Approved: 4/10/98
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Carmody at 3:30 p.m. on March 17, 1998 in Room 313--S of the Capitol.

All members were present except: Representative Kline (excused)
Representative Powell (excused)
Representative Mays (excused)
Representative Wilk (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes
Jan Brasher, Committee Secretary

Conferees appearing before the committee:

John Shoemaker, Administrative Assistant, Senator Bond
Rick Guinn, First Assistant District Attorney, Johnson County
Kyle Smith, KBI
Jim Clark, County and District Attorneys Association
David Miller, Miami County Attorney-written testimony only
Richard Guinn, First Assistant District Attorney,Johnson County
Captain Roger Villanueva, Kansas City, Kansas Police Department
Lt. Don Affalter, Lawrence Police Department
Captain Colwell, Paola, Police Department
Sheryl Diehl, District Attorney, Douglas County
Daryl Reece, Johnson County Sheriff's Office

Others attending: See attached list

The Chair called the meeting to order.

SB 514: Salary of district attorneys

John Shoemaker, Legislative Assistant to the Senate President, testified on behalf of the Senate President in support of **SB 514**. Conferee Shoemaker stated that this bill does not require or mandate a salary level. The conferee stated that Senator Bond feels that the current statute capping salaries of District Attorneys is not comparable with the caseload and management responsibilities. (Attachment 1)

The Chair referred to written testimony provided by Rick Guinn, First Assistant District Attorney from Johnson county. The Chair stated that salary comparison information had been requested demonstrating the existing disparity in county salaries for legal department heads in larger Kansas counties. (Attachment 2)

The Chair noted an error in the supplemental note to **SB 514**.

The Chair closed the hearing on **SB 514**.

HB 2717: Alleged juvenile offender advised of right to remain silent, right to an attorney and right of parental presence; waiver of such rights

The Chair opened the continued hearing on **HB 2717** for those opposing the bill to testify.

Kyle Smith, KBI, testified on behalf of the Director of the Kansas Bureau of Investigation in opposition to **HB 2717**. Conferee Smith stated that law enforcement officers must balance a number of claims when working a case. Conferee Smith stated that the Kansas Supreme Court decision, in *re B.M.B.* case does a good job in balancing the interests of personal rights and public safety. The conferee stated that time should be given in view of the Supreme Court's decision and that law should not be based on just one case. The

conferee stated that this bill weakens constitutional protection. Conferee Smith stated that the courts can deal with individual cases as the facts are available. The conferee stated that this bill will add another hearing and that it would decrease flexibility for law enforcement officers. (Attachment 3)

The Chair discussed the conferee's opinion that the exclusion law is too broad. The conferee and Chair discussed the need to allow spontaneous utterances and that the Miranda warning is given when the individual is in custody and before interrogation.

The Committee members discussed with the conferee situations law enforcement officers deal with in the field and the impact this bill might have on law enforcement. The Committee members discussed issues concerning the *B.M.B. case* and public perception. Some members discussed with the conferee drafting problems perceived with the bill.

Jim Clark, County and District Attorneys Association, presented written material on behalf of David L. Miller, Miami County Attorney in opposition to **HB 2717**. Conferee Clark related information concerning a case in Miami county where a nine year old girl was murdered by an thirteen year old girl. Conferee Smith commented on several issues in the opinion attached to Mr. Miller's written testimony. The conferee stated that he highlighted several issues in the written testimony. The conferee stated that in most cases officers do a fine job and this case is in sharp contrast to the *B.M.B. case*. Conferee Clark stated that the juvenile suspect was interviewed with a social worker present. Conferee Clark stated that a rehabilitation process is the focus in juvenile cases, rather than punishment. (Attachment 4)

Jim Clark referred to written testimony by Nick Tomasic, District Attorney from Wyandotte County, who is opposed to **HB 2717**. Conferee Clark related concerns addressed in Mr. Tomasic's testimony regarding the juvenile population of Wyandotte County and informal kinship relationships that would exasperate situations faced by law enforcement in that county if this bill was to pass. (Attachment 5)

The Committee members discussed whether other relationships could satisfy the requirement in the bill to have a parent or guardian present.

Richard Guinn, First Assistant District Attorney, Johnson County District Attorney's Office, testified in opposition to **HB 2717**. The conferee stated that it has been the experience of his office that law enforcement officers conduct interviews with juveniles in a very appropriate manner and are sensitive to the issues involving young offenders. The conferee discussed what statements from juveniles are accepted by the court. The conferee stated that the *B.M.B. case* is a very isolated incident and **HB 2717** is not necessary to protect juveniles. (Attachment 6)

Roger Villanueva, Captain, Kansas City, Kansas Police Department, testified in opposition to **HB 2717**. Conferee Villanueva explained the process used by his department in dealing with juveniles. The conferee stated that many children under the age of 14 have a better understanding of their rights than a lot of adult suspects. Conferee Villanueva stated that statistics show an increase in the number of 13 to 14 year olds arrested for violent offenses. (Attachment 7)

Lt. Dan Affalter, Lawrence Police Department, testified in opposition to **HB 2717**. Conferee Affalter stated that this bill would be a deterrence to finding the truth and that protection of the public and the juvenile can be achieved using the constitution and case law. The conferee stated that this will make his job much more difficult. The conferee stated that the nature of criminality has changed and juveniles are more aggressive and more likely to challenge authority. This bill will limit the ability of police to protect the public. The conferee stated that while the juvenile's rights need to be protected, often a juvenile will not talk when their parent is in the room during questioning. The conferee discussed his experience with youth and the presence of gangs in the schools. The conferee stated that the current law is working and that this bill would limit the ability of law enforcement officers to deal with the problem of juvenile crime. (Attachment 8)

Captain Colwell, Paola Police Department, testified in opposition to **HB 2717.** The conferee stated that this bill would exclude in-custody admissions or confessions of juveniles under the age of 14 unless a parent, guardian or attorney is present. The conferee discussed his investigation of the case where a 13 year old girl had drowned a 9 year old girl and how the interview provided information to solve the case. (Attachment 9)

Shelly Diehl, District Attorney, Douglas County, testified in opposition to **HB 2717**. The conferee discussed several philosophical and legal arguments as to why **HB 2717** should not become law. The conferee discussed how this bill might affect Children in Need of Care cases, (CINC). The conferee stated that this is unnecessary legislation and is redundant. The conferee discussed sections in the bill that would require a mandated hearing without allowing the judge discretion in the case. The conferee stated that law enforcement officers will run into difficulty locating parents. The conferee stated that in some circumstances, parents will

not cooperate with law enforcement. The conferee discussed kinship problems that could develop as a result of this bill. The conferee discussed problems law enforcement officers face with chronic juvenile offenders. The conferee stated that after the Supreme Court decision of March 13, both the juvenile and parent will be read the Marinda warning. The conferee stated that the emotional part needs to be taken out of the consideration for this bill and the problems that occurred in the *B.M.B. case* need to be addressed. The conferee stated that the *B.M.B. case* is horrible, but laws can not be made because of one case where constitutional errors were made. The conferee stated that almost every right is given to juveniles. The conferee discussed the questioning procedure developed by Judge Shepherd which the conferee can make available to the Committee. (Attachment 10)

The Committee discussed with the conferee the constitutional standard for voluntary statements and the rights given to juveniles. The conferee discussed whether CINC cases would be affected by this bill.

Daryl Reece, Sergeant, Johnson County Sheriff's Office, testified in opposition to **HB 2717**. The conferee stated that it is the experience of law enforcement officers that juveniles do not necessarily identify themselves when taken into custody. The conferee stated that often it is difficult to locate a parent. The conferee related a case he dealt with where 200 juveniles were interviewed concerning a missing gun in a homicide case. The conferee noted that in some cases the parent(s) might be direct or indirect victims. The conferee stated that it should be the juvenile judge's discretion to determine whether the statement taken by law enforcement was voluntary. (Attachment 11)

The Chair closed the hearing on **HB 2717**.

The Chair adjourned the meeting at 5:45 p.m.

The next meeting is scheduled for March 18, 1998.

