

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Pat Colloton at 1:00 p.m. on February 14, 2011 in Room 144-S of the Capitol.

All members were present except: Representative Kay Wolf

Committee staff present:

Sean Ostrow, Office of the Revisor of Statutes
 Jason Thompson, Office of the Revisor of Statutes
 Lauren Douglass, Legislative Research
 Robert Allison-Gallimore, Legislative Research
 Jackie Lunn, Committee Assistant

Conferees appearing before the Committee:

State Representative Jan Pauls
 Sarah Fertig, Executive Director, Kansas Sentencing Commission
 David Weaver, Chief Investment Officer, Kansas State University Foundation
 Larry McRell, Chief Public Defender, Junction City, Kansas
 Angie Davidson, Prosecutor, Salina
 Adam Hall, Defense Attorney, Lawrence
 David Mouille, Psychologist
 Marc Goodman, Kansas County & District Attorneys Association
 John M. Settle, Pawnee County Attorney

Others attending:

See attached.

Chairperson Colloton called the meeting to order and opened the floor for consideration of **HB 2104-Medical confidentiality exception for law enforcement at crime scenes.** Sean Ostrow, Office of the Revisor of Statutes, explained the bill and a balloon on the bill. He presented written copy of the balloon, which can be found in its entirety in the offices of Legislative Administrative Services. **(Attachment 1)** **Representative Goodman moved to pass the bill out favorably. Representative Brookens seconded.** A discussion followed.

Representative Pauls moved to adopt the balloon. Representative Meier seconded. Motion carried.

Representative Smith moved to pass the bill out favorably as amended. Representative Kelly seconded. Motion carried.

Chairperson Colloton opened the hearing on **HB 2188-Requiring fiscal notes for certain resolutions.** The following testified as proponents on the bill. They presented written copy of their testimony, which can be found in its entirety in the offices of Legislative Administrative Services.

- State Representative Jan Pauls (Attachment 2)
- Sarah Fertig, Executive Director, Kansas Sentencing Commission (Attachment 3)

A question and answer session followed. With no others to testify or speak to the bill, Chairperson Colloton closed the hearing on **HB 2188** and opened the hearing on **HB 2334-Creating new procedures to determine a defendant's competency to stand trial.** Sean Ostrow, Office of the Revisor of Statutes, explained the bill. The following testified as proponent of the bill. They all presented written copy of their testimony, which can be found in the offices of Legislative Administrative Services.

- Adam Hall, Defense Attorney, Lawrence, Kansas (Attachment 4)
- David Weaver, Chief Investment Officer, Kansas State University (Attachment 5)
- Larry McRell, Chief Public Defender, Junction City, Kansas (Attachment 6)
- Angie Davidson, Prosecutor, Salina, Kansas (Attachment 7)
- Ed Collister, Defense Attorney, Lawrence, Kansas (Attachment 8)
- David Mouille, Psychologist (Attachment 9)
- Tom Bartee, Attorney, KACDL, "written only" (Attachment 10)

The following testified as opponents on **HB 2334:**

- Marc Goodman, Kansas County and District Attorney Association (Attachment 11)
- John M. Settle, Pawnee County Attorney (Attachment 12)

Chairperson Colloton called for any others wishing to speak to the bill and recognized, Windy Weaver, the wife of David Weaver, who testified earlier. She urged the Committee to do more to fix the broken system Kansas has at the present time.

Chairperson Colloton stated she would not close the hearing in order for others to testify or speak to the bill tomorrow.

The meeting was adjourned at 3:10 pm with the next meeting scheduled for February 15, 2011 at 1:30 pm in room 144-S.

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[illegible]

1 is sought as part of a genealogical study; or

2 (15) any information concerning a patient or former patient who is a
3 juvenile offender in the custody of the juvenile justice authority when the
4 commissioner of juvenile justice, or the commissioner's designee,
5 requests such information; or

6 ~~(16)(a) any communication and information concerning a current or~~
7 ~~former patient of any treatment facility; such patient having been lawfully~~
8 ~~detained by a law enforcement officer, if such law enforcement officer has~~
9 ~~reasonable suspicion that such individual is suffering from mental illness~~
10 ~~and such law enforcement officer has a reasonable belief that such~~
11 ~~individual may benefit from treatment at a treatment facility rather than~~
12 ~~being placed in a correctional institution, jail, juvenile correctional~~
13 ~~facility or juvenile detention facility. Any communication and~~
14 ~~information obtained by any law enforcement officer regarding such~~
15 ~~individual from such treatment facility shall not be disclosed except as~~
16 ~~provided by this section.~~

17 (b) As used in this subsection:

18 (1) "Correctional institution" means the same as prescribed in
19 K.S.A. 75-5202, and amendments thereto;

20 (2) "Jail" means the same as prescribed in K.S.A. 2010 Supp. 38-
21 3202, and amendments thereto;

22 (3) "Juvenile correctional facility" means the same as prescribed in
23 K.S.A. 2010 Supp. 38-3202, and amendments thereto;

24 (4) "Juvenile detention facility" means the same as prescribed in
25 K.S.A. 2010 Supp. 38-3202, and amendments thereto;

26 (1) "Law enforcement officer" means the same as prescribed in
27 K.S.A. 22-2202, and amendments thereto; and

28 (2) "mental illness" means mental disease to such extent that a
29 person so afflicted requires care and treatment for his own welfare, the
30 welfare of others or the welfare of the community.

31 (b) The treatment personnel shall not disclose any information
32 subject to subsection (a)(3) unless a judge has entered an order finding
33 that the patient has made such patient's condition an issue of the patient's
34 claim or defense. The order shall indicate the parties to whom otherwise
35 confidential information must be disclosed.

