

Approved March 22, 1990  
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Michael O'Neal at  
Chairperson

3:30 ~~xxx~~/p.m. on March 13, 1990 in room 313-S of the Capitol.

All members were present except:

Representatives Everhart, Fuller, Peterson and Shriver, who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department  
Jill Wolters, Revisor of Statutes Office  
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Edwin A. VanPetten, Deputy Attorney General  
Lieutenant Steve Ford, Overland Park Police Department  
Mike Santos, Overland Park Assistant City Attorney  
Lieutenant Bill Jacobs, Kansas Highway Patrol  
Mark Wettig, Special Assistant to the Secretary of Revenue  
Susan Stanley, Assistant Attorney General

**HEARING ON SB 688 Frisking a suspect**

Edwin A VanPetten, Deputy Attorney General, testified this bill amends K.S.A. 22-2402 to remove the possibility of an officer conducting a full search of a suspect instead of a pat-down or frisk, see Attachment I.

There being no other conferees, the hearing on SB 688 was closed.

**HEARING ON SB 700 DUI telephonic drivers license revocation hearings**

Lieutenant Steve Ford, Overland Park Police Department, testified SB 700 would reduce expenditures in overtime paid out by cities for officers attending driver's licence suspension and revocation hearings for DUI's and would also reduce the amount of time an officer spends not patrolling his/her district by the use of telephonic conference hearings, see Attachment II.

Mike Santos, Overland Park Assistant City Attorney, said he was concerned about the technical legal aspects of the swearing in process in relation to this bill. This legislation was adopted from the State of Iowa. There are differences between the State of Iowa's approach and Kansas's approach. He said the State of Iowa's Administrative Procedures Act does not require the swearing of the person. He suggested an interim study for this bill.

Lieutenant William Jacobs, Kansas Highway Patrol, testified in support of SB 700. He said if telephonic conference hearings are not just another step in the process to a hearing in person, there would be much savings in manhours and mileage to attend hearings, see Attachment III.

Mark Wettig, Special Assistant to the Secretary of Revenue, testified the Department of Revenue has serious concerns regarding SB 700. He said they are concerned with due process considerations; effect upon hearing examiner's ability to judge credibility of witnesses or of parties to review documents; effect upon situs of judicial review; and logistical difficulties in handling hearings by telephone, see Attachment IV.

There being no other conferees, the hearing on SB 700 was closed.

**HEARING ON SB 712 Disposition of defendant pending appeal by prosecution**

Jerry Wells, Assistant Douglas County District Attorney, proposed an amendment to SB 712. The amendment would insert "shall remain in effect" in line 24 after the word "bond", see Attachment V. He said it was the intent to limit the bill to interlocutory appeals by the prosecution.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,  
room 313-S, Statehouse, at 3:30 ~~xxx~~/p.m. on March 13, 1990

Edwin VanPetten, Deputy Attorney General, testified on behalf of Attorney General Robert T. Stephan. He stated SB 712 was drafted to alleviate a problem faced by prosecutors in the course of litigating the most serious of offenses, murder, see Attachment VI. He suggested the bill should be redrafted. The intent is to keep the defendant on bond or in jail. After Committee discussion, Mr. VanPetten offered to prepare an amendment to present to the Committee.

There being no other conferees, the hearing was closed on SB 712.

**HEARING ON SB 714 Crime victim testimony in criminal trials.**

Susan G. Stanley, Assistant Attorney General, testified SB 714 will protect child victims while they testify, allowing them to testify out of the sight of the defendant, see Attachment VII.

Ms. Stanley agreed to obtain information requested by the Committee. She also suggested the bill should be redrafted.

There being no other conferees, the hearing on SB 714 was closed.