HOUSE JUDICIARY COMMITTEE
GUEST LIST

DATE: 3-17-98

NAME	REPRESENTING
Shelley Diehl	Douglas County D.A.
Roger Villanueva	Kansas City Ks Police Dept
Lt. David L. Affalter	Lawrence Kans, Police Dept.
Josie Stramberg	JO Co
John Shoemaker	Senate President Staff
Steve Clark	KCDAA
Rick Jamison	Jo. Co. D.A.
John Meier	Kansas Police Dept.
Daryl Reece	JCSO
Mark Gleeson	OJA
Heather Randall	Whitney Damron, P.A.
Kevin Colwell	Topeka Police Dept.

JOHN SHOEMAKER
STATE CAPITOL, RM 461-E
TOPEKA, KANSAS 66612
(913) 296-7310

STATE OF KANSAS

TOPEKA

LEGISLATIVE ASSISTANT
TO THE SENATE PRESIDENT

March 17, 1998

Dear Chairman Carmody and Members of the House Judiciary Committee,

Thank you for the opportunity to appear today and offer testimony in support of SB 514. SB 514 was introduced by the Senate Judiciary committee at the request of Senate President Bond. Senator Bond feels that the cap imposed on District Attorney's salaries by current statute is archaic and should be lifted. Five Kansas counties elect a District Attorney (Douglas, Johnson, Sedgwick, Shawnee and Wyandotte). The current statutory cap limits District Attorney's salaries to the same level as District Court Judges salaries (roughly $83,000). The caseload and management responsibilities are much larger for District Attorneys. Roughly comparable jobs (Johnson County's Chief Counselor, $104,000 and Overland Park City attorney, $100,000) offer substantially higher salary levels.

This bill does not require or mandate a higher salary level, it simply allows the county commissioners to raise the compensation level if they see fit, when the cap is removed. Senator Bond suggested this legislation because he believes that the highest level of professionalism and expertise is needed in major prosecutorial positions. The pay should more realistically fit the responsibility and managerial challenge in these larger offices.

Thank you again for allowing me to provide testimony in support of SB 514 and we urge your passage of this measure.

Sincerely,

John Shoemaker
Legislative Assistant to the Senate President

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3-17-98
Attachment 1

#2

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

PAUL J. MORRISON, DISTRICT ATTORNEY

March 16, 1998

Representative Tim Carmody, Chairperson of the House Judiciary Committee
KANSAS HOUSE OF REPRESENTATIVES
State Capitol
Topeka, Kansas 66612

RE: Senate Bill 514

Dear Representative Carmody:

In response to your request to provide salary comparison information, the following examples demonstrate the existing disparity in county salaries for legal department heads in the larger Kansas counties:

	1996		**1996**
Sedgwick Co. Counselor	$135,000.00	Sedgwick Co. DA	$80,057.00
Staff Size (approx.)	8 Attorneys		40 Attorneys
	7 Support Staff		55 Support Staff
Johnson Co. Counselor	$110,000.00	Johnson Co. DA	$80,057.00
Staff Size (approx.)	10 attorneys		25 attorneys
	5 support staff		40 support staff

Three primary reasons support passage of this bill:

1. Larger counties within Kansas need to be able to attract and retain high quality District Attorneys. Larger counties should be given the flexibility to compensate their chief prosecutor as they choose.

2. This bill costs the taxpayers of Kansas absolutely nothing. Counties with District Attorneys can choose to leave the District Attorney's salary at their present levels. The bill provides for local flexibility.

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Attachment 2

JOHNSON COUNTY COURTHOUSE, P.O. BOX 728, OLATHE, KANSAS 66051
PHONE NUMBER: (913) 764-8484 EXT. 5301
FAX NUMBER: (913) 791-5001

3. Both Johnson and Sedgwick counties either already have or will very soon have assistant district attorneys being paid higher salaries than the District Attorneys. This disparity is due to county pay scales providing competitive salaries for assistant district attorneys.

Sincerely,

Richard G. Guinn,
First Assistant District Attorney

:tli

3

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE ON CRIMINAL LAW
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
IN OPPOSITION TO HOUSE BILL 2717
MARCH 17, 1998

Mr. Chairman and Members of the Committee:

I appear today on behalf of Larry Welch, Director of the Kansas Bureau of Investigation in opposition to the well meaning, but misguided HB 2717.

As way of background, I would like to point out I have spent almost 18 years prosecuting cases and handling suppression motions. Six of those years I handled one of the largest juvenile dockets in the State of Kansas. In addition, I have been a law enforcement officer for the last seven years and instructed officers across the state on constitutional interrogation law. I would suggest that HB 2717 is unnecessary, unwise and unworkable.

1. Unnecessary. As was pointed out in sub committee, this legislation was premature. Leaving aside the questionable wisdom of passing statutes that affect everyone because of one particular case, it was pointed out that the *In re B.M.B.* case was pending before the Kansas Supreme Court. That decision came down on March 13, 1998, and does a pretty good job in balancing the interests of personal rights and public safety. Being based on the constitution that decision more surely protects young children against unfair interrogation than any statute could.

> We hold, therefore, that a juvenile under 14 years of age must be given an opportunity to consult with his or her parent, guardian, or attorney as to whether he or she will waive his or her rights to an attorney and against self-incrimination. Both the parent and juvenile shall be advised of the juvenile's right to an attorney and to remain silent. Absent such warning and consultation, a statement or confession cannot be used against the juvenile at a subsequent hearing or trial.

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Attachment 3

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

In re B.M.B. adds another protection for children to the existing constitutional protections. The Bill of Rights of the United States Constitution, in particular the Fifth Amendment against self-incrimination and the due process clause requiring statements to be voluntary are applied equally to juveniles as to adults. Before any statement from a juvenile may be admitted into court, there first must be a finding that the statement was voluntary. *State v. Wacker*, 253 Kan. 664 (1993), (sometimes called a *Jackson v. Denno* hearing). In addition, in case of a custodial interrogation, juveniles must be advised of their right to counsel and the right to refuse to answer questions per the *Miranda* decision. No statement may be used unless the suspect then "knowingly and intelligently" waives the suspect's *Miranda* rights. If the defendant invokes *Miranda* and refuses to answer, then all questioning must stop. *Miranda v. Arizona* (1966). Further, the U.S. Supreme Court has held that once *Miranda* rights are invoked, officers are not allowed to reinitiate interrogation at a later time. *Edwards v. Arizona* (1981). A federal appellate court in *Cooper v. Dupnick*, 963 F. 2d 1220, recently held that continued interrogation in violation of the *Edwards* rule creates a federal civil rights lawsuit under 42 U.S.C. §1983. In 1988 the rule was expanded so that once the suspect invokes *Miranda* rights all officers are prohibited from asking questions, not just on the crime for which the person is in custody, but for any other crime as well. *Arizona v. Roberson* (1988).

Finally, in *Minnick v. Mississippi*, in 1990, the U.S. Supreme Court expanded *Miranda* once again by holding that once invoked, merely consulting with an attorney prior to additional interrogation is not sufficient, the attorney must be present.

Further, the courts have recognized that in deciding whether a suspect has knowingly and intelligently waived his or her *Miranda* rights, the courts are to consider the suspect's age, intelligence and background. *State v. Waugh*, 238 Kan. 537 (1986). (As well as the manner and duration of the interrogation, fairness of the officers, ability to communicate with the outside world, length of detention, etc.).

Contrary to the testimony yesterday by Richard Ney, this statute will not reduce the number of

hearings or their length. This bill would be in addition to the court established constitutional mandates that already require hearings. Section (E) on page 3 specifically requires another hearing apparently on whether the bill was complied with. I would suggest the courts, prosecutors and officers have enough to do, particularly since the issue will already have been addressed pursuant to the *B.M.B.* decision. The suggestion by the two defense attorneys that HB 2717 be expanded to everyone under 16 would aggravate the problem further.

