this Research in Brief is a chart analyzing selected provisions of pertinent legislation that had been enacted as of December 1984. The reform measures are listed in two categories: (1) those seeking to alleviate the perceived trauma of giving live, in-court testimony (hearsay exceptions, exclusion of spectators); and (2) those authorizing mechanical interventions to obtain the child's testimony (videotape and closed-circuit television). The chart includes extensive footnotes providing important clarifications or elaborations of its contents.

Also included in this Research in Brief are statutory citations for selected issues in child witness testimony including competency, abused child hearsay exceptions, exclusion of spectators from the courtroom, and the admissibility of videotaped testimony.

This brief discusses some practical concerns surrounding the actual implementation of proposed reforms. The findings are based largely on personal interviews conducted with judges, prosecutors, victim advocates, protective services workers, and law enforcement officers in Des Moines, Iowa; Milwaukee, Wisconsin; Orlando, Florida; and Ventura, California. Each jurisdiction possessed a different array of innovative statutes and procedures, thereby enabling researchers to examine a broad range of alternative techniques.

The results of this study suggest that many of the new reforms have been rarely used. Many unresolved questions about their ability to withstand judicial scrutiny (not addressed by this study) in addition to a number of practical concerns tend to dissuade prosecutors from taking full advantage of the measures.

Practical concerns with the new techniques

The plight of child victims in the courtroom has generated considerable media attention, much of it focused on the potential of modern technology to alleviate the stress of testifying. Videotape and closed circuit television, in particular, have received much media coverage, and legislators have felt pressured to adopt these controversial measures with limited opportunity for reflection and study.

The findings of this study suggest that these techniques can be used only in a small fraction of child sexual abuse cases, and that there are less obtrusive and less controversial, ways of achieving similar effects for all but the most seriously traumatized children.

Perhaps the most radical of the proposed reform measures is the use of closed circuit television to broadcast the child's live testimony from another room adjacent to the trial courtroom. As of December 1984, this technique was statutorily authorized in only four States: Kentucky, Louisiana, Oklahoma, and Texas.

These laws permit the attorneys and a supportive adult (e.g., victim assistant or close relative) to be present with the child during the broadcast. The defendant and equipment operators may also be present, but the child is not allowed to see or hear them.

Whether the use of closed circuit television satisfies the defendant's constitutional right of confronting his or her accuser has not yet been resolved. But prosecutors and judges question the value of this technique from another standpoint: What effect does the new medium have on jurors' perceptions?

Although there is some empirical evidence to suggest that televised trial materials have no markedly negative effect on courtroom communication between trial participants and jurors,[2] these findings are far from conclusive.

The primary purpose of closed circuit television is to avoid direct confrontation between the child and the defendants, but there are other means to this end. Some prosecutors use their own bodies to block the victim's view of the defendant during the direct examinations. Others simply instruct children to look elsewhere while they testify, or to look for a supportive family member or victim advocate in the courtroom audience. One victim advocate encourages children to tell the judge if the defendant is making faces.

Such instructions may not completely eradicate the child's fear of seeing the defendant in court, but at least they impart a small sense of control in a situation that may seem overpowering to a child.

Videotaping testimony is another technique that is highly praised, yet seldom used where it is authorized. At this writing, at least 14 States have adopted laws authorizing the introduction of videotaped testimony taken at a deposition or preliminary hearing in lieu of live testimony at trial. But some prosecutors point out that the environment at a deposition can be more traumatic than that of a trial courtroom. Depositions take place in small rooms, thereby bringing the child and the defendant into closer physical proximity than in the trial courtroom. The judge may not be there to monitor the behavior of the defendant or his counsel, and victim advocates may not be permitted to attend.

If a court finding of emotional trauma or unavailability is prerequisite to a videotape substitution for live testimony, the child may be subjected to a battery of medical and/or psychiatric tests by examiners for the State and the defense. Some prosecutors also believe that a child who successfully endures all the proceedings leading up to the deposition or preliminary hearing can succeed at trial as well; indeed, by that point the videotaped deposition merely substitutes one formal proceeding for another.

The purpose of the videotape statutes is to spare the child the presumed trauma of a public appearance in court. Yet, many interview respondents observed that the courtroom audience is *not* a major concern for most children. They also noted that there rarely is a general audience; when spectators are present, they can often be persuaded to leave voluntarily by simple request of the prosecutor. Existing statutes for closing courtrooms—another popular remedial technique—are seldom invoked.

At least three States—Texas, Louisiana, and Kentucky—have adopted laws permitting a videotape taken of the child's first statement to be introduced into evidence. For the taping, the child must have been questioned by a non-attorney, and both the interviewer and child must be available for cross-examination. The principal goal of these statutes is to reduce the number of interviews the child must give, but they allow for other benefits as well.

Videotaping the child's first statement can capture the child's most candid reaction to the incident. Prosecutors and victim advocates report that the technique encourages guilty pleas.[3] Police, social workers, and prosecutors in many jurisdictions are already using videotape to achieve these goals, even in the absence of laws authorizing introduction into evidence at trial.