36 Sec. 2. K.S.A. 2010 Supp. 65-5603 is hereby repealed.

37 Sec. 3. This act shall take effect and be in force from and after its
38 publication in the Kansas register.

person

information limited
to whether a
person is a current
patient of any
treatment facility

HOUSE BILL No. 2104

By Committee on Corrections and Juvenile Justice

1-26

AN ACT concerning mental health information; relating to access by law enforcement officers; amending K.S.A. 2010 Supp. 65-5603 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2010 Supp. 65-5603 is hereby amended to read as follows: 65-5603. (a) The privilege established by K.S.A. 65-5602 and amendments thereto shall not extend to:

(1) Any communication relevant to an issue in proceedings to involuntarily commit to treatment a patient for mental illness, alcoholism or drug dependency if the treatment personnel in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(2) an order for examination of the mental, alcoholic, drug dependency or emotional condition of the patient which is entered by a judge, with respect to the particular purpose for which the examination is ordered;

(3) any proceeding in which the patient relies upon any of the aforementioned conditions as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon any of the patient's conditions as an element of a claim or defense;

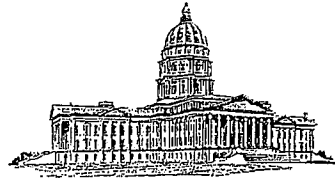
(4) any communication which forms the substance of information which the treatment personnel or the patient is required by law to report to a public official or to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed;

(5) any information necessary for the emergency treatment of a patient or former patient if the head of the treatment facility at which the patient is being treated or was treated states in writing the reasons for disclosure of the communication and makes such statement a part of the treatment or medical record of the patient;

(6) information relevant to protect a person who has been threatened with substantial physical harm by a patient during the course of treatment, when such person has been specifically identified by the patient, the treatment personnel believes there is substantial likelihood that the patient will act on such threat in the reasonable foreseeable future and the head of the treatment facility has concluded that notification should be given.

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TOPEKA
 HOUSE OF
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MEMBER OF KANSAS SENTENCING COMMISSION

CHAIR:
 NATIONAL CONFERENCE OF STATE
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 CRIMINAL JUSTICE

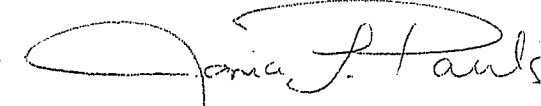
HB 2188
 HOUSE CORRECTIONS & JUVNILE JUSTICE
 February 14, 2011

HB 2188 would change the law in regard to fiscal notes. Currently, the Sentencing Commission prepares a bed impact for each bill which is introduced which amends a current crime or creates a new crime. Obviously, a number of bills are introduced filed that never even receive a hearing. This bill would require the Sentencing Commission to prepare the bed impact only if requested by the Chair or ranking minority member of the committee or if the bill is set for hearing.

Page 1, Section 2, Line 24, provides that the total fiscal note would not be done by the Director of the Budget unless the Sentencing Commission is required to do the bed impact.

As Vice Chair of the House Rules Committee, I'll also request an amendment on this bill on Page 1 in Line 26 to add "or resolutions" following "bills" to clarify that fiscal notes are required for resolutions, too. As some of you may remember, that question came up on the House Floor.

Respectively submitted,


 Janice L. Pauls

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 Attachment # 2



Honorable Ernest L. Johnson, Chair
Honorable Richard M. Smith, Vice Chair
Sarah E. Fertig, Executive Director

Sam Brownback, Governor

HOUSE COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE
Representative Pat Colloton, Chair

TESTIMONY IN SUPPORT OF HB 2188

by

Sarah Fertig, Executive Director

February 14, 2011

I would like to thank the Committee for allowing me the opportunity to speak in favor of HB 2188, which would amend current statutory language pertaining to fiscal impact and correctional resource statements. Currently, the Kansas Sentencing Commission provides correctional resource statements for every bill that amends any current crime or creates new crimes. The Division of Budget, in turn, provides fiscal notes based upon the Sentencing Commission's impact statements. This bill would allow committees to determine which bills require correctional resource statements, and could reduce the workload of the Division of Budget if fewer fiscal notes were required.

The Sentencing Commission did not request this bill; however, I support its goal, which is to encourage greater government efficiency. To date this session, the Sentencing Commission has provided impact statements for 26 bills, and 14 of those bills were determined to have an impact on prison beds. If committees were able to determine which bills require impact statements based on each committee's priorities during the session, then the Division of Budget and the Kansas Sentencing Commission would be able to focus immediate attention on high-priority bills.

The Sentencing Commission anticipates that HB 2188 would not impact our workload, but it would allow us to set workload priorities that are consistent with those of the committees. However, if this bill were to pass, the Sentencing Commission would continue to assess the impact of every bill amending any current felony crime or creating a new felony crime, because the possibility exists that a bill could pass out of committee without the committee having requested an impact statement. The Commission would still produce an impact statement for these bills in the event of later questions by the House or Senate regarding the potential impact. On all occasions, the Sentencing Commission strives to keep Legislators up to date with the most accurate estimated impacts.

Thank you for your time and consideration of this bill.

House Corrections and Juvenile Justice
Committee
2011 Session
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Attachment # 3

**HOUSE COMMITTEE ON CORRECTIONS
AND JUVENILE JUSTICE**

**HEARING ON HOUSE BILL 2334
CREATING NEW PROCEDURES TO DETERMINE A
DEFENDANT'S COMPETENCY TO STAND TRIAL**

My name is Adam Hall, and I am an attorney in Lawrence, Kansas. I drafted this proposed legislation based on the comments and concerns of psychologists and attorneys on the subject of competence to stand trial.

This legislation is, at a basic level, a vehicle to ensure that a criminal defendant is capable of making, or participating in the making of his own defense before a trial is held. In addition, this bill ensures that the process used to determine a defendant's competence is fair, swift, consistent, and well-documented.