In those cases where no parent is available or where a parent is a victim, the law would require the presence of an attorney. Given the financial limitations of most children in this age group, that apparently would be at public expense. There are over 10,000 arrests in Kansas of juvenile offenders between the ages of 10 and 14 and I suspect almost all of them are interviewed about their crime. If HB 2717 becomes law, attorneys will be necessary in an unknown percentage of those arrests. Arbitrarily picking 50% as the number of cases where parents can't be found or are unavailable, that leaves 5,000 arrests a year where attorneys will need to be appointed. Assuming the hourly rate of $100 an hour and two hours of work, this legislation carries at least a $1 million price tag. Who is going to pay? That, or course, is not counting the officer and agency time spent in holding the juveniles and trying to locate parents, or the court and attorney time for the necessary hearings.

2. Unwise. I was taught a truism in law school that "bad facts make bad law". In other words, that unfortunate circumstances in one case can create rules and consequences which may be even more unfortunate in any number of additional cases. Clearly, people, legislators and the Supreme Court were upset by the interrogation techniques used. But, we should proceed cautiously in reacting to one case.

Another truism is that any time a line is drawn there will be cases that fall barely on one side or another, that we could argue should have been on the other side of the line. How will you respond next year to the mother of a child who was raped or killed by a 13 year old gang member who went free, even though he voluntarily, knowingly and freely confessed, but this law required suppression?

Years ago, this legislature decided to set a minimum age for criminal responsibility at age ten, based in part on the growing sophistication and maturity of today's juveniles. After age 14, some juveniles may be tried as adults. Yesterday it was suggested the bill should be expanded to those under 16. Does it make sense that a 15 year old murderer could be tried and punished as an adult, treated as a child as to if he understands that he doesn't have to talk?.

Because of one perceived unfair case, are we going to pass legislation that would let hundreds of gang members and other criminals avoid just punishment?

3. Unworkable. The language on page 2 and 3 of HB 2717 creates a number of practical difficulties which would result in poorer cases, fewer convictions of truly guilty criminals and hundreds of criminals going free. As noted above, I prosecuted juveniles for seven years and can assure the committee there are a fair number of offenders out there who are not likely to admit in the presence of mom and dad that they have been out dealing drugs, committing driveby shootings, robberies or rapes. As to the presence of an attorney, I would suggest it is almost malpractice for any attorney to allow his client to give an incriminating statement. Whether it's a question of competency or not, the reality is that almost no attorneys will allow such statements to be made. Further, some children are more afraid of their parents than the police and won't tell us that they were selling dope for dad.

Section 3a, while containing the standard *Miranda* warning, requires that it be given upon arrest of an alleged juvenile offender. Even under the *B.M.B.* case, *Miranda* warnings are only required before there is any interrogation of a person who is in custody. To require the arresting officer, who may not be from the jurisdiction where the crime occurred and may have no knowledge about the facts and circumstances of the case to give the *Miranda* warning, and then respond to the questions or statements of the juvenile, is totally unworkable. Current law requires the *Miranda* warning to be given prior to any questions being asked of a juvenile in custody. Frequently at the time of arrest, officers are acting either on a warrant or radio communication and are totally unprepared to take a statement at that time.

The statute is more rigid than the *B.M.B.* case. For instance, under the statute the juvenile selling dope or doing a killing for an adult gang leader might give a statement that was voluntary, Mirandized and true, but inadmissible against the adult because of this statute. The court might devise a rule allowing its admission against that adult.

Further, there are problems with how parents are identified. In my own experience, a number of juveniles deny or falsify the existence or names of parents. In this age group they frequently do not have identification documents, such as a drivers license. Even if the parents are identified, there will be extensive delays in trying to identify them, locate them and get them to the police department. I would hate to see a kidnapping or rape victim bleed to death because law enforcement was prevented by this legislation from asking the location of a victim, just because the parents couldn't be found quickly.

It might also be noted that a number of juveniles might be taken into custody wrongly and a statement promptly given would not only result in their release, but allow officers to refocus the investigation on the guilty party. The delays inherent in HB 2717 will thus not only result in the guilty going free, but in some cases innocent being detained.

How are we to deal with a due process challenge where a retarded adult has the mind of an 11 year old. Is it fair and equal protection to treat such a person and a true 11 year old differently?

Under interrogation law following the *Miranda* decision, various exceptions have evolved, such as exigent circumstances where life or serious bodily harm is involved or preliminary booking-type questions. How are such circumstances to be handled with the statutory mandate? The courts may well assume that since this is well known the omission of such exceptions was intentional.

What happens if a juvenile, without being asked, voluntarily blurts out a confession? HB 2717 would prevent such evidence from being used. *In re B.M.B.* would allow the court to develop rules when this would be admissible, the statute does not.

Finally, I would note in sub-paragraph (e) there are two adverbs that do not normally appear in this area of law. That section would require the court to find that the waiver was made knowingly,

"willingly and understandingly". Knowingly, intelligently and voluntarily are the known standards in interrogation law. Does "willingly" mean voluntarily or is it something more? Such as eagerly? Does "understandingly" mean something more or different than knowingly?

The application and interpretation of the language in HB 2717 will lead to innumerable, additional suppression hearings as this new procedure is slowly deciphered with the result of additional drains on law enforcement, prosecutorial, judicial and defense attorney time.

In conclusion, I would suggest that HB 2717, while paved with good intentions, is the road to a hell-of-a-mess. Further, there are existing, sufficient safeguards in place to protect juvenile offenders and to ensure that any statements they give are knowingly, intelligently and voluntarily made. I would be happy to stand for questions.

#4

MIAMI COUNTY ATTORNEY

DAVID L. MILLER

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Facsimile: (913) 294-9555

MICHAEL GREAR
Assistant County Attorney

TERRY L. DeGRANDE
Victim/Witness Coordinator

AMY PRICE
Assistant County Attorney

March 13, 1998

TO: House Judiciary Committee

FROM: David L. Miller, Miami County Attorney

RE: House Bill No. 2717

As the county attorney and chief law enforcement official of Miami County, Kansas, I am opposed to House Bill No. 2717 which would exclude in-custody admissions or confessions of juveniles under the age of 14 unless a parent, guardian or attorney is present.

This bill places unnecessary restrictions upon law enforcement in dealing with juvenile crime in Kansas. I'm not sure I understand the thinking behind this bill but the ultimate issue is that confessions and admissions of juveniles must be freely and voluntarily given, without duress or coercion. This issue should be resolved on a case by case basis by a trial judge whose decision is subject to review by the Court of Appeals and the Supreme Court. There are many 12 and 13 year old juveniles that have experience with law enforcement officers and, unfortunately with the juvenile justice system. Some, likewise have parents who are even less responsible than the child. To require the police to find a parent before talking to the child could tie the hands of good, honest police officers in investigating serious crimes committed by juveniles.

Unfortunately bad cops make bad law and bad cops will continue to violate the rights of juveniles and adults regardless of legislation. They must be reined in by the prosecutor or slapped down by a District Judge. It is up to the courts and prosecutors to insure that the rights of the accused are observed. In Miami County the status quo is working. We recently had a homicide in the county where the victim was a nine year old girl and the suspect was a 13 year old girl who had an I.Q. range of 81. Captain Kevin Colwell of the Paola Police Department interviewed the suspect without an attorney or parent being present, after explaining the suspects Miranda rights. A hearing was held to suppress the statements given during the interrogation. The trial court found the statements to be

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Attachment 4

admissible in evidence against the juvenile suspect. A jury found that the juvenile had committed involuntary manslaughter and the court adjudicated her a juvenile offender. The case was appealed to the Court of Appeals and the trial judge's decision was affirmed.

The Court of Appeals was very impressed with the manner in which Cpt. Colwell advised the juvenile of her rights and in how Cpt. Colwell conducted the interview. This is an example of how the system is supposed to work. If this juvenile's parent were required to be present for the interview, she would have undoubtedly been told not to talk to the officer because of the parents prior experiences with police. That would not have been the will of the juvenile but would have been the will of the parent. The trial court and the Court of Appeals found that the juvenile's statement was a product of her own free will and was voluntarily and intelligently given after having examined the totality of the circumstances.

There are many factors to consider when reviewing a confession of a suspect and those factors are best left to a Judge. A blanket prohibition against interviewing juvenile suspects under the age of 14 will not protect juveniles from officers acting in bad faith but will seriously hamper investigations by good officers who observe and protect the rights of the accused. In Miami County we are protecting those important rights without legislative intervention.