There are drawbacks to these videotape statutes, however. Since child victims must be available for cross-examination, the laws do not protect them from the presumed trauma of testifying at trial and confronting the defendant. And, unless the court places them under a protective order, the videotapes may become public property, perhaps even appear on media broadcasts, causing incalculable trauma for the child and family. Also, the tapes become a liability if the child volunteers contradictory information, or if improper questioning techniques were used to elicit responses.

Useful and effective techniques

Much attention has been focused on technological aids intended to help child victims in the adjudication process. Some of the most useful and effective techniques, however, do not involve advanced technology. Statutes creating special exceptions to hearsay for certain out-of-court statements of child sexual abuse victims fall into this category.

Child sexual abuse victims sometimes make innocent remarks that are quite explicit in their portrayal of sexual activities that should be unknown to a child. For example, when a 7-year-old girl spontaneously asks her father, in child's language, about details of erection and ejaculation, there can be little doubt that this child was sexually abused in some way. Yet this kind of

2. Gerald R. Miller, "The Effects of Videotaped Trial Materials on Juror Responses," in *Psychology and the Law*, ed. Gordon Bermant, Charles Nemeth, and Neil Vidmar (Lexington, MA: Lexington Books, 1976), 205.

3. This effect was reported to us in telephone interviews with prosecutors across the country. See also, Reinhardt Krause, "Videotape, CCTV Help Child Abuse Victims Tell Their Story but Legal Problems Remain," in *Law Enforcement Technology*, (November 1984), 16-18.

II

Exhibit 1

Statutory provisions relevant to child witnesses in sexual abuse cases*

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
LIVE TESTIMONY																																																			
Competency																																																			
• child <14, court determines																														C,1											C,1	C,1					C,1		C,1		
• child <10, court determines			S			S,2							S		S				S,3				S	S,4		S,2						S,3			S,R								S,2			S			S
• child competent if understands oath	S,R	R							C		S	S																															R							
• competent if understands oath					R		C							C		S,R	S	S		R		S					R				R			R						S			R				R			
• every person competent			R	S		R		R		S											S		R		S			S	S		S	R			R		S	S	S			S				R		S	R
Abused child hearsay exception																																																		
• child's age (in years)			<10			<15								<13	<10		M							<10																		<10		M		<10			
• court finds reliable																	S							S																		S		S		S			
• child testifies			S			S								S	S									S																		S		S		S			
• child unavailable, statement corroborated			S			S									S		5							S																		S		S		S			
• notice of introduction			S			S									S									S																							S			
Exclusion of spectators from courtroom																																																		
• victim witness age (in years)	any	≤16	any		any					<16	any			<13					≤15			<18	any	<18	any		any			<16			any	any	any						M			any			any	
• during testimony only		S			6					S				S					S				9							10				S							S						6	
• public transcript provided		S	S		S																									S																			
• media exception			S							S				S					8																							S							
• family, guardian, moral support exceptions		S			S					S									S																														S	
MECHANICAL TESTIMONY																																																		
Videotaped testimony admissible																																																		
• child's age (in years)		≤16	<15	<17	≤15	<15				<16								≤12		<14												<13	≤12				≤12				≤15		≤12					<18	
• defendant's presence specified		S	S	S		S				S								9		S							S					S					S					9					S	
• opportunity for cross-examination specified		S		S		10														S							10					S					S				S					S	
• court findings required (footnote)				11	12	13				14										15												16	17								18							19	
• court findings include unavailability					S	S																																				S							
• government may call child to testify				S														NO														NO					NO						NO					S	
• other (footnote)		20			21															22							23					24	25								21							
Closed circuit testimony available																																																		
• child's age (in years)																		≤12	<14																		≤12						≤12							
• defendant present, but child cannot hear or see																		S	S																		S						S							
• attorneys present																		S	S																		S						S							
Abused child videotape/film hearsay exception																																																		
• child's age (in years)																		≤12	≤14																		≤12													
• no attorneys present at taping																		S	S																		S													
• interviewer child available to testify																		S	S																		S													

SOURCE: Statutes were provided by State governments in the fall of 1984.

*Except for age limits, all numbers refer to footnotes on following page.

See Exhibit 2 for statutory citations and a brief description of related laws *not* included on the chart.

KEY **S** = Statute (includes codified rules) **C** = Case law *only*
R = Rule of evidence (not codified) **M** = Minor; child

1. State most likely uses "14-year-old" common law standard.

2. Exception: A child victim of a sexual offense is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding involving the alleged offense. Trier of fact is to determine the weight and credibility to be given to the testimony.

3. Child under 12 years may not testify under oath unless court is satisfied that child understands the nature of an oath.

4. Exception for sexual abuse cases repealed. New language reads: "A child describing any act of sexual contact or penetration performed on or with the child by another may use language appropriate for a child of that age."