The Committee meeting adjourned at 5:05 p.m. The next meeting will be Wednesday, March 14, 1990 at 3:30 p.m. in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY

DATE: 3/13/90

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Tim Stevens	Stilwell	Close-Up
MARK KLOPFENSTEIN	ATHE	Close-Up KANSAS (USD 221)
Bobby Shepherd	6200 Heritage Ct Stilwell, KS	Close-up Kansas
S. Stanley	TOPEKA KS	AG's office
Jim Clark	Topeka	KC DAA
JERRY WELLS	Lawrence	District attorney
Ed VAN FETTEN	TOPEKA	A.G.
Ryan Spohn	Tampa, KS	Close-Up
Wayne Ryba	Tampa, KS	Close-Up Kansas
John Ryba	Tampa, KS	Close-Up KANSAS
Uriah Titus	Hillsboro, KS	Close-Up Kansas
Richard Russi	Topeka, KS	KU
James S. Keller	Topeka, KS	KDOR
John W SMITH	Topeka	KDOR
Kathleen B...	Kingman	CLOSE-UP-KS
Ann D...	Kingman	Close Up OK
JESSIE BAUDA	KINGMAN	CLOSE-UP KS
Godly Hamb	Kingman	Close-Up KS
Sari Hatcher	Kingman, KS	Close-Up KS
Kyle Arnold	Hesston	Close Up KS
LIZ Horst	Hesston	CLOSEUP KANSAS
Nmy E. Tatten	HESSTON	CLOSE-UP KS
Robert Zwierzykowski	Ponolosa	Close Up-KS
Ashley Davis	Kingman	Close Up - Kansas





STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

TESTIMONY  
EDWIN A. VAN PETTEN, DEPUTY ATTORNEY GENERAL  
ON BEHALF OF ROBERT T. STEPHAN, ATTORNEY GENERAL  
BEFORE THE HOUSE JUDICIARY COMMITTEE  
REGARDING SENATE BILL 688  
MARCH 13, 1990

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Robert T. Stephan, I am here in support of Senate Bill 688, which like Senate Bill 713, can be described as a remedial update of a Kansas statute to bring it into compliance with current case law. K.S.A. 22-2402, commonly referred to as a 'stop and frisk law', is a codification of the U.S. Supreme Court's holding in Terry v. Ohio, a 1968 case providing for a pat-down for weapons of a person temporarily detained where the officer reasonably suspects that personal safety requires it. However, in that codification, the statute refers to a "search" of the person rather than a pat-down or frisk.

This variance with the case law was brought to the attention of the Attorney General's Office by Larry Welch of the Kansas Law Enforcement Training Center and Victor Marshall, Director of Public Safety in El Dorado. The concern is that the term 'search' suggests a much broader authority than what is really granted under the constitutional requirements of a Terry stop. To avoid the possibility of an officer conducting a full search of a suspect rather than the pat-down or frisk

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H. Jud Com

Attachment I

that is authorized, we have requested this change in K.S.A. 22-2402 so that the extent of the intrusion authorized is made clear.

I would be happy to answer any questions.

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H. Jud Com.  
Att I 2

**TESTIMONY ON SENATE BILL 700**

**TO THE MEMBERS OF THE  
HOUSE JUDICIARY COMMITTEE**

**BY STEVE FORD**

**LIEUTENANT, TRAFFIC SAFETY UNIT  
OVERLAND PARK POLICE DEPARTMENT**

**The Overland Park Police Department, like all other law enforcement agencies throughout the State of Kansas, has dramatically stepped up its DUI Enforcement Program over the past two years. This is evidenced by the 900 DUI arrests made in 1989 and the 208 DUI arrests which have been made through February of 1990 by members of the Overland Park Police Department. We have seen, with the increase in individuals being arrested for DUI in our City, over a 50 percent decrease in the number of fatality accidents in 1988 and 1989. We believe that our enhanced enforcement efforts have been responsible for the reduction of fatalities on our roadways.**

**With the increase in the number of DUI arrests, we have seen the**

**hours devoted to the paperwork necessary to process each of** *3/13/90*

*H. Jud Com*

*Attachment II*

these arrests increasing proportionately. Because of the increase in hours being devoted to each DUI arrest, the Overland Park Police Department, along with representatives from the Kansas Highway Patrol and the Johnson County Sheriff's Office, established a DUI Task Force in March of 1989 to study the DUI arrest process. With information gathered from police agencies throughout the entire state, the Task Force prepared three proposals for legislative consideration; one of which was telephonic administrative hearings for driver's license suspensions or revocations.

During the committee meetings it was discovered that the average DUI arrest consumed two to three hours of an officer's day, starting from the time of the arrest to release or incarceration -- a good 25 percent of the officers shift. This, however, was only part of the picture. Besides the actual time officers were spending in the reporting of DUI arrests, they were also required by the State, when subpoenaed by persons arrested for DUI, to appear for Driver's License Suspension Hearings.



