Approved: 1-26-06
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on January 19, 2006 in Room 313-S of the Capitol.

All members were present except:
Jim Ward- excused
Kasha Kelley- excused
Marti Crow- excused
Mike Kiegerl- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research Department
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Dan Hermes, Kansas Ignition Interlock
Carol Foreman, Kansas Judicial Council
Randy Hearrell, Kansas Judicial Council
Jim Puntch, Sedgwick County District Attorney

Dan Hermes, Kansas Ignition Interlock, requested a bill be introduced that would provide that on a person's second, third or fourth occurrence of an alcohol or drug related conviction their suspension period be extend by one year if they do not place an ignition interlock on their vehicle. Representative Kinzer made the motion to have the request introduced as a committee bill. Representative Owens seconded the motion. The motion carried.

Chairman O'Neal requested a bill that would amend the step-parent adoption statute dealing with fathers who are incarcerated. He made the motion to have his request introduced as a committee bill. Representative Kinzer seconded the motion. The motion carried.

Chairman O'Neal opened hearing on **HB 2608 - Kansas health policy authority hearings conducted in accordance with the Kansas administrative procedure act.**

Carol Foreman, Kansas Judicial Council, explained that the newly created Division of Health Policy and Finance is independent from the Department of Administration. The proposed bill would provided that the new Division would conduct its hearings in accordance with the Kansas Administrative Procedure Act and utilize a presiding officer from the Office of Administrative Hearings.

The hearing on **HB 2608** was closed.

Chairman O'Neal opened hearing on **HB 2609 - small claims; forms set forth by judicial council, not the office of judicial administration.**

Randy Hearrell, Kansas Judicial Council, commented that the proposed bill is simply technical change to K.S.A. 61-2707 which directs the Office of Judicial Administration to develop forms. The statute should have been referring to the Kansas Judicial Council instead.

The hearing on **HB 2609** was closed.

Chairman O'Neal opened hearing on **HB 2616 - state may request a preliminary examination on a felony charge.**

Jim Puntch, Sedgwick County District Attorney, stated that the 2004 United States Supreme Court ruled in *Crawford v. Washington* that "testimonial hearsay" was inadmissible in court. This included virtually all statements made by victims and witnesses to police. The ruling did allow for the admission of previous

testimony, under oath, where the defendant has an opportunity for cross-examination and testimony taken at preliminary hearings is also admissible.

The State of Kansas has no right to hold a preliminary hearing to perpetuate testimony that can be used in trial. The proposed bill would simply allow for prosecutors to request preliminary hearings to preserve testimony. (Attachment 1)

The hearing on **HB 2616** was closed.

The committee meeting adjourned at 4:15p.m. The next meeting was scheduled for 3:30 p.m. on Monday, January 23, 2006 in room 313-S.

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January 19, 2006

Chairman O'Neal & Members of the House Judiciary Committee:

I appear before you today in support of House bill 2616. In my experience there is one constant in almost all criminal cases - witnesses and victims are anxious about testifying in court. Their anxieties come from many sources - a fear of the unknown, a fear of appearing in front of a group of strangers to discuss traumatic events, a fear of revealing intimate details of their life and a fear of what the experience will be like. Some witnesses fear retaliation for their testimony form gang members and other lawless elements. Others fear having to testify against loved ones or family members. In my experience the single greatest fear is having to confront the defendant in person in court. The combination of these fears make many witnesses reluctant to testify.

Most witnesses are reassured when they discover that their testimony will be taken in a courtroom, with all the legal and physical security that such a setting represents. Nonetheless, some witnesses do not appear to testify and, in fact, hide themselves so they do not have to testify.

In the past, there were legal remedies to deal with the situation where necessary witnesses failed to appear for court. In 1909, the Kansas Supreme Court ruled in a case called State v. Pigg, that the prosecution had the right., along with the defendant, to request a preliminary hearing. In this way testimony could be preserved and the was defendant given an opportunity to cross examine witnesses to protect the right to confrontation. In my personal experience the State would, on occasion, request that a preliminary hearing be held, even where the defendant wished to waive that hearing. .In addition, case law permitted certain kinds of hearsay testimony to be introduced at trial, if certain safeguards to establish the reliability of that statement could be met. In this way all appropriate testimony could be presented to the fact finder to be weighed in arriving at a verdict.

Both of these courses of action are now either no longer available or have been severely curtailed. In 1988 the Kansas Supreme Court held in State v. Trudell that the State had no right to a preliminary hearing under language of K.S.A. 22-2902. This was a ruling with little practical importance to prosecutors as witness' statements to law enforcement authorities could be introduced in the witness' absence provided certain safeguards could be established. Even so, many defense counsel have told me that it is their preference to waive preliminary hearings so that vital witnesses' testimony is not preserved.

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All this changed in March, 2004, when the United States Supreme Court, in a case called Crawford v. Washington, ruled that what it called "testimonial hearsay" was inadmissible. This label included virtually all statements made by victims and witnessers to police. An entire class of testimony which once was admissible in court was now excluded from court. The protection afforded to prosecution is gone.

The ruling did permit the admission of previous testimony, under oath, where the defendant had an opportunity for meaningful cross-examination. Testimony taken at a preliminary hearing is still admissible under this ruling.

The difficulty is, as noted above, the State has no right to a preliminary hearing to perpetuate testimony in a form that can be used at a later trial. All the State may do to attempt to perpetuate testimony is request permission to take a victim's or witness' deposition.

There are a number of factors in favor of permitting the State to request a preliminary hearing. All of the parties necessary are already present when a preliminary hearing is scheduled - the witnesses, the defense counsel, the defendant, the prosecuting attorney, the court reporter and the judge. There is no need to attempt to schedule all these parties at a later time or date at a deposition. The fears of witnesses and victims, addressed earlier, are greatly reduced when they testify at a regular court proceeding, with all the safeguards court proceedings provide. There is a great cost savings and time savings to the parties. It is very expensive anf time consuming to take and schedule depositions in criminal cases.

My experience has been that even when the prosecution had the right to request a preliminary hearing most such hearings were waived. Amending K.S.A. 22-2902 should not greatly increase the number of preliminary hearings. In those cases where the prosecution does request a preliminary hearing vital testimony will be preserved so that justice can be served.

Thank you for the opportunity to appear before you today.

James Puntch, Sedgwick County Assistant District Attorney