Sincerely yours,

David L. Miller
Miami County Attorney

TOTAL P.02

NOT DESIGNATED FOR PUBLICATION

No. 78,599

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of
P.J.W., d/o/b: 9/22/82.

MEMORANDUM OPINION

Appeal from Miami District Court; STEPHEN D. HILL, judge. Opinion filed March 6, 1998. Affirmed.

Sheila M. Schultz, of Winkler, Lee, Tetwiler & Domoney, of Paola, for the appellant.

David L. Miller, county attorney, and *Carla J. Stovall*, attorney general, for the appellee.

Before PIERRON, P.J., GREEN, J., and GENE B. PENLAND, District Judge Retired, assigned.

Per Curiam: P.J.W. appeals her juvenile adjudication for involuntary manslaughter.

4-3

P.J.W., a 13-year-old girl, was accused of holding 9-year-old Amy Andrews under water on July 1, 1996, in the swimming pool at Lakemary Center in Paola, where both girls resided. Amy died the following day of complications from this near-drowning incident. P.J.W. had been in the custody of the Kansas Department of Social and Rehabilitation Services (SRS) since before January 1993 and had resided at Lakemary for approximately 9 months prior to the incident. At the memorial service for Amy, P.J.W. confided to a Lakemary employee that she had held Amy underwater. On July 4, Lt. Colwell of the Paola police department questioned P.J.W. at Lakemary regarding Amy's death. Sally Hetzke, a social worker for SRS who had worked on P.J.W.'s case since September 1994, also attended the interview as both an investigator for SRS and as P.J.W.'s guardian. At that interview, Lt. Colwell did not read P.J.W. her rights, nor was any attempt made to contact her mother or attorney. The questioning lasted 30 minutes and was videotaped.

On July 9, 1996, Lt. Colwell questioned P.J.W. again for approximately an hour. Hetzke also attended this interview as P.J.W.'s guardian. Hetzke attempted to contact both P.J.W.'s mother and attorney prior to the meeting, but neither could be reached. Before questioning P.J.W., Lt. Colwell explained her rights to her and she said she understood. She did not request an attorney, nor did she say that she did not wish to talk to Lt. Colwell. Because the interview was videotaped, Lt. Colwell did not ask P.J.W. to sign a waiver of her rights. During the interview, P.J.W. told Lt. Colwell that she had pulled Amy underwater by the straps of her life jacket until Amy floated to the top.

On July 12, 1996, P.J.W. was charged with second-degree murder. P.J.W. filed a motion to suppress the statements made at the two interviews with Lt. Colwell. The trial court denied the motion. She again objected at trial to the admission of the statements when the State offered the videotapes of the two interviews into evidence, and the trial court overruled the objection. The jury found P.J.W. had committed involuntary manslaughter, and the court adjudicated her a juvenile offender.

P.J.W. challenges the trial court's refusal to suppress statements, its decision to allow the public and media access to the proceedings, and its ruling to allow the State to amend its complaint.

P.J.W. contends the trial court should have suppressed the statements she made at the July 4 interview because Lt. Colwell did not apprise her of her rights as set out in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

Prior to any custodial interrogation, a defendant must be warned of his or her constitutional rights. *State v. Fritschen*, 247 Kan. 592, Syl. ¶ 1, 802 P.2d 558 (1990). The rights declared in *Miranda v. Arizona* were extended to juveniles by *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967). *In re Edwards*, 227 Kan. 723, 725, 608 P.2d 1006 (1980). A "custodial interrogation" is defined as "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *State v. Benoit*, 21 Kan. App. 2d 184, 189, 898 P.2d 653 (1995). P.J.W. sets out the five-factor test used in *State v. Carson*, 216 Kan. 711, 533 P.2d 1342 (1975), to analyze whether an interrogation was custodial. The Supreme Court, however, undermined the *Carson*

approach in *Fritschen*: "We do not believe it necessary or prudent to set forth hard and fast factors to be examined. Each case needs to be analyzed on its own facts." 247 Kan. at 603. The court held that an objective standard should be used to judge whether an interrogation was custodial. To make that determination, a court must consider how a reasonable person in the suspect's position would have understood the situation. 247 Kan. 592, Syl. ¶ 2.

P.J.W. claims the July 4 questioning amounted to custodial interrogation and, thus, Lt. Colwell had the affirmative duty to provide *Miranda* warnings. She points to the following facts to support her position: (1) she was 13 years old and in the care and custody of SRS, while residing at a facility where her freedoms were restricted on a daily basis; (2) Lt. Colwell asked questions he knew might elicit incriminating evidence; and (3) she was the focus of the investigation.

Despite the facts cited by P.J.M., the record shows the July 4 encounter did not amount to a custodial interrogation. Although P.J.W. was relatively young and in SRS custody, she was not a prisoner at Lakemary. She attended public schools and was allowed to walk to school by herself. While she generally was told when to eat, go to bed, and leave the facility, such restrictions are similar to those imposed by parents of many 13-year-olds. Even if one could equate residing at Lakemary with incarceration, this court held in *Benoit* that to create a custodial interrogation of an inmate in a prison setting,

> "some change in the inmate's surroundings that results in an added imposition or restriction on the inmate's freedom of movement should occur. To apply the test to determine if an inmate's freedom of

movement has been restricted, a court must consider the totality of the circumstances surrounding the alleged interrogation." 21 Kan. App. 2d 184, Syl. ¶ 8.

The videotape reflects that the first interview did not involve any added impositions or restrictions on P.J.W.'s freedom. Lt. Colwell conducted the first interview in a large conference room at Lakemary. It lasted for only 30 minutes, after which P.J.W. left to play at the pool. Neither Colwell nor Hetzke restrained P.J.W. in any way. Lt. Colwell testified that the purpose behind the first interview was to familiarize himself with P.J.W. He wanted the opportunity to assess her emotional state and maturity level, and he claimed to have no intention of interrogating the juvenile. The videotape reveals that Colwell told P.J.W. that he just wanted to talk to her; she was not under arrest; she was not going to jail; and she could leave any time she wanted. Hetzke testified that when she had meetings with P.J.W. in the past, if P.J.W. became angry or did not want to talk, she would get up and leave the room. P.J.W. had this same option at the first meeting with Lt. Colwell. The fact that she could not leave the facility is irrelevant. P.J.W. could have terminated the questioning and left the room at any time. The tape demonstrates, however, that she was willing to talk with the detective. She displayed no signs of wanting to leave or terminate the interview.

P.J.W. also contends that Lt. Colwell's questioning amounted to a custodial interrogation because she was the focus of the investigation. Whether an individual is the focus of an investigation is only one relevant factor a court considers when determining whether an individual is in custody. See *Fritschen*, 247 Kan. at 603. The fact that P.J.W. was the focus of the investigation is not

determinative. In *State v. Costa*, 228 Kan. 308, 613 P.2d 1359 (1980), the court held that the defendant had not encountered a custodial interrogation in violation of *Miranda*, even though the defendant was the focus of the investigation. The court accepted the State's characterization that it had performed an investigatory, rather than a custodial, interrogation. The court noted that the investigation of the case had just begun and that the defendant was not restrained during the interrogation. In this case, the fact that P.J.W. was not restrained, the investigation had just begun, and she had complete freedom to leave at any moment undermines her contention that she was in custody.

If an individual is questioned while in custody without receiving *Miranda* warnings, a court then must consider whether the individual was interrogated. The questions asked must be "'likely to elicit an incriminating response and to produce psychological pressures that will subject the individual to the "will" of his examiner.'" *Benoit*, 21 Kan. App. 2d at 195. At the first interview, Lt. Colwell told P.J.W. he was investigating the death of Amy and he needed to talk to everyone to understand what happened. Both he and Hetzke asked questions. Colwell simply asked P.J.W. to explain what she observed at the pool on July 1. He did not question her forcefully or accusatorially. He even told her not to tell him anything she did not wish to tell him and stated that he did not want to put any words in her mouth. There is no evidence of any type of coercive conduct--no threats, no promises, no leading or suggestive questions. The videotape shows no effort on the part of Lt. Colwell to elicit an incriminating response or to exert pressures on the respondent. The first interview amounted to nothing more than an investigatory interview and, thus, Lt. Colwell had no obligation to provide P.J.W. with *Miranda* warnings.