5. Corroboration is *not* required.

6. This provision applies to the preliminary hearing.

7. This provision provides for in-camera testimony.

8. Exception for a reasonable but limited number of members of the public.

9. Defendant present, but the court to ensure child cannot hear or see defendant.

10. Testimony to be taken under the Rules of Evidence.

11. Court order "for good cause shown."

12. Court finding "that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable . . ."

13. Upon application, court to make preliminary finding whether "the victim is likely to be medically unavailable or otherwise unavailable . . .; at trial, court to find whether, "further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable . . ."

14. Court finding that, "there is substantial likelihood that such victim or witness would suffer severe emotional or mental distress if required to testify in open court."

15. Court "expressly finds that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial."

16. Court Rule. Court order upon, "Showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm." (Statute. Court order "for good cause shown.")

17. For a child witness 12 years old or under, testimony may be videotaped *without* court findings. For a witness greater than 12 years old, court must find the witness "is likely to suffer severe emotional or mental distress if required to testify in person . . ."

18. Court finding that "further testimony would cause the victim emotional trauma, or that the victim is otherwise unavailable...or that such testimony would...be substantially detrimental to the well-being of the victim . . ."

19. Court order where "there is a substantial likelihood that the child will otherwise suffer emotional or mental strain."

20. The videotapes are listed as an exception to hearsay in R. Evid. R. 804.

21. Testimony to be videotaped at preliminary hearing.

22. Stenographical testimony or other court approved means also available. Videotapes are specified in the videotape law as an exception to hearsay.

23. Victim in prosecutions for sexual intercourse without consent if victim is less than 16 years; deviate sexual conduct, incest (no age specified).

24. Videotapes are specified in the videotape law as an exception to hearsay.

25. Videotape law applies to testimony presented to the Grand Jury.

statement does not fit [illegible] traditional hearsay exceptions and would be inadmissible in most States. The new laws would admit such a statement, provided that certain indicia of reliability are met, even when the child is unavailable as a witness.

Many effective innovations do not require statutory reform at all. These include the following:

- enhancing the child's communication skills through dolls, artwork, and simplified vocabulary;
- modifying the physical environment—providing a small chair for the child, having the judge sit on a level with the child or wear business clothes instead of a judicial robe; and
- preparing child victims before their courtroom appearances—briefing them on the roles of people in the courtroom, introducing them to the judge, taking them for a tour of the courtroom, and allowing them to sit in the witness chair and speak into the microphone.

By demystifying the courtroom, these techniques help to alleviate children's fear of the unknown, thereby enhancing the accuracy and efficiency of their recall abilities.[4]

Most of the legislative reforms address only the trial experience, and therefore benefit only those children whose cases go to trial. However, the trial is only the culmination of a long series of stressful events that the child endures as the case is adjudicated. Some States have adopted laws intended to ease the child's anxiety throughout the criminal justice process. Such legislation includes the following:

- laws permitting child witnesses to have a supportive person present during court proceedings, and offering the services of the court to explain the proceedings to the child, assist the

4. Helen E. Dent and Geoffrey M. Stephenson, "An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses," in *British Journal of Social and Clinical Psychology*, (1979): 41; citing W. Stern, "The Psychology of Testimony," in *Journal of Abnormal and Social Psychology*, Vol. 34 (1939): 3–20; E. Lord, "Experimentally Induced Variations in Rorschach Performance," in *Psychological Monograph*, Vol. 64 (1950): 10; and C. Zimmerman and R.A. Bauer, "Effect of an Audience on What Is Remembered," in *Public Opinion Quarterly*, Vol. 20 (1956): 238–248.

Exhibit 2

Statutory Citations for Selected Issues in Child Witness Testimony

Competency

Ala. Code § 12–21–165;
Ariz. Rev. Stat. Ann. § 12–2202 (controlling);
Ark. Rev. Stat. Ann. § 28–1001;
Cal. R. Evid. R. 701;
Colo. Rev. Stat. § 13–90–106(1)(b) (controlling);
Fla. Stat. § 90.601;
Ga. Code §§ 38–1607, 1610;
Hawaii Rev. Stat. § 621–16;
Idaho Code § 9–202;
Ind. Code § 34–1–14–5 (applied to criminal matters via § 35–37–4–1; § 35–1–31–3);
Iowa Code § 622.1;
Kan. Stat. Ann. § 60–417;
Ky. Rev. Stat. § 421.200;
La. Rev. Stat. Ann. § 15:469;
Md. Cts. & Jud. Proc. Code Ann. § 9–101;
Mass. Gen. Laws. Ann. ch. 233, § 20;
Mich. Stat. Ann. § 27A.2163;
Minn. Stat. § 595.02(1)(f);
Miss. Code Ann. § 13–1–3;
Mo. Rev. Stat. § 491.060(2);
Neb. Rev. Stat. § 27–601;
Nev. Rev. Stat. § 50.015;
N.J. Rev. Stat. § 2A:81–1 and R. Evid. R. 17;
N.Y. Crim. Proc. Law § 60.20 (Consol.);
Ohio Rev. Code Ann. § 2317.01;
Okla. Stat. tit. 12, § 2601;
Or. Rev. Stat. § 40.310;
Pa. Stat. Ann tit. 42, § 5911 (Purdon);
S.D. Codified Laws Ann. § 19–14–1;
Tenn. Code Ann. § 24–1–101;
Utah Code Ann. §§ 78–24–2, 76–5–410;
Wash. Rev. Code 5.60.050;
Wis. Stat. § 906.01;
Wyo. Stat. § 1–138.