Each of the hearings required the appearance of one, and sometimes more than one, of the officers involved in the DUI arrest to answer questions regarding his/her probable cause and the following of the protocol outlined in State Form DC 27, "Officer's Certification" and "Notice of Suspension." The Task Force pointed out that much of the time officers were being called to these suspension hearings on their off-duty time and, therefore, were paid overtime for their appearances. Those officers that were called to appear while in an on-duty status must leave their respective districts, and in many cases, their jurisdictions to give testimony at these hearings. This, in effect, leaves their area to be covered by another officer and cuts drastically the quality of service pledged to the citizenry occupying these districts.

The DUI Task Force, in an effort to reduce the expenditures in overtime paid out by the cities for officers attending these suspension hearings and also reduce the amount of time an officer spends not patrolling his/her district, specifically recommends that all driver's license suspension hearings scheduled by the division shall be telephonic conference hearings unless the examiner

**determines that the facilities to conduct a telephonic hearing are not available or special conditions exist that require the hearing to be conducted in person.**

**We believe the passage of Senate Bill 700 will result in better and more effective DUI enforcement efforts, while at the same time affording the law enforcement agencies more time to perform their primary functions of crime prevention and repression.**

**I speak not only for Myron Scafe, Chief of Police of Overland Park, but also for the Johnson County Police Chiefs Association, who have endorsed Senate Bill 700 and are in favor of its passage.**

Summary of Testimony

Before the House Judiciary Committee

Senate Bill 700

Presented by the Kansas Highway Patrol  
(Lieutenant William Jacobs)

March 13, 1990

Appeared in Support

The Kansas Highway Patrol supports Senate Bill 700.

Senate Bill 700 amends KSA 8-1002 relating to the conduct of driver's license revocation hearings. The new language on page 3 of the Bill would require that all hearings scheduled by the division shall be by telephonic conference hearing unless the examiner determines that facilities to conduct a telephone hearing are not available or special conditions exist that require the hearing be conducted in person.

The Patrol feels that if this procedure is followed to conduct the hearing, and not just another step in the process to a hearing in person, much savings in manhours and mileage to attend hearings could be eliminated. Those savings would be very beneficial to all law enforcement agencies not only in monetary cost, but the officers would be available to provide services to the public instead of driving to and from the numerous hearings conducted throughout the state.

The Patrol feels that with the written certification required of an officer when an individual is suspended for refusing a test or failing a test, the hearing officer, in most cases, could make their decision on those items which are limited within the scope of the hearing as defined in paragraph h of KSA 8-1002 by telephonic conference. This would eliminate the excessive travel and time required for hearings conducted in person.

Again we would reiterate that this process would be a savings if the telephone conference would be the actual hearing and not just another step in the process of conducting a hearing in person at a later date.

Under the conditions described above, if it is the intent of this legislation to eliminate much of the expense and time involved in the driver's license suspension hearing process, the Patrol asks your favorable consideration of Senate Bill 700.

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H. Jud Com.

Attachment III

MEMORANDUM

TO: The Honorable Michael O'Neal, Chairman  
House Judiciary Committee

FROM: Mark Wettig, Special Assistant to the  
Secretary of Revenue

DATE: March 13, 1990

SUBJECT: Senate Bill 700

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I appreciate the opportunity to appear before you with regard to Senate Bill 700.

BACKGROUND

This bill proposes an amendment to K.S.A. 8-1002 to provide for telephone hearings regarding driver's license suspensions under the implied consent law in most cases. Hearings will be handled in person only upon a determination by the hearing examiner that the facilities to conduct a telephonic hearing are not available or special conditions exist that require the hearing to be conducted in person.

The Department of Revenue has serious concerns regarding this proposed legislation.

1. Due Process Considerations

The Kansas Supreme Court has recognized that a driver's license suspension hearing is required to afford due process. Among the considerations under due process is that the licensee or his attorney be able to examine witnesses at the hearing under oath. In Barnhart v. Kansas Dept. of Revenue, 243 Kan. 209, 216-17 (1988), the present procedures under the Kansas implied consent law were upheld against a claimed denial of due process because ". . . the officer's certification can be verified by testing under oath in the presuspension hearing provided in the statute." Courts have consistently held that an oath is unauthorized and illegal unless the person taking the oath is in the personal presence of the person

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Attachment IV

administering the oath. [See 58 Am.Jur.2d, Oath and Affirmation § 20]

In addition to the objection to the inability to properly administer an oath, licensees can also be expected to object to their inability to physically confront the witnesses against them as a further denial of due process.