The bill before you incorporates most of the American Bar Association's standards on competence to stand trial; it incorporates the detail-oriented competence evaluation process used in the State of Florida; it maintains certain time-honored traditions of Kansas law in the area, including the ability of the Court to impanel an advisory jury to aid in the competence determination; and, like the law of Massachusetts, it requires evaluating professionals to be specially educated in the area of competence to stand trial prior to performing a competence evaluation.

Adam Hall, J.D.

February 14, 2011

**HOUSE COMMITTEE ON CORRECTIONS
AND JUVENILE JUSTICE**

**HEARING ON HOUSE BILL 2334
CREATING NEW PROCEDURES TO DETERMINE A
DEFENDANT'S COMPETENCY TO STAND TRIAL**

I am David Weaver, the Chief Investment Officer for the Kansas State University Foundation. My wife, Mindy, is in business for herself managing commercial real estate.

My family and I are convinced the State of Kansas can no longer protect us from that segment of the mentally ill who are a danger to themselves and society. The State of Kansas has no adequate procedure for accurately evaluating and effectively treating and/or confining the mentally ill who are dangerous. My wife and I know this from personal experience: in our ongoing attempt to help our adopted son, Danny, we have spent 10's of thousands of dollars and dedicated literally months of time in working with psychologists, psychiatrists, hospitals and organizations such as SRS, the school system, Children's Service League and multiple mental health organizations attempting to obtain accurate assessments, diagnoses, and treatments for Danny. We have tried—sometimes quite unsuccessfully—to protect ourselves and other Kansas citizens from our son for fourteen out of the fifteen years since his adoption. After all our struggles to help Danny, to protect ourselves, and to protect the citizens of Kansas, we have come to where we are now: because there is no appropriate facility for the retention and treatment of the mentally ill who are dangerous, we must now beg the courts to incarcerate Danny, and responsible mental health and law enforcement professionals advise us to carry concealed weapons to protect ourselves.

Our son is only one individual out of many we have become aware of through this ordeal; I am here to encourage you to promote House Bill 2334 through the legislature, turn this bill into a law. The bill provides a reasonable and inexpensive way to begin addressing the major liability Kansas now faces; the bill provides a way to insure the mentally ill will be diagnosed properly and professionally.

I had planned to encourage you by describing what my family and I have lived through. Instead, I have decided to read to you the words of Judge Meryl Wilson. This is a passage from one of Danny's legal proceedings. In this paragraph Judge Wilson is commenting on a report from a competence evaluation performed on Danny in 2007:

When I received this report and read the report I was shocked at what I read, and that's based upon my own personal knowledge of this young man. If I have not indicated before on the record I will today, that I have been involved with him since he was a minor in Child in Need of Care matters, and if I recall correctly I believe there may have been one or two juvenile offenses, but eventually in the Child of Need of Care action. So I have over the years seen many reports, and read many diagnoses and I have observed him in the courtroom before. I've observed numerous outbreaks in this courtroom, one of which basically resulted in an extremely heavy table being tipped over. And I can go on, and on, and on, much as Mr. McRell has stated in the background, and his mother has stated, so when I read the report and they make various conclusions and various statements in here that I know from personal observation, but reading numerous reports from SRS, from doctors, from everybody else in the state system involved totally disagree, I have to – I have no faith in this report. None. I have no confidence in its conclusions, simply because factual information is not correct. It's not accurate. And I assume that that having accurate information is important in having an accurate forensic evaluation. I know all of this information was available to them, if not through counsel, through Pawnee, or even other sources, if they didn't ask.

Based upon the evidence today,...I...find Mr. Weaver is incompetent...

I am also going to order that a copy of this transcript be made and forwarded to the appropriate authorities, not the least of which would be Larned State Hospital, which prepared this report, and I may request more than one copy, because I may have it forwarded to other appropriate agencies, because this is – to have such a report is just outrageous, in the Court's opinion. I have observed many people over the years on the bench and as counsel, and to make these kinds of conclusions leaves me scratching my head. I don't understand it. So that will be the Court's order.

Danny has physically attacked his mother and his sister, has been convicted of inappropriate sexual activity with a minor, has solicited sex from a minor, has twice threatened to kill his mother, has threatened to kill me, has threatened to kill his attorney, has threatened to kill a judge, and has scarred a corrections officer. The Kansas system for managing the mentally ill has not been able to protect my family from Danny, has not been able to protect Kansas society from Danny, has not been able to protect the Courts and corrections officers from Danny, and has not been able to protect Danny from himself. Danny's actions continue to grow ever more violent; our fear is he will, without appropriate detention and treatment, eventually kill someone.

My family and I are asking the Kansas Legislature to act. Protect my family and the people of Kansas. Demand that the mentally ill and dangerous receive appropriate examinations, demand exams that stand up to the rigors of the legal system. Stop this insanity; stop this destruction; end the revolving door of committing an offense, serving time in jail instead of receiving treatment, being released on his own recognizance, and committing another offense; keep this from happening again and again. Keep my son from hurting other people. This bill is a beginning.

David Weaver

February 14, 2011

**HOUSE COMMITTEE ON CORRECTIONS
AND JUVENILE JUSTICE
HEARING ON HOUSE BILL 2334
CREATING NEW PROCEDURES TO DETERMINE A
DEFENDANT'S COMPETENCY TO STAND TRIAL**

Introduction

Chairman and members of the Committee, I am Larry McRell, Chief Public Defender, North Central Regional Public Defender Office, Junction City, Kansas. I thank you for the opportunity to appear before you and discuss House Bill.

