To: Senate Judiciary Committee
From: Dan Dunbar, former prosecutor
Date: January 20, 2016

Re: Support for SB 327

Hon. Chairman King and members of the Senate Judiciary Committee:

Thank you for the opportunity to provide testimony in support of SB 327. My name is Dan Dunbar and I am a former prosecutor with more than twenty-two years of felony prosecution experience from Shawnee, Douglas, and Franklin counties. I support SB 327 as proposed.

SB 327 amends K.S.A. 22-2902(3), which is the statutory provision for preliminary examinations. The bill would allow for courts to consider hearsay in whole or in part in making a probable cause determination in felony cases.

A preliminary hearing is a statutorily created proceeding whereby the State presents evidence, primarily through live testimony of witnesses, in order to establish probable cause that a felony was committed and that the defendant committed the felony. The hearing is conducted in open court with the defendant present along with his/her counsel. Witnesses typically testify under oath in open court and are subjected to cross examination. At the close of evidence, the court makes an independent judicial determination whether or not probable cause exists to cause the matter to go to trial. The probable cause standard is the same standard used by law enforcement to arrest a defendant. With few exceptions, the rules of evidence apply at a preliminary hearing.

As a result of how preliminary hearings are statutorily structured coupled with the application of all of the rules of evidence, specifically, the prohibition of hearsay, an unintended consequence is, preliminary hearings are in essence "mini trials". Preliminary hearings often require a number of witnesses to appear and testify in order to avoid the prohibition of hearsay. Witnesses include, but not limited to: victims, civilians, law enforcement officers, and medical personnel. All witnesses require personal service of subpoenas by process servers. Civilian witnesses typically have to take time off work to attend the hearings, law enforcement are taken away from the daily duties or being paid overtime to attend, and most concerning, victims of violent crimes are brought face-to-face with their attackers sometimes just days or weeks after being victimized. In addition, this process is often repeated sometimes multiple times due to continuances of the preliminary examination.

Kansas in present form goes well beyond what is constitutionally required for a preliminary examination. In fact, under the leading United State Supreme Court case on this very issue, the Supreme Court stated the Constitution does not even require a preliminary examination to satisfy the 4th Amendment probable cause

requirement. *Gerstein v. Pugh,* 95 S.Ct. 854 (1975). According to the United States Supreme Court, all that is required under the Constitution is an independent judicial determination of probable cause. The manner in which that judicial determination is structured is left to the states to determine through their legislature. *Id. See also, State v. Sherry,* 233 Kan. 920 (1983) and *State v. Cremer,* 234 Kan. 594 (1984). In fact, it is common for states to permit hearsay in preliminary examinations. In 2012, the State of Wisconsin passed legislation identical to SB 327 allowing hearsay in whole or part at preliminary examinations. Not only did Wisconsin adopt such legislation, but their Supreme Court found it constitutional. Furthermore, the proposed amendment to hearsay is identical to the preliminary hearing hearsay provision used by the United States government in federal criminal court.

SB 327 not only goes well beyond what is constitutionally mandated for the protection of criminal defendants, but at the same time creates substantial benefits to the administration of justice by creating efficiencies saving valuable resources and protecting victims from needless revictimization.

The efficiencies created by SB 327 cannot be understated. When considered throughout 105 counties across the State of Kansas, consider the number of witness that are needlessly inconvenienced by a process that requires witness missing work, law enforcement officers often lined up outside of the courtroom waiting to testify rather than patrolling the streets, agencies paying overtime for officers to attend hearings during their off-duty hours, medical personnel spending time in court rather than attending to their patients, court personal including judges and court reporters spending hours of court time, prosecutors and defense attorneys preparing and attending these protracted hearings, sheriff offices having to personally serve subpoenas for witness attendance. These costs both in time and money for hearings that far exceed what is constitutionally mandated are substantial. Finally, and more importantly, the fact that victims, especially those of violent crimes are required to attend these hearings and face the perpetrator sometime just days or weeks after having been victimized and then again at trial.

In conclusion, SB 327 provides defendants with protections well beyond what is constitutionally mandated and at the same time provides for a more efficient administration of justice while protecting victims from needless revictimization.

Thank you for the opportunity to appear and testify in support of SB 327. I respectfully request that the committee report SB 327 favorably for passage. I am available for questions at the appropriate time.

Respectfully submitted,

Dan Dunbar
Former Prosecutor