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January 31, 2022

TO: Chairman Patton and Members of the House Judiciary Committee
FROM: Brett Watson, Chief Deputy District Attorney, Shawnee County, Kansas
RE: Proponent Testimony for HB 2538

Good Afternoon Chairman and to the Committee:

Thank you for the opportunity to provide testimony in support of HB 2538. My name is Brett Watson and I am currently the Chief Deputy District Attorney in the Shawnee County District Attorney's Office. I have been a criminal prosecutor since 2007 and I have worked as a clerk for the Kansas Court of Appeals, as the staff attorney for the Kansas Criminal Code Recodification Committee, and as a prosecutor in the Ford, Finney, and Shawnee County or District Attorney Offices. Based on my experience in criminal prosecution I support HB 2538.

HB 2538 amends K.S.A. 22-2902(3), which is the statutory provision for preliminary hearings. The bill would allow for courts to consider hearsay in whole or in part in making a probable cause determination in felony cases. Additionally, it would permit the taking of testimony at preliminary hearings through electronic media platforms such as Zoom! or Skype.

Under the Confrontation Clause of the United States Constitution, a criminal defendant has the right to cross-examine the witnesses against them at trial. However, this right does not apply to pre-trial proceedings such as a preliminary hearing. *State v. Leshay*, 289 Kan. 546, 213 P.3d 1071 (2009). Preliminary hearings are a procedure created by the legislature and it has the power to establish which rules of evidence are applicable.

The purpose of a preliminary hearing is to determine if there is probable cause to believe a defendant committed a felony. The State presents evidence, primarily through live testimony of witnesses, in order to establish probable cause. 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 that 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 are 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 and law enforcement are taken away from their daily duties or are being paid overtime to attend. Most concerning, however, is that 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 hearing.

However, current law does permit some limited instances of allowing hearsay at preliminary hearings. One such exception is that hearsay is permitted in instances involving witnesses who are children less than 13 years of age. This exception comes into play primarily when children are the victims of sexual offenses and it is typical for the probable cause determination to be made in these cases based upon hearsay. K.S.A. 22-2902(3). Additionally, under K.S.A. 22-2902a, the results of scientific tests by agencies such as the KBI are admissible at a preliminary hearing without the expert testifying. They are required to have the same “force and effect as if the forensic examiner...had testified in person.” Undoubtedly, the purpose behind this exception is to relieve agencies such as the KBI of the enormous burden of having to testify in person throughout the State.

Our preliminary hearing procedure, in its present form, goes well beyond what is constitutionally required for a probable cause determination. In fact, the U.S. Supreme Court stated the Constitution does not even require a preliminary hearing to satisfy the 4th Amendment probable cause requirement. *Gerstein v. Pugh*, 95 S.Ct. 854 (1975). According to the U.S. Supreme Court, all that is required under the Constitution is an independent judicial determination of probable cause. This can occur merely by having a magistrate review an affidavit which is almost entirely hearsay. The manner in which the 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 nearly identical to HB 2538 allowing hearsay in whole or part at preliminary hearings. Not only did Wisconsin adopt such legislation, but their Supreme Court found it constitutional. Furthermore, the proposed amendment to allow hearsay is identical to the preliminary hearing hearsay provision used by the United States government in Federal criminal court.

HB 2538 not only exceeds 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 HB 2538 cannot be understated. When considered throughout the 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 personnel 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 probably the most important factor, HB 2538 would save victims, especially those of violent crimes, from being required to attend hearings and face the perpetrator, sometimes within a few days or weeks, and then go through it all again at trial.

The preliminary hearing is a meaningful procedure in our criminal code but, the State's burden is much lower at a preliminary hearing than at trial and the district court is required to view the evidence in a light most favorable to the State. In my experience as a prosecutor, defendants frequently waive their right to preliminary hearing, but often only on the day of the hearing and after the witnesses have been summoned. At that point, the cost and inconvenience of the hearing has already been incurred.

One recent example of this kind of behavior is illustrative. In Shawnee County, we had a case involving a defendant who burglarized the car of a family who were passing through Topeka on a vacation. The family lived in Ohio, and when the preliminary hearing was set we only had 10 days to summon the witnesses. The State had to ask for more time because we could not issue an out-of-state subpoena to Ohio in this amount of time. The preliminary hearing was rescheduled and when it did occur, after we had paid to bring a civilian witness from Ohio, the Defendant offered to waive his right to a preliminary hearing.

Now is an important time to consider this legislation considering the difficulties caused by COVID. For the past two years the criminal proceedings district courts have bottlenecked due to the requirements that witnesses appear and give testimony. This is unavoidable for trials because of the defendant's right to confrontation; however, it is not legally required for preliminary hearings. Permitting the introduction of hearsay in preliminary hearings would help solve this problem and reduce the risk of COVID by reducing the number of witnesses who would need to be physically present in court. HB 2538 also provides that witnesses may appear and give testimony through electronic media platforms.

In conclusion, HB 2538 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 HB 2538. I respectfully request that the committee report HB 2538 favorably for passage. I am available for questions at the appropriate time.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'B' followed by a horizontal line.

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