Competency to Stand Trial

"A person accused of a crime is guaranteed certain rights to ensure a fair process that produces a just outcome. Those rights include trial by jury of one's peers, the right to have one's lawyer cross-examine the prosecution's witnesses to test the truthfulness of testimony and the right to present testimony that may show innocence. In a perfect world, these rights make certain that facts are subjected to tests, which serve to counterbalance the lopsided battle between the state (represented by the prosecutor) and the individual (represented by the defense)." Ordinary Injustice—How America Holds Court, Amy Bach

Criminal defendants who are cognitively impaired present a special set of circumstances for lawyers representing them. Indeed, those who are cognitively impaired are more likely than the general population to be arrested, convicted and sentenced to prison, where they are likely to be victimized. They are as some of observed "Minds on the Edge". *"We have a system of health care that, isn't particularly attentive to mental illness. It likes physical illness"* (Arthur Caplan, PhD, Professor of Bioethics, Chair of the Department of Medical Ethics, University of Pennsylvania).

The US Supreme Court has held that a criminal defendant may not be tried, waive his right to counsel, or waive his right to a trial unless he or she is competent. In other words, the client must be able to understand the criminal justice process and rationally consult with his client in order to make or assist in his defense.

The goal of this proposed bill is to establish better outcomes for defendants, the communities they live in and to more effectively manage funds and resources. Better management of the process should benefit taxpayers as well. As an example, in Sedgwick County last June there was a huge gap between the average time spent in the jail by all inmates,

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16.1 days, and by the 50 mentally ill inmates facing the most the most serious charges, 156.46 days. Wichita Eagle, *Jail Needs a Mental Health Pod*, September 8, 2010.

“Competency to stand trial” is an area of mental health that is uniquely shaped by the law, and inevitably always triggered by alleged criminal offenses committed by the mentally ill. It is settle that mental illness can induce individuals to commit suicide or become violent and hurt others. While, today, we do not want to be perceived as a threat to the civil liberties of a private citizen merely because someone is “different”. Nor are we seeking to be part of a solution that can be perceived as a government obsession with public protection and control. Rather, it is an effort to find a new and Constitutional way of doing business that can avoid the “justice delay, justice denied” that plagues our justice system, particularly as it involves the mentally ill. To be clear, the purpose today is not to infringe on civil liberties, rather it is offered to strengthen the competency process in the present (and it should have the positive consequence of pre-empting or minimizing the risk of wrongs and dangers in the future).

There are many parties and agencies involved when assessing competency in the criminal justice process. Potential variables include the number of people ordered to undergo competency to stand trial evaluations, the number of those who can be restored to competency and the actual decisions of the courts which would commit defendants to state institutions for competency treatment. John House, *SRS Legal Department, Senate Judiciary Committee, March 2, 2009*. There are statutory and Constitutional duties imposed on healthcare professionals when evaluating an alleged offender and rendering a medical opinion on the competence of an alleged offender to understand the criminal proceedings against him and assist in his own defense. Likewise, there are Constitutional and caselaw requirements on defense counsel to provide effective assistance of counsel; just as there are ethical obligations required of prosecutors to seek justice rather than a win in the courtroom. Finally, judges should ultimately be convinced and persuaded by the inherent logic of the rendered competency examination before deciding whether the defendant is or is not competent.

Structural inefficiencies

After Tucson, the media headlines read:

“Red Flags at a College, but Tied Hands”

“Politics, Parenting, Pot or Psychosis: What Caused Arizona Shootings?”

“A Missed Chance To Intervene In Tucson”

“Crazy Talk—We’re Too Quick to Use “Mental Illness” as an Explanation for Violence

Unfortunately, for far too long the competency process has suffered from inefficiencies, frequently it is time wasted while waiting and at other times it is a result of a poorly conducted and rushed competency evaluation. It is promising that light is beginning to now shine on the systemic problems that go beyond these cases and their shortcomings. There are big holes in the

“safety net” designed to make sure that the cognitively challenged are not disproportionately punished or victimized. And, it is equally important to emphasize that protecting the civil rights of mentally ill offenders is not at the expense of public safety

Both medicine and the law should fight more broadly for the necessary resources to concentrate on *treating* mental illness, but that is a different issue. Today, the focus is more narrowly drawn on *competence to stand trial*. However, just as funding and resources drive the broader treatment of mental illness, competency evaluations are just as adversely affected by inadequate funding and resources. Inadequate funding, resources and processes create a “perfect storm” in the courtroom. When an inadequate competency evaluation “meets” an inadequate justice process in the courtroom there is no justice, it is justice denied. And why do we not find criminal defense lawyers challenging the poor work? Perhaps for some of the same contributing reasons as the poorly prepared competency exams, inadequate funding and resources for the defense bar. (*“Nothing guarantees the conviction of an innocent person more than a lawyer that is not adequately funded or not competent to do the job.”* Barry Scheck, September 2010.)

Case delays

In March 2009, 37 defendants were on the waiting list at Larned State Security Hospital seeking forensic evaluations or services. “Some have been waiting for months.” John House, *SRS Legal Department, Senate Judiciary Committee, March 2, 2009*. In FY 08, 108 defendants were committed for competency evaluation and treatment. Among the many issues regarding competency to stand trial the level of unmet needs is one of the chief problems with the current process.

Lack of funds and resources almost invariably lead to cases being continued, ironically states which are already underfunding indigent defense may end up incurring even greater costs, not to mention the deteriorating quality of the justice system.

Fueling even greater fiscal costs are unreliable competency reports and defense lawyers who do not challenge the reports, but watch as the unchallenged reports form the basis for decisions made in the courtroom that will likely assault the civil rights of some at the same time as the decisions adversely impact community safety.

SRS/Pawnee/Larned/Osawatomie

After reviewing approximately 24 case files to get a snapshot of problems identified during competency to stand trial evaluations, it is always the case that once the court orders a competency evaluation, the wait times in county jails exceeds any reasonable expectation or goals to get the client or defendant back into court with a competency evaluation in hand. Then, the wait begins again when setting the case for hearing (and issuing subpoenas for witnesses, etc.).