Some of the above are codified versions of R.EVID.R.601. In addition, R.EVID.R.601 is found separately for the following States: Alabama, Alaska, Arizona, Colorado, Delaware, Iowa, Maine, Michigan, Montana, New Mexico, North Carolina, North Dakota, Ohio, Texas, Vermont, Washington, Wyoming.

Abused child hearsay exceptions

Ariz. Rev. Stat. § 13–1416 (1984);
Colo. Rev. Stat. § 18–3–411 (3);
Ill. Rev. Stat. ch. 38, para. 115–10 (1983);
Ind. Code § 35–37–4–6 (1984);
Kan. Stat. Ann. § 60–460(dd) (1982);
Minn. Stat. § 595.02(3) (1984);
S.D. Codified Laws Ann. § 19–16–38 (1984);
Utah Code Ann. § 76–5–411 (1983);
Wash. Rev. Code § 9A.44.120 (1982)

Related provisions: Some States permit the use of certain out-of-court statements in a criminal prosecution if the witness is available to testify. See, for example, Del. Code Ann. tit. 11, § 3507 (1953) (statement can be consistent or inconsistent).

Exclusion of spectators from courtroom

Ala. Code § 12–21–202 (1940);
Alaska Stat. § 12.45–048 (1982);
Ariz. R. Cr. P.R. 9.3(c) (1973);
Cal. Penal Code § 868.7(a) (1983);
Fla. Stat. § 918.16 (1977);
Ga. Code § 17–8–53 (1933);
Ill. Rev. Stat. ch. 38, para. 115–11 (1983);
La. Rev. Stat. Ann. § 15:469.1 (1981);
Mass. Gen. Laws Ann. ch. 278 §§ 16A (1923), 16C (1978);
Mich. Comp. Laws § 750.520;
Minn. Stat. § 631.045 (1982);
Miss. Const. art. III, § 26;
Mont. Code Ann. § 3–1–313 (1977);
N.H. Rev. Stat. Ann. § 632–A: 8 (1979);
N.Y. Jud. Law § 4 (1968);
N.C. Gen. Stat. § 15–166 (1981);
N.D. Gen. Code § 27–01–02 (1974);
S.D. Codified Laws Ann. § 23A–24–6 (1983);
Vt. Stat. Ann. tit. 12, § 1901 (1947);
Wis. Stat. § 970.03(4) (1979).

Related provision: Utah Code Ann. § 78–74 (1953). Utah's law authorizing the closure of the courtroom in an action of ". . ., seduction, . . ., rape, or assault with intent to commit rape," has been construed to apply only in *civil* actions to avoid conflict with the Constitution.

Videotaped testimony admissible

Alaska Stat. § 12.45.047 (1982);
Ariz. Rev. Stat. Ann. § 12–2311 (1978);
Ark. Stat. Ann. §§ 43–2035 to 43–2037 (1981, 1983);
Cal. Penal Code 1346 (1983);
Colo. Rev. Stat. § 18–3–413;
Fla. Stat. § 918.17 (1984);
Ky. Rev. Stat. § 421.350 (1984);
Me. Rev. Stat. Ann. tit. 15, § 1205 (1983);
Mont. Code Ann. §§ 46–15–401 to 46–15–403 (1977);
N.M. R. Cr. P.R. 29.1 (1980) (based on N.M. Stat. Ann. § 30–9–17 (1978));
S.D. Codified Laws Ann. § 23A–12–9 (1983);
Tex. Code Crim. Proc. Ann. art. 38.071 (1983);
Wis Stat. § 967.04(7) (1983).

Related provision: Iowa Code § 232.96 applies to petition alleging a child in "need of assistance" in juvenile proceedings, *not* criminal prosecutions.

Related provisions: State law sometimes permits a deposition in sexual assault cases to be used in lieu of live testimony *if* the accused consents. See, for example, Va. Code § 18.2–67 (law does *not* specify videotape).

Closed circuit testimony available

Ky. Rev. Stat. § 421.350(3) (1984);
La. Rev. Stat. Ann. § 15:260 (1984);
Tex. Code Crim. Proc. Ann. art 38.071(3) (1983).

Abused child videotape film hearsay exception

Ky. Rev. Stat. § 421.350(1) and (2) (1984);
La. Rev. Stat. Ann. §§ 15:440.1 to 15:440.6 (1984);
Tex. Code Crim. Proc. Ann. art 38.071(1) and (2) (1983).

fam[illegible]d child, and advise the court and prosecutor;

- laws directing law enforcement, social service agencies, and prosecutors to conduct joint investigations in child sexual abuse cases, using a single trained interviewer; and

- laws attempting to expedite the adjudication process by giving precedence in trial scheduling to sexual offense cases or to cases in which the victim is a minor.