At the second interview on July 9, Lt. Colwell read aloud to P.J.W. her rights under *Miranda* and explained them to her. He also provided Hetzke with a copy of the *Miranda* form. After hearing her rights, P.J.W. indicated she would talk with Colwell. P.J.W. claims the court should have suppressed the statements made at this interview because her waiver was not given voluntarily, knowingly, and intelligently.

> "When a trial court conducts a full hearing on the admissibility of an extrajudicial statement by an accused, determines the statement was freely, voluntarily, and intelligently given, and admits the statement into evidence at the trial, an appellate court accepts that determination if there is substantial competent evidence to support the trial court's determination. [Citation omitted.] After a court has determined the confession was voluntary, an appellate court will not reweigh the evidence. [Citation omitted.] *State v. Lane*, 262 Kan. 373, 382-83, 940 P.2d 422 (1997).

To determine whether a statement by an accused is voluntary, a court considers the totality of the circumstances. Factors bearing on the voluntariness of a confession or admission of guilt by an accused include the duration and manner of the interrogation; the ability of the accused on request to communicate with the outside world; the accused's age, intellect, and background; and the fairness of the officers in conducting the interrogation. "The essential inquiry in determining the voluntariness of a statement is whether the statement was the product of the free and independent will of the accused." *State v. Morris*, 255 Kan. 964, 971, 880 P.2d 1244 (1994). The fact that the accused is a juvenile does not make the confession inadmissible. Among the factors to be considered in determining the voluntariness and admissibility of a juvenile's confession are the age of the juvenile, the length of

the questioning, the juvenile's education, the juvenile's prior experience with the police, and the juvenile's mental state. *State v. Young*, 220 Kan. 541, Syl. ¶ 2, 552 P.2d 905 (1976).

At the time of the July 9 interrogation, P.J.W. was 13 years old, less than 3 months short of her 14th birthday. The videotape reveals that Lt. Colwell spent considerable time and effort explaining, as opposed to just reading, P.J.W. her rights. For example, when explaining the right to an attorney, he commented that when he gets in trouble, he likes to call an attorney because attorneys have a better understanding of the law. Colwell asked P.J.W. about her attorney and told her she could contact him if she wanted. Colwell emphasized she did not have to talk to him, and if she did start talking to him, she could stop at anytime and he would not take it personally. As Colwell read and explained her rights, P.J.W. appeared attentive and gave every indication she understood. When Colwell described a right P.J.W. did not understand, she stopped him to have him provide further explanation. She never indicated she did not want to talk to Colwell or that she wanted to speak to her attorney. Throughout the interview, P.J.W. appeared to listen and understand Colwell's questions and provide appropriate answers.

Both Dr. William Logan and the State's expert, Dr. Bruce Cappo, testified that P.J.W. had an IQ in the range of 81, placing her in the "low-average" category. Dr. Cappo testified that 69 and below is mentally retarded, and that P.J.W. does not suffer mental retardation. In a number of cases, the Supreme Court has upheld the admission of statements made by defendants who claimed to suffer from a low IQ. See *State v. Lane*, 262 Kan. 373, (defendant had IQ of 77 and was borderline mentally retarded); *State v. Warden*, 224 Kan. 705, 585 P.2d 1038 (1978), *cert. denied* 441 U.S.

948 (1979) (defendant had IQ of 79). In *State v. Perkins*, 248 Kan. 760, 811 P.2d 1142 (1991), the Supreme Court upheld the court's admission of a statement made by a defendant who had an IQ of 67 and was mildly retarded and schizophrenic. In so ruling, the court considered the totality of circumstances and emphasized that no threats or promises were made during the interrogation and there was no evidence the defendant did not know right from wrong.

With regard to P.J.W.'s education, the testimony revealed that she had been placed in remedial classes throughout much of her childhood and early adolescence. However, she had been mainstreamed into the public schools for 2 years prior to the interrogation.

The State's and P.J.W.'s experts disagreed as to whether she had the capacity to knowingly and voluntarily waive her rights. While Dr. Logan testified he did not think P.J.W. could make a knowing and voluntary waiver, Dr. Cappo testified that, in his opinion, P.J.W. voluntarily confessed. Dr. Cappo based this conclusion on P.J.W.'s records, his personal evaluation, her performance on various performance and intelligence tests, as well as his observation of the two videotapes. In discussing any possible mental illnesses, Dr. Cappo testified that P.J.W. may have a diagnosable disorder that is conduct-related, but that any such mental illness would not interfere with her ability to understand her rights or to give a voluntary statement. In discussing the videotapes, Dr. Cappo commented on how Lt. Colwell effectively used appropriate language that P.J.W. could understand and did not use any coercive tactics to question her. In ruling on the motion to suppress, the trial court gave greater weight to Dr. Cappo's testimony, apparently because the videotapes supported his analysis. This court should not reweigh the testimony presented to

the trial court. It simply must determine whether substantial competent evidence supports the lower court's finding. *Lane*, 262 Kan. at 382-83. Irrespective of Dr. Logan's testimony, the opinions expressed by Dr. Cappo, as well as the videotape of the July 9 questioning, provide substantial evidence that P.J.W. had the capacity to make a voluntary waiver.

In assessing a juvenile's confession, a court must also consider the length of questioning. The second interrogation in this case lasted only 1 hour. In *State v. Hooks*, 251 Kan. 755, 840 P.2d 483 (1992), the Supreme Court held that a juvenile defendant gave a voluntary confession despite having been confined for hours and shackled to a table during questioning. In the videotape, P.J.W. does not appear tired, worn down, or uncomfortable. The duration of the interrogation appears to have had little effect on her willingness to confess.

In recognizing the importance of P.J.W.s statements, we have sought to find cases in other states with facts similar to this case where an appellate court suppressed the confession. Our research emphasized cases involving a juvenile with low to average intelligence, with a history of emotional problems or mental illness, who confessed in the absence of parents.

We found no cases with significantly similar facts where an appellate court deemed a confession inadmissible when applying a totality of circumstances test comparable to the one followed in Kansas. Opinions finding a juvenile confession inadmissible in the absence of parents generally came from states which have adopted a per se rule requiring the presence of parents during interrogation. Our

Supreme Court rejected this approach in *State v. Orr*, 262 Kan. 312, 342-43, 940 P.2d 42 (1997), and *State v. Young*, 220 Kan. 541, 551-55, 552 P.2d 905 (1976).

The record contains sufficient evidence that P.J.W. had the capacity to make a voluntary, knowing, and intelligent waiver. In addition, the record shows that her ability to waive her rights was not overcome by any coercive conduct on the part of Lt. Colwell. Colwell did not threaten her; he did not make her promises; he did not restrain her; he did not attempt to make her physically uncomfortable; and he did not question her for an unreasonable amount of time. Substantial competent evidence supports the trial court's ruling that P.J.W. voluntarily, knowingly, and intelligently waived her rights and confessed to Lt. Colwell on July 9. The trial court did not err by denying the motion to suppress.

At a prehearing conference, P.J.W.'s counsel asked the trial court to exclude the public and the media from the adjudication hearing. Counsel requested that the press not be allowed in the courtroom, that P.J.W.'s name not be printed in the paper, and that the court issue a gag order to keep the parties or observers from commenting publicly on the case. The court ruled the public and press could have access to the hearing but that P.J.W. could not be photographed and her name could not be published. The court provided that only one television camera would be in the courtroom and that it would be situated so P.J.W. could not be seen.

K.S.A. 1996 Supp. 38-1652(b) provides:

> "If the respondent was under 16 years of age at the time of the alleged offense, the court *may* exclude all persons except the respondent, the respondent's parents, attorneys for interested parties,

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officers of the court, the witness testifying and the victim, as defined in subsection (b) of K.S.A. 74-7333 and amendments thereto or such members of the victim's family, as defined in subsection (b)(2) of K.S.A. 74-7335 and amendments thereto as the court deems appropriate. Upon agreement of all interested parties, the court shall allow other persons to attend the hearing unless the court finds the presence of the persons would be disruptive to the proceedings."

