

OFFICE OF THE COUNTY ATTORNEY

Brian Yearout
Assistant County Attorney

SHERRI L. SCHUCK
Pottawatomie County Justice Center
108 North First Street, P.O. Box 219

Thomas A. Hostetler
Assistant County Attorney

Andrea B. Karnes
Office Administrator
Victim/Witness Coordinator

Westmoreland, KS 66549
Telephone 785-457-3511
Fax 785-457-3896

Darla King
Diversion Officer

To: Kansas House Judiciary Committee

From: Sherri Schuck, Pottawatomie County Attorney
Kansas County & District Attorney's Association
Secretary/Treasurer

Date: January 31, 2022

Re: Testimony in support of HB 2538 regarding Preliminary
Examination

Thank you for hearing HB 2538 that seeks to amend the current statute governing preliminary hearing examinations to provide for a "reasonable" time frame in which to hold the preliminary hearing; allow hearsay testimony at preliminary hearing and to allow testimony to be provided by audio-visual means.

Currently KSA 22-2902(2) Requires a preliminary examination to be held within 14 days after an arrest or personal appearance of the defendant. Section 3 of the current KSA 22-2902 speaks specifically to testimony of children 13 years of age and younger to be taken outside the presence of the defendant. The current statute is silent as to the method in which testimony may be given.

HB 2538 would allow a preliminary hearing to be held within a "reasonable time" rather than 14 days. It would also allow hearsay evidence to be used at preliminary hearing. Further it would allow the use of audio-visual means in which to take that testimony.

The 14 day requirement is an arbitrary number. In 20+ years of prosecuting I have rarely had a preliminary hearing actually occur within 14 days. They are set, but rarely occur. The reasons are many. More often than not, investigations are still on going within the fourteen day time frame. Evidence and discovery continue to come in and defense will not have had the opportunity to have reviewed this new information. Defense may not have had time to review any evidence and/or talk to his/her client about that evidence prior to the scheduled hearing. On short notice, witnesses may not be able to be served, located or be available. The people in the best position to set a preliminary hearing within a reasonable time are the parties to the case: the State, the defendant, his/her counsel and the Court.



Currently, the majority of prosecutor officers across the state have to issue subpoenas for witnesses for preliminary hearing examinations. Essentially, the State must put on a mini-trial just to establish probable cause. This is not the purpose of a preliminary examination.

The purpose of a preliminary examination is to determine whether a defendant can be held for trial. It is not a determination of guilt or innocence. The constitution does not require an adversary determination of probable cause at preliminary hearing, nor does it mandate that rules of evidence apply at preliminary hearing. Preliminary examinations are a wholly statutory construction that provides an opportunity for a defendant to challenge the existence of probable cause for further detention, to set bail and to apprise the accused of evidence they will be required to meet when subjected to final prosecution.

Allowing hearsay evidence at preliminary hearing does not divest the defendant of any constitutional rights. Hearsay is used in grand jury indictments. We use affidavits to support a request for warrants. An affidavit is a compilation of an officer's investigation and is hearsay to a reviewing court. Currently, the State can proffer KBI reports at preliminary examination without the necessity of the KBI forensic scientist or expert and child victims are not subject to the defendant at preliminary examinations. The use of hearsay at preliminary examination expedites the proceedings and is cost effective without injuring any constitutional safeguards for the defendant.

The pandemic provided the national population with the ability to conduct meetings, business, etc, via audio-visual means. For the last year, most of the courts across the nation have gone to allowing this form of testimony. It is a viable option and should be allowed at preliminary examination. Audio-visual testimony occurs in real time. The testifying witness is still present and subject to direct and cross examination. The witness can be observed by the trier of fact as well as the defendant and counsel, and the witness is able to observe the parties in the courtroom. Even though there is no right to confrontation in preliminary examinations, allowing audio-visual testimony does provide this.

Thank you for your time and attention to this very important matter. I ask that the committee pass this bill favorably, and work for its passage from the legislature during the 2022 session.

Respectfully submitted,

Sherri Schuck
Pottawatomie County Attorney
Kansas County & District Attorney's Association Secretary/Treasurer