2. Effect Upon Hearing Examiner's Ability to Judge Credibility of Witnesses or of Parties to Review Documents

The holding of hearings by telephone will prevent the hearing examiner from observing first-hand the demeanor of witnesses as they testify, which may affect the result at the hearing. In addition, some cases involve the introduction of documents regarding medical conditions or procedures used in obtaining a breath or blood test. Telephonic hearings will make it difficult to introduce and review such documents.

3. Effect Upon Situs of Judicial Review

Licensees who object to the telephonic hearing do have the right to petition for review to the district court. A difficulty raised by the proposed amendment to K.S.A. 8-1002 is that K.S.A. 8-259 states that the petition for review must be filed in the county in which the administrative hearing is held. If the hearing is held by telephone, there must be some direction given as to where the petition for review should be filed in such cases. If the situs of the hearing is the location from where the call is made, then the courts in such locations are likely to be unduly burdened with appeals from administrative hearings and participants are likely to have to travel longer distances to attend the de novo appeal hearings in district court. Law enforcement officers will be required to travel longer distances to testify in court than under the present system.

4. Logistical Difficulties in Handling Hearings by Telephone

The Department presently handles hearings involving driver's license suspensions with four hearing examiners. Hearings are scheduled at various locations on a docket system similar to what might be done in traffic cases before a municipal court. One might imagine what it

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H. Jud Com

would be like to handle a municipal court docket by telephone. In addition, driver's license suspension hearings may involve more witnesses and more issues than the average traffic case.

Implied consent hearings are held in the county where the offense took place or in a county adjacent thereto. Hearings are scheduled approximately every 10 to 15 minutes. Quite frequently, however, an individual hearing may extend to an hour or more depending upon the issues raised by the licensee and the evidence submitted in support of the licensee's position. It is difficult to anticipate which hearings will be extended. It is difficult to limit the time of the hearings because, as the Kansas Court of Appeals ruled in Angle v. Kansas Dept. of Revenue, 12 Kan.App.2d 756 (Kan.App. 1988), to preserve issues for appeal, the issue must be raised at the administrative level and the evidence concerning that issue must be produced at the administrative hearing.

Presently, when an individual hearing is extended, all of the participants present for the following hearing are aware that the preceding hearing is still being held. If a telephone hearing is extended, much time will likely be expended by Department personnel in answering or making phone calls to explain the nature of the delay.

Hearings may involve several law enforcement officers with different agencies, a licensee, his or her attorney and possibly expert witnesses. All of these witnesses may be present in different locations when they are to be reached by telephone. The usual difficulties in making telephone connections will be compounded with each additional person involved in the hearing. Speaker phone capability may also be required to allow participation where more than one person is at the same location.

#### RECOMMENDATION

As the result of the serious due process difficulties with Senate Bill 700, as well as the other practical problems, the Department opposes this bill.

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H. Jud Com  
Att. IV

SENATE BILL No. 712

By Committee on Judiciary

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Attachment V

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AN ACT concerning the Kansas code of criminal procedure; relating to disposition of defendant pending appeal by prosecution; amending K.S.A. 22-3604 and repealing the existing section.

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

Section 1. K.S.A. 22-3604 is hereby amended to read as follows: 22-3604. (1) *Except as provided in subsection (3), a defendant shall not be held in jail nor subject to an appearance bond during the pendency of an appeal by the prosecution.*

(2) The time during which an appeal by the prosecution is pending shall not be counted for the purpose of determining whether a defendant is entitled to discharge under section K.S.A. 22-3402 of this code and amendments thereto.

(3) *A defendant charged with a class A felony crime shall not be released from jail or the conditions of such person's appearance bond during the pendency of an appeal by the prosecution, and the time during which an appeal by the prosecution is pending in a class A felony case shall not be counted for the purpose of determining whether the defendant is entitled to discharge under K.S.A. 22-3402 and amendments thereto.* — shall remain in effect

Sec. 2. K.S.A. 22-3604 is hereby repealed.