These laws reflect the legislature's concern for child victims, and, for maximum effect, they require the personal commitment of the individuals handling these cases. Indeed, dedicated people in many jurisdictions have introduced these innovations successfully even without legislation. These precautions can and should be provided to every child coming into the system, not only to those whose cases actually come to trial or whose emotional well-being is severely threatened by the prospect of testifying.

Conclusions and recommendations

There are two areas of statutory reform that appear to be necessary and beneficial to many child witnesses. The first is abolishing special competency requirements for children, preferably by establishing a presumption that every witness is competent (as in the Federal Rules of Evidence), and leaving the determination of credibility to the trier of fact.

To date, some 20 States have adopted this standard; three more States have waived their competency requirements in cases of child sexual abuse. Since psychological research on children's memory and morality suggests that all but the youngest children (i.e., age 3 and under) can testify as truthfully and accurately as adults,[5] it seems unfair to impose a special requirement on children.

Secondly, legislatures should adopt special hearsay exceptions to admit certain out-of-court statements that do not fall within the existing exceptions to hearsay. These exceptions will not apply in every prosecution, but they are useful when a child freezes or recants on the witness stand, or when the defense asserts special exceptions for child sexual abuse victims; other States that lack residual hearsay exceptions should consider adopting similar laws.

Regardless of the existing statutory structure in a given State, there is much that can be done to ease the child victim's trauma. Each prosecutor's office should designate at least one attorney to receive training or specialize in child sexual abuse cases. Training should be provided, not only in general concepts of child development and family dynamics, but also in the specifics of State law and case precedent.

Child development and mental health professionals in the community should be tapped for assistance in interviewing children, selecting potential jurors, and formulating opening and closing statements. Above all, prosecutors should work to improve communication and coordination among the several agencies responsible for child welfare. A concentrated team effort is necessary to develop a more rational, cohesive approach to the adjudication of crimes against children.

Each child should have a victim advocate or other supportive adult for assistance and accompaniment throughout the investigation and adjudication processes. Where prosecutors lack access to a victim/witness assistance unit, provision should be made for volunteer support or carrying over the guardian ad litem function from juvenile court proceedings. (The Child Abuse Prevention and Treatment Act of 1974 requires States to appoint a guardian ad litem to represent the best interests of children involved in abuse and neglect proceedings.)

Support persons should receive the same specialized training given to prosecutors so that they can advocate for the child's best interests from a knowledgeable standpoint.

Judges, especially, should be aware of a child's unique situation in the criminal court setting. Some interviewees objected to any intervention on behalf of a witness in the courtroom on grounds that it prejudices the jury to believe the allegation of victimization; certain departures, however, are necessary for child witnesses simply because they are children.

At a minimum, judges should be alert to lines or forms of questioning that confuse or intimidate the child. They should recognize signs of discomfort or embarrassment that may cloud or distort the child's testimony, and then take the initiative, for example, to call a recess to identify and remedy the source of the child's distress.

Whenever possible, and where the prosecutor fails to file a motion, judges should order alternative procedures on their own motion. They should avoid granting continuances unless absolutely necessary, and they should ensure that every child has a supportive friend or advocate in court.

There are many ways to relieve the child victim's anxiety and elicit effective testimony. Drastic interventions—such as closed circuit television and videotaped depositions in lieu of live testimony—should be used only in extraordinary cases.

Sensitive treatment of the child throughout the pretrial period, along with creative interpretations of available statutes and case law precedent, may be no less effective in most cases. These measures should not be overlooked in our desire to aid child victims.

Debra Whitcomb of Abt Associates, a research firm in Cambridge, Massachusetts, was principal investigator for the National Institute of Justice study called When the Victim Is a Child *(NCJ 97664). It is on sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Stock number is 027–000–01248–5.*

5. For an excellent overview of research on children's capabilities as witnesses, see the *Journal of Social Issues*, Vol. 40 (1984), ed. Gail S. Goodman.

II

hearing and the child may not have to appear at all.) Prosecutors in Ventura observed that a child who withstands the preliminary hearing can likewise endure the trial.

* * *

Despite widespread interest in the use of videotape technology to alleviate the stress on child victims, there are both legal and practical questions that tend to limit its use by prosecutors even where enabling legislation exists. Videotaping the child's first statement appears more promising than the videotaped deposition. Although the child must still be available to testify, the early videotape captures the child's candid reaction to the incident, helps to reduce the total number of interviews the child must endure, and reportedly encourages confessions and guilty pleas. Where the videotape can be admitted into evidence, it serves as a "failsafe" against the possibility of a child recanting on the witness stand (with appropriate explanations from experts), thereby enabling the state to prosecute cases that might otherwise be dismissed. To protect the victims' privacy, all videotapes should be placed under protective orders. Above all, to ensure the tapes' admissibility at trial, interviewers should be thoroughly trained to elicit the necessary information without unduly leading or encouraging the child.

