

**Senate Judiciary Committee
February 7, 2023**

**Senate Bill 72
Testimony of the BIDS Legislative Committee
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Opponent

Chairperson Warren and Members of the Committee:

The Kansas Board of Indigents' Defense Services is opposed to SB 72 which would create a new exception to the rule against hearsay evidence without safeguarding the reliability of the proposed evidence.

Hearsay Evidence

Hearsay evidence generally is any out-of-court statement, and such statements are inadmissible if they are offered to prove the truth of the matter asserted in the statement. A statement which is offered for some other purpose than proving the truth of the matter asserted in the statement is not hearsay.

KSA 60-460 is the Kansas Statute that sets out exceptions to the general rule that out-of-court statements offered for the truth of the matter are inadmissible. The exceptions set out in the statute are excepted from exclusion because they are deemed sufficiently reliable to admit in court even though they were made outside of court. When a statement is made outside of court, it is generally not made under oath, the declarant is not before the trier of fact so the trier can observe the testimony directly, the statement is not subject to cross examination by the opponent of the statement, and there has been no opportunity to test the veracity, perception, or recollection of the declarant.

When statements which are hearsay are allowed into evidence without the declarant testifying in court, those statements are admitted as true without the usual challenges to ensure that they are in fact true and accurate. As such, the statute has set out a limited set of out-of-court statements which are presumed to be reliable and trustworthy enough to admit without the usual challenges to test the veracity and accuracy. Those current exceptions include previous statements by a person who is present and available for cross examination about those previous statements, sworn affidavits, and previous testimony under oath. There are currently 31 listed exceptions to the prohibition against hearsay.

SB 72 seeks to add an additional exception to the prohibition against hearsay for a "translator". A language conduit exception as set out in proposed section (ff) would allow statements of any person called a translator without any baseline information regarding the reliability or accuracy of the statement. This creates a number of problems as the statement in this case is not merely the words stated by the translator, but the words of the translator are offered to prove the substance of the words of another person in another language. This creates a number of issues that are not readily apparent without further examining how translation, or more accurately interpretation, works.

Interpreters and Translators

SB72 uses the term “translator” to refer to a person who is making an out of court statement. According to the National Association of Judiciary Interpreters and Translators (NAJIT), interpretation is the process by which oral communication is rendered from one language to another. Translation is the process by which written text is rendered from one language to another (both the original and the translation are in written format). The NAJIT notes that interpretation and translation are distinct disciplines that each require specific knowledge, training, and practice. It also notes that credentialing is different for interpretation and translation. More information is available on the NAJIT website: <https://najit.org/resources/the-profession/>

If this bill is intended to allow written translations rather than oral communication, that is less problematic because it is easier to check the accuracy of a written text in one language to the written text of the translation in another language. However, if it is intended to apply to oral communication, it does not sufficiently safeguard against unreliable or inaccurate interpretations.

SB72 does not have any reference to the credentialing or proficiency of the “translator”. This would allow anyone who is trying to assist communication between two speakers of different languages to be considered a translator. Oftentimes in the context of criminal investigations, this would include neighbors, friends, or family of a witness or suspect who is a native speaker of a different language trying to communicate to another person in English. There is no guarantee that the translator is fluent in both languages or is accurately conveying the original statements into English.

The guidelines for interpreters in legal settings highlight just how problematic this is. In legal settings the interpreter uses the same grammatical voice as each speaker without confusing the context by lapsing into the third person. This is called direct speech. The interpreter’s task is to interpret everything from one language into the other language while preserving the tone and register of the original discourse. In a legal setting, the interpreter is not permitted to add, omit, or delete any content. Nor is the interpreter permitted to give a summary of a speech or text. This proposed exception does not offer any such guidelines for statements by translators or interpreters.

An interpreter does not render statements word for word, this is impossible given there is not a one-to-one correspondence between words or concepts in different languages. For example, sometimes one word in English requires more than one word in another language to get the same idea across and vice versa. Interpreters render the meaning of the original statement by reproducing the full content of the ideas being expressed. They do not interpret words, they interpret concepts.

Because statements cannot be translated word for word, it takes great care for an interpreter to ensure that they are accurately conveying the full extent of the statement without omitting or adding any content and that they are conveying the correct tone of the statement. A neighbor, friend, family member, or even a police officer who speaks both languages, is not generally capable of doing so without specialized training and certification and may not even be aware of the problems that arise if part of the statement is omitted or if that interpreter inserts their own opinions or characterizations into the statement during the interpretation.

Kansas Court Rule 1703 sets out a code of professional conduct for court interpreters which is in accordance with the standards of NAJIT. This recognizes that even for in-court statements where a statement is subject to cross-examination, it would not be sufficient to allow just anyone to interpret statements without safeguards to ensure the accuracy and reliability of those statements. To allow out-of-court statements into evidence in a court proceeding with even less protection to ensure the accuracy of those statements would be directly counter to the general rule that hearsay is inadmissible unless it is deemed inherently trustworthy.