Other notable problems with competency evaluations include:

Failed to obtain key information from local authorities;

Failed to obtain key information from witnesses;

Failed to obtain key information from prosecutors or defense counsel; and

Failed to obtain available medical and/or mental health records.

Other notable problems that have surfaced either before or during the competency evaluation include:

Failed to adequately classify and supervise;

Failed to properly supervise employees responsible for clients;

Ignored failure to take medications;

Failed to refer for mental health assessments;

Failed to conduct effective home visits;

Failed to talk to neighbors and public safety agencies; and

Failed to act on information clearly showing that he was deteriorating.

And the defendants included in the review of materials had or have been charged with: murder; battery on a correction officer; aggravated indecent liberties with a child under 16 yrs of age and older than 14 years old; criminal threat; rape; attempted rape of child under the age of 14; aggravated assault; aggravated burglary; sexual exploitation of a child; battery on a law enforcement officer; aggravated battery with a weapon (knife); rape (70 year-old victim); aggravated arson; criminal possession of a firearm; possession of meth; murder; and aggravated indecent liberties with a child.

Conclusion

More and more people are ending up arrested, in jail and waiting on a court appearance and they arrive with untreated mental illness, some are homeless, others have attempted suicide and others literally suffer in silence. Almost certainly the mentally ill have signs of increasingly erratic behavior.

If we listen to stories, the system itself is a definition of incompetence. *"We keep doing the same thing again and again, expecting a different outcome, but the outcome will not be different until the system changes. What's most likely gonna happen. He may run into the same police officer. The officer says, 'You know what?' I took him in on a misdemeanor, and they let him right out. So, now, you know, he ran away from me. I'm gonna charge him with a felony.' So, he's gonna come into the felony system, and he's gonna sit eight times longer than someone without mental*

illness for the same charge, 'cause we don't know what to do with him. And, we're gonna get him into a forensic state hospital. So, we can restore his competency, not so we can get him back to the community for treatment. So, we can try him and send him to prison or jail. In Florida, a third of our mental health money is going to 1,700 beds to restore competency. And then there's no money at the front end to keep people out. That's your reality." Judge Steven Leifman, Miami-Dade County, Florida.

"Your odds of being in the right place at the right time are pretty low. The money in some states is more readily available than money in other states. The problem is we refer to it as a system, and it isn't a system. It is a lots of things that are sort of—put together almost by bubble gum. As opposed to by any plan. And the goal for most us in policy making positions is to try to untangle it enough to create a system." Ms. Estelle Richman, Secretary of Public Welfare, State of Pennsylvania.

The process of "Competency to Stand Trial" in Kansas is a serious problem and it takes swift affirmative action to correct it. It requires a law that honors and values the disadvantaged as well the medical and legal professionals who practice their respective professions. In turn, it is expected that the disadvantaged, and the medical and legal professionals will honor the law as it has honored the civil rights of the mentally ill and the civil rights of the local communities. The quality of the criminal defense bar, the quality of the work effort at community mental health centers, Larned State Security Hospital and Osawatomie State Hospital and the quality of local police and prosecutors are all key components that must be synchronized.

In our leadership positions, all of us want to do the right thing--we should act as ministers of justice to do the right thing and it starts with a willingness to recognize deficiencies and correct them. Actually, we can look at this review as a civil rights movement that eliminates criminal justice issues and results in cost savings. I want to encourage the criminal justice community, of which we all belong, to understand and react positively to the circumstances that require the mid-course corrections we are supporting.

This is not a measure that can be labeled as Republican or Democratic, as liberal or conservative or prosecution or defense, instead it is one we can all agree on and support. (*"One of the big problems we've had in this country in the criminal justice area is a lot of reforms where professionals of good faith on both sides -- I'm talking about police professionals, prosecutorial professionals, defense lawyers, academics -- have known what needs to be implemented but can't get there."* Barry Scheck.) The Constitution is flexible and the law is always evolving, but in a matter such as this there should be common ground and room for rational debate and concrete improvements that spare the disadvantaged, protect our communities, defend the notion of justice and save lives and money. However, this effort is similar to an observation that others have noted about the criminal justice process when *"often talented and dedicated professionals, couldn't see their own role in perpetuating bad behavior. They didn't seem able to in any way to connect their conduct to the courts' worst outcomes."* *Ordinary Injustice—How America Holds Court*, Amy Bach.

Everything that is proposed as a solution to the competency to stand trial process is really just good law enforcement. We should not miss this opportunity for intervention. *"[T]he effects of*

...denials to due process are...damaging to the system. They happen regularly and create an environment in which more grievous incidents can take place. Ordinary injustice seems to occur in a blind spot. Of course, the ideal (the laws, principles, theories) and the actual (the practitioners and the contingencies they face) never match each other perfectly. But the way legal professionals strike the balance between the two ultimately determines what criminal justice actually amounts to on any given day." Ordinary Injustice—How America Holds Court, Amy Bach.

Again, Chairman and Committee members thank you for the opportunity to present this information and feel free to ask any questions you may have at this time.

Larry M. McRell, J.D.

February 14, 2011

**HOUSE COMMITTEE ON CORRECTIONS
AND JUVENILE JUSTICE**

**HEARING ON HOUSE BILL 2334
CREATING NEW PROCEDURES TO DETERMINE A
DEFENDANT'S COMPETENCY TO STAND TRIAL**

Ms. Colloton, and Members of the Committee:

I am Angela Davidson. I have been a prosecutor in Saline County.