When considering a videotaped deposition as a substitute for live testimony, prosecutors note that confronting the defendant across a conference table may be more stressful than confronting him from the witness stand. Primarily, however, they are concerned with the jury's reaction to videotaped testimony. As one prosecutor told us, she much preferred to "let the jury see the little angel".

at the taping, problems of face-to-face confrontation are avoided. Yet, critics of this technique have argued that it threatens the defendant's rights to a public trial and a jury trial because the jury and public are not physically present when the videotape is made.[15] And, as was discussed in Chapter 5, the psychological effects of the videotape/television medium on jurors' perceptions are uncertain. It is interesting to note, though, that in some cases, the courts themselves have expressly acknowledged the superiority of videotape technology over other methods of reproducing a witness' testimony when the witness is unavailable for trial (such as an audio or written recording of the preliminary hearing or having someone relate the witness' testimony).[16]

Practical Concerns

Three of the jurisdictions we visited currently have legislation permitting introduction of videotaped testimony in lieu of a live appearance at trial: California (which permits only a videotape made at the preliminary hearing), Wisconsin, and Florida. In each state, the prosecutors we interviewed alluded to several practical obstacles that constrained their use of videotape technology.

In states like Florida and Wisconsin, the videotape is made at a formal deposition. The deposition is generally taken in the judge's chambers or another small room where all the participants can be seated around a conference table. Although this removes child witnesses from the imposing milieu of the courtroom, it places them in close physical proximity to the defendant. Many prosecutors and victim advocates maintain that such a deposition can be far more harrowing to a child than giving testimony in court. If the statute requires a finding of emotional trauma or unavailability before this technique can be used, the child may be subjected to a battery of medical and/or psychiatric tests by examiners for the state and the defense. Prosecutors say that a videotaped deposition merely substitutes one formal proceeding for another. They report that a child who successfully endures all the pretrial events can probably handle a trial as well.

In California, videotapes may be taken at preliminary hearings, which closely resemble trials since the probable cause determination must be based solely on legally admissible evidence. (This is not the case in most other states, where hearsay is admissible at the preliminary

A PROPOSAL TO PERMIT "RECIPROCAL JENCKS DISCOVERY" IN KANSAS

*Emil A. Tonkovich**

In Kansas criminal cases, after a State witness has testified on direct examination, the defense may discover any relevant pretrial statement made by the witness.[1] The State, however, is not entitled to discover relevant pretrial statements made by defense witnesses.[2]

This article will briefly review the case law and legislation governing the discovery of witness statements in criminal trials in Kansas. The article will also set forth a proposal that would permit the State to discover relevant pretrial statements made by a defense witness other than the defendant after the witness has testified on direct examination.[3]

I. Discovery of Government Witness Statements

In *Jencks v. United States*,[4] the United States Supreme Court held that a criminal defendant in a federal case may inspect prior statements of a government witness without first showing that the statements are inconsistent with the witness' trial testimony.[5] In 1957, Congress responded to the *Jencks* decision enacting Title 18, section 3500 of the United States Code.[6]

Congress designed section 3500, commonly referred to as the Jencks Act, to clarify and limit the Supreme Court's holding in *Jencks*. The Jencks Act entitles a criminal defendant in a federal case to discover any relevant pretrial statement made by a government witness, but only after the witness has testified on direct examination at trial.[7] The purpose of the Jencks Act was to provide criminal defendants with impeachment material in accordance with *Jencks*, while protecting the government's files from unwarranted disclosure.[8] Until 1980, the Jencks Act was the exclusive means for obtaining pretrial state-

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* Associate Professor of Law, University of Kansas, J.D. 1977, *summa cum laude*, Notre Dame. The author acknowledges the assistance of Barbara Harmon, third-year law student at the University of Kansas, in preparing this article.

[1] Kan. Stat. Ann. § 22-3213(2) (1981).

[2] State v. Sandstrom, 225 Kan. 717, 727, 595 P.2d 324, 332, *cert. denied*, 444 U.S. 942 (1979). According to *Sandstrom*, "there is no express provision permitting the State to discover the statement of a defense witness either prior to the trial or after the defense witness has testified upon direct examination."

[3] This type of discovery is commonly referred to as "reciprocal Jencks discovery."

[4] 353 U.S. 657 (1957).

[5] *Id.* at 666.

[6] S. Rep. No. 981, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Ad. News 1861, 1861-64.

[7] 18 U.S.C. § 3500(a) (1976).

[8] *See* United States v. Carter, 613 F.2d 256, 261 (10th Cir. 1979), *cert. denied*, Carter v. United States. 449 U.S. 822 (1980).