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



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TESTIMONY OF  
DEPUTY ATTORNEY GENERAL EDWIN A. VAN PETTEN  
ON BEHALF OF ATTORNEY GENERAL ROBERT T. STEPHAN  
BEFORE THE HOUSE JUDICIARY  
MARCH 13, 1990  
RE: SENATE BILL 712

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Senate Bill 712 has been drafted to alleviate a problem faced by prosecutors in the course of litigating the most serious of offenses, murder. That problem is, what to do when faced with an adverse ruling, during the pre-trial stages, that could result in the acquittal of a defendant?

If an appeal is taken, the defendant must be released, pending appeal, without being subject to bond. If an appeal is not taken, there is a greater chance of acquittal. Neither alternative is in the best interest of society, when you consider that as a result of either one, a murderer may be released with no restrictions on his movements or behavior.

This provision would be invoked principally upon the suppression of evidence by the trial court, and any appeal could easily be expedited to make every attempt at shortening the appellate process due to the limitation of issues involved.

*3/13/90  
H. Jud Com*

*Attachment VI*



Certainly, such appeals would be much more simplified than the appeal of a conviction, with most issues having been recently argued to the trial court at a suppression hearing or other motion hearing and all research completed. Thus, the time required to prepare briefs and arguments would be shortened.

This is a measure which has been requested by prosecutors faced with a terrible dilemma and modification is only being asked for the most serious of crimes. Surely such matters should only be litigated with both litigants having full advantage of all evidence that can legally be presented, without taking the chance of releasing a suspected murderer into society during the process of such an appeal.

We ask your favorable consideration of Senate Bill 712.

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H. Jud Com.  
Att VI



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TESTIMONY OF  
ASSISTANT ATTORNEY GENERAL SUSAN G. STANLEY  
ON BEHALF OF ATTORNEY GENERAL ROBERT T. STEPHAN  
BEFORE THE HOUSE JUDICIARY  
MARCH 13, 1990  
RE: SENATE BILL 714

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to address you in support of Senate Bill 714. My name is Susan Stanley, Assistant Attorney General, and I am here on behalf of Attorney General Stephan.

I ask you to support this bill not so much for the prosecutors and judges of this State but for the child victims of sexual abuse who are placed in the most unbelievable and horrifying situations.

As I am sure you are aware, prosecutors love to tell war stories and in this instance I believe this particular story will be illustrative of the reason we need to strengthen K.S.A. 22-3434.

During the past year I prosecuted a case involving an eight year old girl in Labette County. Her stepfather was being tried for indecent liberties with a child. While waiting for her turn to testify, the social worker gave her

*3/13/90  
H. Jud Com*

*Attachment VIII*

crayons and paper and a child's magic sketch pad to play with. When her time came to testify, she wanted to take them to the stand with her. She was a wonderful witness until we asked about the incidents of abuse that led to the charges being filed. Then she froze - she couldn't talk. She covered her face with the sketch board or bowed her head and stared at her hands laying in her lap. I attempted to question her for a while, then she looked up at me, pointed towards the twelve adults in the jury box, and wanted to know if they were all of the defendant's brothers and sisters and why they were there. This is an instance where the trauma to that child could have been avoided.

The way our procedure presently works, we ask children who are violated in the most private way, by people they are raised to trust, to take a seat in front of a roomful of strangers and tell them about unspeakable acts they have been subjected to. These children are often threatened with physical harm if they "tell" and if the harm isn't directed at the child it is directed at friends, family or pets.

Senate Bill 714 would protect child victims while they testify, allowing them to testify out of the sight of the defendant. Presently we have K.S.A. 22-3434 on the books. It allows children to testify via closed circuit television and logistically it works. It involves setting up closed circuit television sets, an extension cable and two remote speakers.

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Att VII

After a somewhat similar statute was found unconstitutional by the United States Supreme Court in Coy v. Iowa, our State Supreme Court reexamined our statute and found that a finding should be made by the trial court that the child requires the protection of the statute. What Senate Bill 714 does is specifically spell out the duties and requirements that the Kansas Supreme Court has dictated to our trial courts in order to protect this procedure from claims of unconstitutionality. This amendment will make K.S.A. 22-3434 easier to use and clearer to apply. That in turn will protect many child victims across the state.

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Att VII