I appear before you today to encourage you to advance House Bill 2334. I cannot perform my professional duties as an attorney given the current Kansas law. Over the years, my professional work has been impeded in Douglas County, in Marion County, in Geary County, and in Saline County. The Douglas County case was an attempted murder case, and the judge cited the mental health professional for contempt of court. The Marion County case was a sexual predator case, and the mental health professional admitted under oath he did not know what he was doing. The Geary County case also involved a sexual predator, and the judge made scathing remarks about the mental health professional who wrote the report. The Saline County case involved arson, and I was not able to obtain an adequate report. What is most striking about these files is that each one of them involved unprofessional reports about the accused person's competence to stand trial.

I cannot work with the present law; I can work with House Bill 2334. Please do not impede my professional work any further. Advance House Bill 2334.

Angela Davidson, J.D.

February 14, 2011

**HOUSE COMMITTEE ON CORRECTIONS
AND JUVENILE JUSTICE**

**HEARING ON HOUSE BILL 2334
CREATING NEW PROCEDURES TO DETERMINE A
DEFENDANT'S COMPETENCY TO STAND TRIAL**

The evaluation of a defendant's competency for trial is not merely one step in the conviction process; it is a much more severe and long lasting issue. The statutes and constitutional law in both the Federal and Kansas Courts suggest that a person who is not competent to stand trial cannot be tried. It is also true that a person who is convicted of a crime after erroneously being evaluated as competent to stand trial can challenge the conviction at any time. An incorrect conclusion in an evaluation is an error of subject matter jurisdiction. That means it can be raised at a later date without the usual time limitations involved. Years after conviction and sentencing, the claim may be raised, and if it is shown the evaluation declaring competence was in error and the individual was in fact not competent when tried earlier, that person may be release from custody. With today's detailed record keeping and computer storage methods preserving the records, the evidence to prove the fallacy of the original evaluation is in fact generated and preserved for future review. The quality of an evaluation for competence to stand trial can haunt a Court's decision for the entire lifetime of the defendant. This drastically increases the need to obtain a well-executed evaluation on the first attempt. The evaluations performed today must be performed with the professional rigor and accuracy that can make them able to withstand legal scrutiny for decades to come.

Edward G. Collister, Jr., J.D.

February 14, 2011

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Committee
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LAW OFFICES
COLLISTER & KAMPSCHROEDER
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EDWARD C. COLLISTER, JR.
HALLEY E. KAMPSCHROEDER
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February 14, 2011

Memo to committee chair Pat Colloton:

We are a group of volunteer attorneys and psychologists who have been meeting regularly for about a year to consider problems we have all encountered in our business lives that potentially affect the safety of Kansas Citizens. The focus of our concern relates to the issue of competence to stand trial. The problems that have existed relate to the ability of concerned prosecutors, defense lawyers, and judges to handle and process cases involving accusation of crimes committed by those who do not meet the constitutional standard test for competence to stand trial, meaning they cannot be legally tried for crimes. The specific request we make of you is that you support and urge the adoption of legislation we propose.

I want to take this opportunity, in addition to thanking you, to make several suggestions.

1) In the hearing before you, you have heard the comments from individuals of individual horror stories emanating from the inadequacy of current practices. If you think these examples represent the extent of the difficulties, you are making a terribly inaccurate conclusion. If you wish to investigate the further extent of the problems, we will be glad to help. Have your committee chair contact us.

2) If you think the horrors described by some of those who appeared before you are regrettable, that is an understatement. What is worse is there is nothing that gives us any confidence that further horrors of the same ilk will not occur in the future. We have stressed one incident in which an innocent Kansas citizen was murdered following the repeated demonstration of why the current facilities did not or could not solve or ignored problems which could have prevented his death.

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If you wish to support our efforts, let me tell you, we do not want money. What would help us is for you to authorize your chair to correspond with David Mouille, express your concern and join our efforts by requesting that we continue our work and that we try to devise some solutions or remedies in addition to adopting the legislation, and in encouraging us to continue our work, indicate that you would like to hear further from us at some time later in the current session at a time worked out between David Mouille and your chair.

Personally, I think the unnecessary death of Thomas James is a tragedy that should weigh on the souls of anyone who has any ability to do something about correcting deficiencies that now exist.

Yours very truly,

Ed Collister

EGC/kn

**HOUSE COMMITTEE ON CORRECTIONS
AND JUVENILE JUSTICE**

**HEARING ON HOUSE BILL 2334
CREATING NEW PROCEDURES TO DETERMINE A
DEFENDANT'S COMPETENCY TO STAND TRIAL**

Ms. Colloton, Members of the Committee:

I am David Mouille, the Co-Chair of the Kansas Board of Forensic Examiners.

Two weeks ago I presented this Committee with the Board's suggestions for changing the Kansas Law controlling procedures for competence to stand trial evaluations. Those suggestions have become House Bill 2334.

I address you today in support of House Bill 2334, and I am addressing you as a psychologist, as a citizen of Kansas, and as a grandfather. As a psychologist who has performed many competency-to-stand-trial evaluations, I support House Bill 2334 for one very simple professional reason: Given the present Kansas law, I can no longer do my job. No Kansas-licensed psychologist can do this job. The guidelines laid out for me by Kansas Law are so dramatically deficient I inevitably face a dilemma, i.e., if I strictly follow the Kansas Law, I risk losing my license to practice. Were I to perform my professional duties strictly within the guidelines as described within the present Kansas Law, I would expose myself to professional censure and malpractice actions because I would provide Kansas Courts with inadequate and inaccurate information. And the harm would extend far beyond me: one poorly performed exam and poorly written report damages several generations of multiple families, damages the judicial system, damages the mental health treatment system, and damages the corrections system *at a minimum*. The ramifications last for decades.