SB72 would allow out-of-court statements to be introduced when a person is interpreting from another language into English, unless the opponent to the statement can prove there is a motive to mislead or distort the statement or show that the statement is substantially inaccurate. A motive to mislead or distort is not required for a statement to be inaccurate. Interpretation is a difficult process, it is not a computer program where you input a word and that word comes out in the other language. In cases where a statement is recorded, it is possible to check the accuracy of the interpretation; however, for an unrecorded statement it is impossible for a party opposing the admission of such statements to prove that it is inaccurate or unreliable and the absence of a motive to distort the statement does not prove it is reliable.

Burden of Proving Accuracy of Interpreted Statement

In criminal cases, the current state of the law concerning discovery is such that creating a hearsay exception for interpreters will not relieve the State of their burden to investigate who is performing the interpretation at issue. Since the decisions in *Brady v. Maryland* and *Giglio v. United States*, principles which have been adopted in Kansas as well in *State v. Warrior*, the prosecution in a criminal case in Kansas is required to disclose material information favorable to the defendant to defense counsel. Creating a hearsay exception and allowing interpreted statements to enter evidence with the interpretation unchallenged does not change whether arguments about the correctness of interpretation will happen: it only makes getting to the bottom of such a complex issue much more difficult.

As outlined above, interpretation is not an exact science. This makes the identity and qualifications of the interpreter an extremely important point when any interpreted statement enters into a criminal proceeding outside a courtroom. Knowing that a hearsay exception applied would discourage law enforcement from conducting a rigorous investigation at a critical moment where they are generally the only investigative body present: the initial investigation of the alleged crime. Creating an incentive to skip a step in the evidence collection process would not actually relieve the State from the burden of identifying and interviewing the interpreter, though it might create error when they fail to do so since discovery obligations are not changed by this law.

If law enforcement officers in the immediate course of a criminal investigation fail to collect such critical information, that failure does not relieve defense counsel from the obligation to seek defenses. Instead, creating any incentive for lax investigation shifts the investigative burden to defense counsel. Defense counsel would be forced to shoulder the burden and cost of finding the specific interpreter days, weeks, or even months after the event in question. Or in instances where the original interpreter cannot be found to answer questions about the specifics of their interpretation, expert witnesses will have to be retained for reviews of recorded interpreted statements to ensure that all defenses are investigated. This

expense for additional investigative and expert services will fall on the State, as most defendants in the State rely on appointed counsel and BIDS' assistance with the financial burden of investigation and expert witnesses. Furthermore, from a fairness standpoint, it may be impossible for the defense to meet the burden of showing that a statement is unreliable or inaccurate if the initial investigation did not document information about the translator and record the statement at the time of the statement. It is fundamentally unfair to place the burden on the opponent of a statement as set out in SB72.

Constitutional Issue in Criminal Cases

Finally, if this law is passed as written, there stands a good chance that the higher courts of Kansas will strike the proposed hearsay exception down on Constitutional grounds. Assuming that this legislation is a response to *State v. Gutierrez-Fuentes* from the Kansas Supreme Court last year, it is worth noting that neither the Kansas Supreme Court nor the Kansas Court of Appeals, who heard the original appeal on this case in 2020, conducted any analysis into whether there was a Constitutional implication of applying the language conduit concept to interpreters. This analysis was not performed because Mr. Gutierrez-Fuentes's attorney at the trial level did not raise a Constitutional challenge relating to the admission of the statements that could then be preserved for appellate review. Looking further afield than Kansas, the key case cited by the State and relied on by the Court of Appeals in *Gutierrez-Fuentes*, was *Lopez v. Georgia*, and it specifically declined to address any Constitutional implications as well due to a lack of preservation.

The reason the Constitutional issue was not raised in *Gutierrez-Fuentes* or *Lopez* is not really our concern here; nobody likes a Monday morning quarterback. What is important to note is there is a Constitutional problem should this amendment be adopted; the 6th Amendment Confrontation Clause becomes the logical avenue of attack to such statements. With the current state of case law at the United States Supreme Court requiring confrontation of all testimonial statements and specifically disconnecting analysis of the 6th Amendment from whatever evidentiary codes are used to determine hearsay and admissibility, this bill seems to immediately run into the waiting arms of a Constitutional problem it cannot easily escape. Whether interpreted statements are deemed admissible as a hearsay exception or not, the same types of hearings and evidence presentations will be required to maintain compliance with the Constitution, placing this proposed law in the position of solving nothing in terms of the problem it was engineered to solve. It will create further Constitutional problems as outlined above. It may offer some relief in civil cases, where one cannot seek the protections of the 6th Amendment but it may in fact encourage the State to rely on this exception in criminal cases and result in cases being reversed for confrontation clause violations.

For all the reasons stated above, we respectfully ask the Committee to reject SB72.

Respectfully Submitted,

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Kansas Board of Indigents' Defense Services