A-II

ments made by federal government witnesses.[9]

Chapter 22, section 3213 of the Kansas Statutes Annotated is patterned after the Jencks Act.[10] This statute allows criminal defendants in Kansas to discover the State's "Jencks material."[11]

II. DISCOVERY OF DEFENSE WITNESS STATEMENTS

Federal Rule of Criminal Procedure 26.2, which became effective in 1980, incorporates the substance of the Jencks Act.[12] The rule is nearly identical to the Act except that it establishes procedures for the production of defense wit-

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[9] *See* Palermo v. United States, 360 U.S. 343, 351 (1959).

[10] KAN. STAT. ANN. § 22-3213, Judicial Council Note (1981).

[11] "Jencks material" is the term commonly used to refer to statements of government witnesses discoverable under the Jencks Act.

[12] FED. R. CRIM. P. 26.2, titled "Production of Statements of Witnesses," provides:

> (a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.
>
> (b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.
>
> (c) Production of Excised Statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statemment that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.
>
> (d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial; for the examination of such statement and for preparation for its use in the trial.
>
> (e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.
>
> (f) Definition. As used in this rule, a "statement" of a witness means:
>
> (1) a written statement made by the witness that is signed or otherwise adopted or approved by him;
>
> (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

ness statements at trial.[13] Pursuant to Rule 26.2, the government may discover relevant pretrial statements of a defense witness other than the defendant after the witness has testified on direct examination.[14] Rule 26.2 reflects the principles that the United States Supreme Court established in *United States v. Nobles*.[15]

In *Nobles*, the defendant was on trial for federal bank robbery.[16] Two key prosecution witnesses had identified the defendant as the robber.[17] The defense sought to impeach the credibility of these two witnesses by offering the testimony of a defense investigator who had interviewed the witnesses prior to trial and had prepared a report regarding the interviews.[18] When the defense called the investigator to testify, the trial court stated that the defense would have to submit a copy of the investigator's report, which the court had inspected and edited *in camera* to excise irrelevant matters, to the prosecution at the completion of the investigator's direct examination.[19] When defense counsel stated that he did not intend to produce the report, the trial court ruled that the investigator could not testify concerning his interviews with the witnesses.[20]

The United States Supreme Court unanimously upheld the trial court's ruling.[21] Noting the federal judiciary's inherent power to require the government's disclosure of "Jencks material," which gives the defense the full benefit of cross-examination and enhances the truth-finding process,[22] the Court rejected the notion "that the Fifth Amendment renders criminal discovery 'basically a one-way street.' "[23] Reasoning that the fifth amendment privilege against self-incrimination is personal to the defendant, the Court held that the privilege does not extend to statements of third parties called as witnesses at trial.[24] The Court concluded that the district court had inherent power to require production of the investigator's report to facilitate full disclosure of highly relevant facts.[25]

Federal Rule of Criminal Procedure 26.2, consistent with the Court's reasoning in *Nobles*, places the disclosure of relevant pretrial statements of defense witnesses other than the defendant on the same legal footing as the disclosure of government witness' statements under the Jencks Act.[26] Through Rule 26.2,

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[13] FED. R. CRIM. P. 26.2, Advisory Committee Note.
[14] FED. R. CRIM. P. 26.2(a).
[15] 422 U.S. 225 (1975).
[16] *Id.* at 227.
[17] *Id.*
[18] *Id.* at 227-29.
[19] *Id.* at 229.
[20] *Id.*
[21] *Id.* at 226.
[22] *Id.* at 231.
[23] *Id.* at 233.
[24] *Id.* at 233-34.
[25] *Id.* at 231-32. The Court also rejected the defendant's arguments that Federal Rule of Criminal Procedure 16, the work-product doctrine, and the sixth amendment rights to compulsory process and cross-examination all barred the disclosure. *Id.* at 234-41.
[26] FED. R. CRIM. P. 26.2, Advisory Committee Note. Rule 26.2 does not apply to the defendant's statements because the fifth amendment privilege against self-incrimination prohibits this disclosure.

the federal courts have adopted "reciprocal Jencks discovery."

III. PROPOSAL

The Kansas Legislature should amend section 22-3213 to provide for "reciprocal Jencks discovery." Specifically, the first sentence of 22-3213(2)[27] should be amended to read:

> After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.[28]

Additionally, the legislature should modify other language in 22-3213 to reflect the amendment.[29]

Adoption of the proposed amendment would make discovery under 22-3213 identical to the federal practice. It would also be consistent with the unanimous Supreme Court holding in *Nobles*[30]

The proposed amendment will enhance our adversary system of criminal justice, which depends on the ability of the parties to develop all the relevant facts. Cross-examination of witnesses plays an important role in the development of facts. The purpose of disclosing a witness' relevant pretrial statements is to provide the adverse party with impeaching material which aids in cross-examination. As an adversary, the state is equally entitled to develop the facts through the use of impeachment material in cross-examination. Justice is not served if the withholding of relevant facts stifles the truth-finding process and if only partially disclosed evidence serves as the basis for a verdict. The integrity of the judicial system depends on the disclosure of all the facts, limited only by constitutional considerations and the rules of evidence. The proposed

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[27] Section 22-3213(2) reads:

> After a witness called by the state has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement (as hereinafter defined) of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

KAN. STAT. ANN. § 22-3213 (1981).