P.J.W. cites *Stauffer Communications, Inc. v. Mitchell*, 246 Kan. 492, 789 P,2d 1153 (1990). That case involved a mandamus request to allow media access to detention hearings and other preliminary matters in juvenile cases. The court held K.S.A. 38-1652 applies only to adjudication hearings. The *Stauffer* case is of little benefit in resolving the issue before this court.

K.S.A. 1996 Supp. 38-1652(b) gives a court the discretion to exclude or allow members of the public and press from observing an adjudication hearing when the respondent is under the age of 16. "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Simon v. Simon*, 260 Kan. 731, Syl. ¶ 2, 924 P.2d 1255 (1996). One cannot say the trial court abused its discretion with this ruling, particularly considering the steps it took to insure the confidentiality of the proceedings. Even if the court did err by allowing the public and media access to the hearing, P.J.M. has not shown how the error substantially prejudiced her rights, and, thus, any error would be harmless. "'Harmless error is error which does not prejudice the substantial rights of a party. It affords no basis for a reversal of a judgment and must be disregarded.'" *Tamplin v. Star Lumber & Supply Co.*, 251 Kan. 300, 308, 836 P.2d 1102 (1992).

#5

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DISTRICT ATTORNEY
Nick A. Tomasic

March 17, 1998

Representative Carmody, chairman
House Judiciary Committee
Kansas House of Representatives

RE: HB 2717

Mr. Carmody, Ladies and Gentlemen:

This proposed legislation is a matter of great concern to our office. The courts of our state already have guidelines which can be followed in determining the admissibility of a minor's confession or statement. These sensible factors were first announced in *St. v. Young*, 220 Kan. 541, in 1976, and have been cited with favor as recently as 1997 in *St. v. Orr*, 262 Kan. 312. The factors are: 1) age of the juvenile, 2) length of the questioning, 3) the juvenile's education, 4) the juvenile's prior experience with the police, and 5) the juvenile's mental state. Each case must be reviewed on its unique and individual facts. In Wyandotte County, we have a very transient population. In addition, many of the children here do not live with parents, but are cared for in an informal kinship fashion. They live with an auntie, grandmother, friend, etc., without any formal legal custodial arrangement. Often the circumstances are that parents cannot be located. To require that each child under those circumstances be afforded an attorney for the questioning process will be a nearly impossible burden for our police.

Additionally, the proponents of the legislation have not examined closely the population of juvenile offenders in the urban areas of our state. Many of the 12 and 13 year old children in custodial interrogation situations in Wyandotte County are more understanding of their rights

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than most adults. We have had situations involving children under the age of 14, being gang-involved, and committing violent felonies with firearms. Often situations arise when information must be obtained in a very timely fashion to recover a gun or find a co-defendant before more harm occurs in the community. To enforce a bright line rule that such information, which amounts to self-incrimination by the youth, is not admissible because a parent could not be located or simply would not cooperate, is not the result that I believe you would intend.

I am urging you to reject HB 2717 as a proposal which is not in the best interest of the communities of Kansas.

Respectfully,

Nick Tomasic
District Attorney for Wyandotte County

March 17, 1998

House Judiciary Committee

RE: House Bill 2717

I'm here today on behalf of the Johnson County District Attorney's Office to express our opposition against House Bill 2717. While the facts in that case might, at first blush, appear to be worthy of action by this body, last week the Kansas Supreme Court issued their ruling. Their ruling in no uncertain terms makes House Bill 2717 the rule of law as promulgated by our Supreme Court. Therefore, it is our considered opinion that your action on this is unnecessary.

It's also our opinion that your action on this subject is unnecessary and bad public policy. Our experience has been that most law enforcement officers conduct interviews with juveniles in a very appropriate manner and are sensitive to the issues involving young offenders. In fact, our experience has been that many young offenders today are incredibly street savvy, oftentimes having been arrested numerous times in the past. To pass a bill based on one isolated, extreme situation is not good public policy.

Richard J. Guinn

Richard G. Guinn,
First Assistant District Attorney
Johnson County District Attorney's Office
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Olathe, Kansas 66051
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DEPARTMENT of POLICE

Kansas City, Kansas

James Swafford
Chief of Police

March 17, 1998

Representative Carmody, Chairman
House Judiciary Committee
Kansas House of Representatives

RE: HB 2717

Mr. Carmody, Ladies and Gentlemen:

On behalf of the officers in my department, I am urging you to reject this proposed law. In Kansas City, Kansas, we have contact with hundreds of youth each year. Many of those, even under the age of 14, have a better understanding of their rights than a lot of adult suspects. As a practical matter, we do attempt to contact a parent, if one can be found, prior to the questioning of a child. To protect the child, as well as document the child's understnding, our department routinely tape records the explanation of rights and the entire interview. Also, with the younger subjects, we try to make a simpler explanation of each of the rights, calculated to help them understand the situation.

Often, in the Kansas City, Kansas area, children are not living with a parent, and it is simply not possible to locate a parent within a reasonable time. Our department does not have funding to provide attorneys for interviewees, and the juvenile court is not going to do that until a case is filed.

Because our computer system is somewhat outdated, I cannot give your committee too many statistics that relate to this specific age group. In checking with the local Juvenile Intake and Assessment Center, they related to me that in 1997, 631 total children were brought to their center. Of the children 10 years old to 13 years old who were brought to the center, 140 children had **at least one prior contact with the police.** I am attaching a copy of a page from the 1996 edition of Uniform Crime Reports, published by the Federal Bureau of Investigation. As you can see, across the nation, children aged 10 to 14 are arrested for 13.3 percent of property crime, and 5.3 percent of violent crime. The most recent, comprehensive information I could find about juvenile crime in Kansas is: Kansas Juvenile Justice: A Statistical Overview 1987-1994 , published by the Koch Crime Commission. That report stated that "The number of arrests for juveniles 13 to 14 years old increased by **71 percent** from 1987 to 1994, and is growing faster

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than for any other age group." It also went on to state that "**The number of 13 to 14 year olds arrested for violent offenses increased faster than any other age group by growing 120 percent from 1987 to 1994.** For your review, I am also attaching a chart from the Koch Crime Commission report which breaks down both the age groups and the type of offense. I direct your attention to the "Drug Offense" category. These startling numbers should convince you that the population of youth targeted by this bill for protection from the police really need protection from a lot of things, other than the police.

Finally, I am a parent, as are many officers in our department. Speaking for myself, I am comfortable that the courts will sort out the cases where a child is coerced into telling an untruth. I would want my child to tell the truth, even if he or she gets into trouble. That is the lesson of character I try to impart at home. My instruction would be no different to my child under questioning by a police officer trying to do his job.

Please, reject this law, or at least take time to study this. I understand that within a year the data gathering capability in our department will be much better, and the criminal justice information system in our state will be able to provide you with more information about what is really happening to the kids in the juvenile justice system.

Sincerely,

Capt. R. Villanueva

Roger Villanueva, captain
Kansas City, Kansas Police Department
South Patrol Division

cc: Chief of Police Swafford

#8

City of Lawrence
KANSAS

W. Ronald Olin, Ph.D.
Chief of Police

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March 16, 1998

The Honorable Tim Carmody
Chairman of the House Judiciary Committee
115 South
Kansas Capitol Building

Dear Mr. Carmody and members of the Judiciary Committee:

As the Commander of the Investigations Division of the Lawrence Police Department, I would like to state my opposition for House Bill 2717. I have been a police officer for the City of Lawrence, Kansas for 22 years. The majority of those years have been spent in the field of criminal investigations.

The goal of any credible investigation is to seek the truth. Based on my experience with criminal investigations, witness interviews, and suspect interrogation, House Bill 2717 would act as a considerable deterrence to accomplishing the goal of finding the truth. Additionally, House Bill 2717 is unnecessary to assure the constitutional guarantees of juvenile offenders. Every statement given to law enforcement must withstand a review by the court to determine whether it was voluntarily given. I have read with interest the statements of Douglas County Assistant District Attorney Shelley Diehl, and Assistant Attorney General Kyle Smith. They both make very valid points with which I agree. I will add that it is ill-conceived in my professional opinion to rewrite the Constitution. There are other related issues I believe need to be considered as well.