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If all Kansas psychologists face this problem, then all Kansas attorneys face the same problem. To paraphrase Federal Judge Frank, an attorney cannot do an adequate job if the attorney cannot obtain the services of an adequate expert [United States v. George Johnson, 238 F2d 565 (2nd Cir.1956)]. Any circumstance combining of mental illness, criminal action, and civil action makes life difficult for professionals, but the present Kansas law controlling the procedures for competence-to-stand-trial evaluations endangers the careers of attorneys and psychologists. Two prosecutors told me they could not do their jobs and could not protect the citizens of Kansas. Both prosecutors were speaking to me about files containing descriptions of killings and murders. One prosecutor said, as a consequence of the Law, Kansas was no longer a safe place to live. The other prosecutor sobbed before me for thirty minutes because he could not do his job. Because the current Law is worded the way it is, the judicial system cannot remove mentally ill and dangerous people from the streets of Kansas, and the judicial system cannot obtain adequate treatment, supervision, and care for the mentally ill and dangerous.

You have it within your power to begin to resolve this problem: you can change Kansas Law. Listen to your psychologists and your attorneys, the professionals this Legislature licensed and entrusted with the responsibility to protect you, your families, and all Kansans. Give us the wherewithal we need to do our jobs; let us protect you and your families. Advance House Bill 2334.

When I speak as a psychologist, I speak as a scientist, which means I drain emotions from my words. But this matter has an intense, large, and important emotional component, and I want to communicate that component to you by speaking now as a

citizen of Kansas and a grandfather. On October 16, my granddaughter, Norah, was born. I want you to help me create for Norah a safer and more humane Kansas than the one in which you and I live and work. Someday, before I die, I want to look into Norah's face and tell her she is safe because I worked with my colleagues to remove dangerous people from the streets of Kansas, and we worked to give the mentally ill the help they needed. I want to tell Norah she can practice psychology in Kansas and she may not have to carry a concealed weapon; I want to tell her she can be a social worker in Kansas with less fear she might be murdered; I want to tell her she can become an attorney in Kansas with less fear a client might murder her; I want to tell her she can become a mother in Kansas with less fear her own child might beat the hell out of her; I want to tell her she can become a judge in Kansas with less worry she will have to deprive the mentally ill of their civil rights; I want to tell Norah she can become a grandmother in Kansas with less fear her grandson might sexually molest her. Surely you want to say the same things to your families.

At the time of my birth, Kansas was attempting to eliminate mental retardation by castrating mentally retarded little boys. Seventy years ago people feared mental retarded children inevitably became sexually deviant adults. In the face of their fears, our forefathers found more humane ways to treat the mentally retarded. If our forefathers had the courage, integrity, and power to change and treat the mentally retarded more humanely, we can find it in ourselves to change and treat the mentally ill and dangerous more humanely. I want to say this to Norah and to all Kansans. We have the power to dawn the day when I can tell Norah we have worked together to leave her in a safer and more humane Kansas than the Kansas into which she was born.

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I thank you for your attention.

David R. Mouille, Ph.D.

February 14, 2011

House Corrections and Juvenile Justice Committee
February 14, 2011
Testimony of the Kansas Association of Criminal Defense Lawyers
Proponent of House Bill 2334

Chairwoman Colloton and Members of the Committee:

The Kansas Association of Criminal Defense Lawyers is a 300-member organization dedicated to justice and due process for people accused of crimes. **KACDL supports HB 2334.**

We appreciate the Kansas Board of Forensic Examiners – the people who bring you this bill – for including KACDL in the process. We reviewed the bill prior to filing and the few suggestions we had were incorporated. We are very thankful they are bringing this issue to the Legislature and appreciate all of the time they have put into this bill.

We know the arguments, statistics and real world stories the other proponents are bringing to you for your review and action. This is a very real, widespread problem in our state. While we do not have anything additional to add at this time, KACDL is available if the Committee has any questions or concerns it would like us to address.

Thank you for your consideration and **we encourage you to favorably pass HB 2334.**

Sincerely,

Tom Bartee
785.232.9828
Legislative Committee, KACDL



Kansas County & District Attorneys Association

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**Testimony to the House Corrections and Juvenile Justice Committee
Regarding HB 2334
Submitted on Behalf of the Kansas County and District Attorney Association**

Madam Chair and members of the committee:

On behalf of the Kansas County and District Attorney Association, thank you for the opportunity to raise concerns regarding HB 2334, which would create new procedures to determine a defendant's competency to stand trial.

First, KCDA is concerned about the short time frame between the time that a bill draft was available (Friday, February 11th) and the day of the hearing (Monday, February 14th). This time frame did not allow for the KCDA properly vet this legislation with our membership of prosecutors from across the state. This inability to vet HB 2334 creates apprehension on the part of the KCDA regarding this bill, considering the major legal, constitutional, and policy consequences that would result if this bill were to advance. Our organization will need more than a weekend to consult with our membership and other interested parties to fully understand the full impact of this bill.

I am aware of specific concerns expressed by Mr. Settle, and believe that the Board of Directors of the KCDA would well agree with some, if not all, the same concerns given sufficient time to review the language.

Further, on just a cursory review of this legislation the KCDA is initially concerned with the following sections:

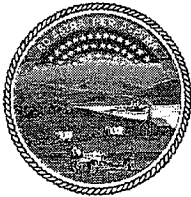
1. Section 7 expands the recognized test to 7 categories to be evaluated and in addition allows for expansive findings by the evaluator. This does no more than open a mine field of appellate issues.
2. Section 6 rewords the timeframes for a defendant in an institution to be evaluated, but in practical effect, the time is the same as currently exists.
3. There are references within the bill to sanity findings which is a entire other issue that has not been explored by KCDA.

In conclusion, the KCDA believes that more time is needed by all parties to confer with each other on the implications of this bill. We ask that the committee take no further action regarding HB 2334.