[28] FED. R. CRIM. P. 26.2(a).

[29] With the exception of substituting the word "state" for the word "government," the legislature could adopt Rule 26.2 verbatim. In any event, the legislature should include the sanction provisions of Rule 26.2(e) if it adopts the proposed amendment.

[30] State v. Sandstrom, 225 Kan. 717, 727-28, 595 P.2d 324, 332, *cert. denied*, 444 U.S. 942 (1979), is the only case in which the Kansas Supreme Court has discussed the *Nobles* decision. *See supra* note 2. *Sandstrom*, however, dealt with the discovery of statements made by defense witnesses *prior* to testifying. The Kansas Supreme Court distinguished *Nobles*, which dealt with the discovery of a defense witness statement *after* testifying, and held that no statutory authorization exists for this disclosure prior to testifying. *Id.* at 728, 595 P.2d at 332. The Kansas Court of Appeals has not addressed this issue.

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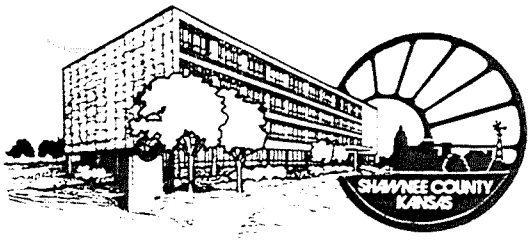
amendment would promote the full disclosure of facts and significantly enhance the search for truth.

3-21-86



Shawnee County
Sheriff's Dept.
200 East 7th, Topeka, KS 66603

ED RITCHIE
SHERIFF
295-4047

DALE COLLIE
UNDERSHERIFF
295-4050

March 18, 1986

TO: Senate Judiciary Committee

FROM: Byron M. Cerrillo, Legal Advisor
Shawnee County Sheriff's Department

RE: House Bill 2783

On behalf of the Shawnee County Sheriff's Department, I wish to thank you for the opportunity to speak on behalf of House Bill 2783. House Bill 2783 would amend K.S.A. 22-2902a, which permits certain law enforcement agencies to enter forensic examination reports prepared by them as evidence at preliminary examinations without the examiner's presence in the courtroom. The Shawnee County Sheriff's Department wishes to be included as one of those law enforcement agencies.

The statute we wish to be amended has a two-fold purpose: (1) it allows the court to move through preliminary examinations in a quick and orderly fashion that meets the requirement of due process, and (2) saves the maker of the report from waiting to testify concerning the reports.

We provide frequent training programs to the officers so they may become familiar with new procedures as well as remain current in all aspects of law enforcement. Presently, Sergeant Richard Warrington performs our forensic testing and makes the reports in his areas of expertise. These areas include marijuana testing, photography and crime scene investigation. Sergeant Warrington is a certified instructor for the State of Kansas in the areas of photography and crime scene investigation. Deputy Rick Atteberry has received extensive training in crime scene investigation and photography and will be certified in both areas in the near future. The department would happily supply copies of certificates which they have received. These certificates evidence the training these two men have undertaken.

S. Jud.
3/20/86
III

The Shawnee County Sheriff's Department could save considerable expense by passage of House Bill 2783. The county's forensic testing is conducted in facilities located at Forbes Field - some nine (9) miles distance from the Courthouse where the preliminary hearings are held. The officers who presently testify must drive in from Forbes, be present during the hearing and then drive back to Forbes. Not only could manpower hours be saved by using the forensic reports in lieu of testimony, but there would also be a savings in gasoline expense and vehicle wear. It seems to us it would be a more efficient use of time and money to allow the Shawnee County Sheriff's Department to be included as one of the law enforcement agencies allowed to submit forensic reports at a preliminary hearings.

Thank you for your time and consideration of this matter.

Byron M. Cerrillo
Legal Advisor

BMC/jl

III

3-21-

JOAN WAGNON
REPRESENTATIVE, FIFTY-FIFTH DISTRICT
1606 BOSWELL
TOPEKA, KANSAS 66604

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: ASSESSMENT AND TAXATION
JUDICIARY
LEGISLATIVE, JUDICIAL AND
CONGRESSIONAL APPORTIONMENT
PUBLIC HEALTH AND WELFARE

March 17, 1986

TO: Senate Judiciary Committee

FROM: Representative Joan Wagnon, Chair Shawnee County Legislative Delegation

RE: HB 2783

The Shawnee County Legislative Delegation unanimously voted to support introduction of HB 2783 which would allow a forensic examiners report to be admitted in evidence at a preliminary hearing without the examiner being present. We are aware that this issue comes up from time to time. This particular statute has been broadened gradually to permit those sheriff's and police departments which have the capabilities to assure high quality forensic reports to forego having the examiner present in person at the preliminary hearing.

We are confident that the Shawnee County Sheriff's Department can demonstrate to the committee that they possess such capability. We would urge your favorable support of this legislation.

Joan

S. Jud,
3/21/86
A-IV