First, we are dealing with the issue of parental rights. Parental rights is always an emotional issue and as such is difficult to come to agreement. As a father of three children, I can sympathize with anyone wishing to be involved in decisions affecting the welfare of their children. However, as a police officer I can tell you there are few parents who will see the goal of an investigation to find the truth as more important than the need to minimize personal liability. Many parents feel the need to shield their children from the police. This is a natural tendency for them because we have an adversarial criminal justice system. My concern is that we send the wrong message to our children when we write laws that encourage them to stand silent or lie. However painful at the time, teaching our children to tell the truth and to make right a wrong is investing in their future and the future of our country.

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The Juvenile Justice system is designed to do things for juvenile offenders, not just to them. The entire Juvenile Code is written with the age of the offender in mind and gives them the benefit of the doubt whenever their age is concerned. Additionally, in many cases the community services that are in place to deal with the causation factors of juvenile crime are only available to those children who are in the juvenile justice system because of limited availability. If a parent is allowed to actively interfere with an investigation by denying the police access to their child there may be serious negative concequences. The child's moral and ethical development and well being may suffer. Also, the child may not be able to get the help he or she needs and certainly will not learn the value of telling the truth.

Second, the spirit of this bill is to encourage juvenile offenders and their parents to not accept responsibility for their own actions. I am often questioned by members of my community about current affairs and am asked "How can this happen" or "Where did we go wrong"? This bill is an example of where we are about to "go wrong". We, as a society, do not expect people to accept responsibility for their own actions and in order to be perceived as politically correct, we are afraid to set limits on right and wrong behavior. Right is always right, and wrong is always wrong, and we must not let juvenile offenders or their parents hide from that. We must not be afraid to tell parents of juvenile offenders what they need to know to make proper parenting decisions. However, before we can tell them, we need to know the truth. The truth of what happened and most importantly, why it happened, can only come from the juvenile offenders themselves.

Many parents are in denial and are not able to accept the possibility of their children committing a criminal act. Others can accept it, but act out inappropriately when faced with it. And others are well aware of the actions of their children and are indifferent to their obligations as a parent and interfere with the investigation to keep from having to deal with the truth. Additionally, I strongly agree with Mr. Smith's statement that there are a fair number of juvenile offenders who are not likely to admit to criminal activity in the presence of their parents. In fact, a large percentage of juvenile offenders I have dealt with have learned through a conditioned response that, when in the presence of their parents and asked to accept responsibility for their actions, many of them need only to stand silent and let mom or dad fight the battle. Many others feel the need to confess because of a guilty conscience, but are reluctant to do so in the presence of their parents. To encourage the suppression of the need to tell the truth is absolutely wrong.

Third, I would like to say that in my 22 years of law enforcement experience, I have seen the behavior of an average juvenile offender change dramatically. For that matter, I have seen it change dramatically since 1988 when we saw our first gang influence in Lawrence. It has only been in the last three to five years that I have had to investigate Junior High School aged students for crimes such as carrying guns to school, drive-by shootings, and assaults with the intent to kill their classmates. The gang influence is in every school in Lawrence from the elementary level through high school. The gangs in Lawrence have members of all ages. It is my experience that age is certainly no accurate measure of innocence or naivete.

The officers of the Lawrence Police Department have been combating gangs on many fronts. With the assistance of the Koch Crime Commission, we are attempting to educate the parents of our community about gangs. We are also attempting to educate the youth of the community starting with the elementary and junior high age students. We have enacted an ordinance to deal with gang graffiti and have a community based program for its removal. We also have a very aggressive stance on identification, investigation, and prosecution of gang members involved in criminal activity. We feel the gang issue and gang behavior has a significant impact on the quality of life for our community and are committed to keep the problem from growing. We need every tool available to us in our endeavor and House Bill 2717 is definitely a step in the wrong direction in combating gang activity.

In conclusion I think it is important to keep in mind that the current law is working and affords juvenile offenders equal protection under the constitution. The burden is on law enforcement to prove that any statement made by a juvenile is or was voluntary and each case is reviewed on it's own merits. I have dealt with many 12 and 13 year old children who are much more "savvy" or "street wise" then young adults who have never had any involvement with the Criminal Justice System. To say that anyone under the age of eighteen years old is incapable of understanding their constitutional rights is enabling those individual's ability to break the law and get away with it. Juvenile crime is one of the most rapidly growing problems in America. It does not make sense to further limit the ability of law enforcement officers to deal with the problem.

Thank you for giving me the opportunity to express my views.

Very truly yours,

Lieutenant Daniel L. Affalter
Investigations Division

W. Ronald Olin, Ph.D.
Chief of Police

#9

March 16, 1998

To: House Judiciary Committee

From: Capt. Kevin Colwell, Paola Police Department

Re: House Bill #2717

As an investigator for the Paola Police Department, I am opposed to House Bill #2717 which would exclude in-custody admissions or confessions of juveniles under the age of 14 unless a parent, guardian or attorney is present.

I can only give the committee my personal experience on how a bill like this would have been an extreme detriment in a homicide case I investigated.

On July 4th, 1996 I was assigned to investigate a drowning of a nine year old girl that occurred at the Lake Mary Center swimming pool. Lake Mary is an institution for disabled children and houses many of the children. The reason for the follow-up investigation was to investigate a comment made by a female resident that she was responsible for the drowning. This resident was 13 years old and had an I.Q. of approximately 81. Upon starting my investigation I had no physical evidence, and I had two parents of the victim wondering what happened to their little girl.

I interviewed the 13 year old girl without an attorney or parent being present, after thoroughly explaining her Miranda Rights to her. The 13 year old girl subsequently admitted to intentionally holding the nine year old girl under water until she quit breathing. This interview was video taped, and was the only real evidence I had linking her to the cause of the drowning.

A motion to suppress the taped interview was filed by the defense and the court found the statement admissible. The 13 year old girl was found guilty of involuntary manslaughter by a jury.

I must stress that the only critical evidence that I had was the taped statement given by the 13 year old girl. If it were mandatory for me to have this girl's parent(s) present during the interview, I sincerely believe that I would have never found out what had actually happened to that nine year old girl. The parents of that nine year old girl would have never found out what actually happened. The 13 year old suspect would have continued living at Lake Mary with other children putting them in potential danger. Why do I say I would have never found the truth? The parent(s) of

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this 13 year old girl had many prior experiences with the Police, and they would have most likely told the 13 year old not to talk to the police. The will of the parent(s) rather then that of the juvenile would have decided whether she talks.

The result of her free will decision to talk to me without a parent present resulted in the family of the victim putting closure on their daughter's death, the other residents of Lake Mary were protected, and the 13 year old suspect gets the help she desperately needed in a more structured environment.

In this case the defense appealed to the Court of Appeals and it upheld the trial judges decision.

If this bill is passed it will hinder investigations done involving juveniles. The good officer will look after the rights of the accused juvenile and the bad officer will not. With the bad officer it will not matter if a law has been enacted to protect the juvenile. The bad officer is few and far between. Don't penalize the majority with this law. The majority being the good officers who protect the rights of the accused. Let the trial judges and the Court of Appeals do their jobs as they have been. Let them decide these cases on an individual basis. The system works in Miami County.

Respectfully,

Capt. Capt. Kevin Colwell
Paola Police Department, Paola, Kansas

#10

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STATEMENT IN OPPOSITION TO HOUSE BILL No. 2717

Shelley J. Diehl
March 17, 1998

As the juvenile prosecutor for Douglas County, Kansas for over six years, I would like to state my opposition to House Bill No. 2717. In addition to some philosophical arguments, I believe there are some legal arguments as well.

I. Proposed House Bill No. 2717 would create rights that are not provided for and are unnecessary constitutionally. Further, for youth 10 to 14 years of age, HB No. 2717 would, essentially, curtail the district court's purview in the determination of the voluntariness of their confessions. As the law stands now, the judge at the district court level has the opportunity to look at all of the circumstances surrounding a juvenile's admission and the characteristics of each youth in determining the voluntariness and admissibility of that his/her statements.

The leading Kansas Supreme Court case in this area is State v. Young, 220 Kan. 541, 552 P.2d 905 (Kan. 1976). In Young, the Court looked specifically at the issue of the admissibility of juvenile confessions and the laws pertinent to the issue, beginning with In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967). The Young Court found that a juvenile is capable of making an admissible voluntary confession, and there is no constitutional requirement that he have the advice of a parent, guardian or other adult. Whether or not a juvenile's confession is voluntary is a different issue, one that is protected by the courts on a case-by-case basis upon considering the totality of the circumstances. In Young, the Court cited a number of factors to be considered in determining whether a juvenile's confession is voluntary. What the constitution prohibits is not self incrimination, but **involuntary** self incrimination. State v. Young is still good case law and has been followed as recently as 1997. *See* State v. Orr, 262 Kan. 312 (1997). As well, both cases that the Young Court found to be controlling, In re Gault, *supra*, and State v. Hinkle, 206 Kan. 472, 479 P.2d 841 (1971), are still good law.

2. HB No. 2717 would significantly hamper the legitimate governmental, societal and law enforcement interests in solving youth crimes. Given the countrywide increase in youthful crime, requiring a parent, guardian or attorney to be present before admissions or confessions of youth under 14 years of age to be admissible would seem unwise, if the object is to hold youth responsible for the offenses they commit. For many of our youth, locating a parent or guardian in a timely fashion is difficult at best. Whether or not a parent or guardian can be located, HB No. 2717 actually creates for that parent or guardian a new right - the ability to invoke constitutional rights for their wards. Either by being unavailable or by refusing to permit their wards to speak to law enforcement, a parent or guardian of a youthful offender can effectively curtail any police investigation, no matter how urgent. For those chronic offenders whose families are anti-law enforcement or entrenched in criminal activity themselves, HB No. 2717 is a very effective way to circumvent the law. Further, juveniles frequently lie to intake workers and law enforcement about their own identities, as well as, their parents' identities and whereabouts.

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3. HB No. 2717 is contrary to the philosophy of the significant amendments recently made to the Juvenile Justice Code Prior to 1975 the focus of juvenile proceedings in juvenile court was in the nature of a protective proceeding entirely concerned with the welfare of the child. See State ex rel Londerholm v Owens, 197 Kan. 212, 416 P.2d 259 (1966). After 1975 the Kansas Legislature made a significant retreat from an emphasis on the welfare of a child and a far greater emphasis on concern for the welfare of the community. In 1996, the Kansas Legislature revamped the Kansas Juvenile Offenders Code in the Juvenile Justice Reform Act of 1996. The resulting Kansas Juvenile Justice Code was thus created. K.S.A. 38-1601 was amended to read as follows:

38-1601. Article 16 of chapter 38 of the Kansas Statutes Annotated and sections 8, 9 and 16, and amendments thereto, shall be now and may be cited as the Kansas juvenile justice code. The primary goal of the juvenile justice code is to promote public safety, hold juvenile offenders accountable for such juvenile's behavior and improve the ability of juveniles to live more productively and responsibly in the community.....(emphasis added)

K.S.A. 38-1601 further states that the ultimate solutions to juvenile crime lie in the strengthening of families and educational institutions, the involvement of the community and the implementation of effective prevention and early intervention programs, facilitating efficient and effective cooperation, coordination and collaboration among agencies of the local, state and federal assessment of program performance, utilizing resources wisely, reflecting community norms and public priorities and encouraging public and private partnerships to address community risk factors, etc. An enormous amount of energy has been expended trying to revamp the tools that are available to those youths who become involved in the juvenile court system, i.e. adjudicated juvenile offenders.

Further, in revamping the Juvenile Code, the 1996 Kansas Legislature envisioned a dramatic change in the prosecutor's ability to prosecute juveniles as adults. The 1996 Supplement to K.S.A. 38-1636 advises that this section was amended by the Legislature and the amendments were to take effect on July 1, 1997. As of July 1, 1997, the county or district attorney may file a motion requesting that the court authorize prosecution of the respondent as an adult for **any age**, for any crime. In the instance where a motion is filed and the juvenile is under 14 years of age, the presumption is that the juvenile should be prosecuted as a juvenile, unless the prosecutor is able to rebut that presumption. This amendment is certainly in keeping with the philosophy of the Kansas Juvenile Justice Code in holding juveniles responsible for their behavior.

For whatever reason, the proponents of HB No. 2717 have placed law enforcement and juvenile prosecutors in the "bad guy" role. The reality is just the opposite. In fact, if law enforcement and juvenile prosecutors aren't allowed to do their mandated jobs, juveniles under the age of 14 who commit crimes are likely to not be adjudicated. It isn't difficult to see that if at-risk juveniles and violent juveniles are not adjudicated, then all of the community's resources and all of the court's power to order rehabilitative treatment will not be utilized. It is the behaviors of those juvenile offenders that call out for treatment and rehabilitation. The only means to be certain that both juvenile offenders and their parents/guardians participate in programs and treatment is to have the juvenile court judge order it. Without the very important functions that law enforcement and juvenile prosecutors provide, the at-risk youth and the violent youth under 14 years of age are likely to never come in front of the judge to be adjudicated and, subsequently, treated. There is no hope at prevention for the younger offenders if the younger offenders are not able to be prosecuted for the crimes that they commit because HB No. 2717 makes solving juvenile crime more difficult.

If the law makes it more difficult for law enforcement officers to perform their jobs, then it is not a far stretch to contemplate the chilling effect HB No. 2717 will have: officers will simply avoid pursuing juvenile offenders and investigations involving juveniles. The public will lose faith in its law enforcement as it pertains to youthful crimes. HB No. 2717 purports to help youth under the age of 14, yet are we really helping those youth most at risk, who are engaging in criminal and, frequently, violent behaviors, by giving them another way to avoid the courts? Those at risk youth are exactly the ones that need the attention of the courts and the rehabilitation services the courts provide.

HB No. 2717 is an unnecessary piece of legislation. All of the constitutional safeguards for all of our youth are currently in place and are utilized by juvenile court judges throughout the state. HB No. 2717 would terminate all of the court's discretion in these matters.

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Testimony of Sergeant Daryl Reece
Johnson County Sheriff's Office
Concerning HB 2717
March 17, 1998

The Johnson County Sheriff's Office has concerns that amendments proposed for in-custody questioning of juvenile offenders are redundant and unnecessary, as this issue is already controlled by law enforcement procedures and federal and state law. In regards to Miranda, law enforcement procedures are consistently interpreted statewide in favor of the juvenile. These procedures have a history of maintaining the rights of the juvenile, their parents or guardians, and the need for legal consultation by an attorney.

A number of cases involving juvenile offenders are the result of offenses involving the parents either as direct or indirect victims. At what point would a parent being victimized by a youthful offender, especially their own child, be a reasonable and logical thinking individual? As House Bill 2717 is currently written, the added burden of dealing with a victimized spouse has been increased by placing the additional responsibility of being present during the questioning of the suspect. This places what could easily be an unwanted burden on the parent or guardian. They now have to deal with the prospect of not only protecting their victimized loved one, but now trying to balance their loyalty between their child and spouse. Juveniles providing voluntary statements may be affected by the pressure of their parent or guardian to do what the parent perceives as the right thing to do. These statements may not be in the best interest of the juvenile.

School Resource Officers (SRO's) are encountering daily situations where statements are taken from students that start as an interview and evolve into an interrogation. These situations usually involve multiple juveniles. The School Resource Officer will not know who is a witness or suspect until well into the investigation and statements are evaluated. Although the students may not be "in custody," those statements are reported to the prosecutors and can result in charges filed.

Patrol officers encounter similar situations during juvenile contacts and generally handle those situations much like the School Resource Officers. However, some of those contacts are the result of car stops late at night where juveniles will often mislead officers when the officers are trying to contact the juvenile's parents.

It should be the sole discretion of the juvenile judge, in his or her jurisdiction, to interpret whether the statement taken by law enforcement was voluntary.

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