Respectfully submitted,

Marc Goodman
Lyon County Attorney

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Attachment # 11



JOHN M. SETTLE **PAWNEE COUNTY ATTORNEY**
PAWNEE COUNTY COURTHOUSE – LARNED, KANSAS 67550 – 620-285-2139

**TESTIMONY OF JOHN M. SETTLE, PAWNEE COUNTY ATTORNEY
IN OPPOSITION TO HOUSE BILL 2334
House Corrections & Juvenile Justice Committee Hearing February 14, 2010**

Honorable Chairwoman Colloton and Members of the Committee:

I have served as the Pawnee County Attorney since my appointment by Governor Graves in 1995. I am a Past President of the Kansas County and District Attorneys Association and I served on the KCDA's Board of Directors from 1996 through 2004. I presently serve on the Criminal Law Advisory Committee of the Kansas Judicial Council. I also serve on the Board of Editors of *The Kansas Prosecutor*, a publication of the KCDA. In addition to my legal career, I own a newspaper publishing business which publishes five Kansas publications covering the Kansas communities of Larned, Lyons, Hoisington and Ellinwood. Those publications reach over 30,000 readers in the Central Kansas counties of Pawnee, Edwards, Barton, Rice and Stafford.

I appear today on behalf of myself as a Kansas prosecutor, the Pawnee County Commissioners and the citizens of Pawnee County. **I am opposed to HB 2334 because in any form it will not provide any meaningful benefit for the citizens of Kansas.** In fact, in my opinion the only group this proposed legislation is likely to benefit is "licensed doctoral level psychologists who engage in clinical practice that includes therapy and assessments".

I believe **HB 2334 is truly a "solution in search of a problem"**. Proponents of the measure have pointed to the backlog of forensic competency evaluations of criminal defendants as a problem caused by the current status of Kansas' law and a lack of properly trained evaluators. Nothing could be further from the truth!

The facts are:

1. The status of Kansas law regarding the issues of "competency to stand trial and the defense of lack of mental state" are well established and widely understood by Kansas Courts, defense attorneys and prosecutors. See *State v. Foster*, 290 Kan. 696 (2010), 233 P.3d 265.

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2. The state wide backlog of forensic competency evaluations of criminal defendants in contested matters is not caused by a lack of properly trained evaluators but instead because the necessary funding which would allow the staff at Larned State Security Hospital (LSSH) to function at capacity has been diverted since 2005. The Isaac Ray Building, located on the Larned State Hospital grounds was completed in 2005 and houses the LSSH. Isaac Ray was designed and built to handle the anticipated state wide volume of such competency evaluations, however, it has never been funded to that capacity and at present there are two unopened units (60 open beds) on Isaac Ray. **If those 60 beds were to be funded this year by SRS the state wide backlog of competency evaluations would disappear immediately.**
3. At this time, most uncontested competency evaluations are already performed at community mental health centers across Kansas. These initial evaluations are part of, or preliminary to, plea negotiations between defense counsel and prosecutors. Unless the local evaluators' findings are contested by either the defense or the prosecutor there is normally no need to seek an evaluation at LSSH. **The proposed legislation would needlessly increase the cost of this process.**
4. In contested matters, the quality and competence of the LSSH staff and procedures has been well established. For many years Larned State Hospital has offered formal training in Forensic Psychology and specific training in evaluation of competency to stand trial cases. **The team approach used by LSSH staff in conducting such evaluations is much more comprehensive and complete than those provided by community mental health centers or than would result from the process proposed in HB 2334.**

In addition to the above reasoning, I have attached a list of other specific concerns with the proposed bill that have been suggested by both legal and mental health practitioners. Thank you for your consideration. I am happy to try to answer any question you might have.

Sincerely,

John M. Settle
Pawnee County Attorney

Specific Problems presented by HB 2334

1. Under HB 2334 evaluations are to be done by a person who has completed professional forensic training for competency evaluations with sufficient training and experience to offer testimony in court proceedings. The evaluator must be a licensed doctoral level psychologist who engages in a clinical practice that includes therapy and assessments. This eliminates most mental health centers, and probably results in appointing therapists in private practice. **Who pays for it- BIDS, or the state general fund? No cost savings here.**
2. What is the statewide availability of the evaluators proposed by HB 2334? There will be a lot of windshield time for these professionals, both for the evaluation and to testify in court. There would be no uniformity in the results of these evaluations which would likely result in defense counsel as well as prosecutors shopping for independent evaluators. Additionally, the availability of Licensed Psychologists to complete these evaluations, particularly in rural/frontier areas, would need to be addressed. **Where does the funding for this process come from?**
3. A defendant has the right to call an independent expert, presumably with the same qualifications of the appointed evaluator. Additional expense and delay. A defendant also has the right to depose the evaluator. **BIDS probably gets stuck for the defense counsel time and transcript expense, but who will compensate the evaluator?**
4. Section 4(e)(1) on page 5 requires the evaluator to "indicate the agencies or setting in which such treatment or habilitation might be available." Recommendations from evaluators and subsequent orders from the court to send defendants to treatment facilities could create potential problems such as admissions to public or private facilities lacking the resources to deal with violent defendants, facilities lacking competency education classes, and/or facilities lacking clinicians trained in forensic evaluation, report writing, and expert testimony. **Additionally, this proposal does not address how court ordered treatment at such facilities would be funded.**
5. Section 10(b), on page 10, requires the filing of a treatment plan with the court within 14 days of the commitment. **Such filing may be an unnecessary burden for both a treatment facility and the court.**
6. Section 10(d), on page 10 specifies that a defendant determined incompetent to stand trial has no right to refuse treatment. **This language may be problematic in light of a series of decisions beginning with Sell v. United States (539, U.S. 166 [2003]) that limited involuntary administration of medication for defendants incompetent to stand trial.**
7. Section 13 on page 12 creates a category of "permanently incompetent to stand trial", and in (1), places them in a treatment facility for 12 months. Currently, K.S.A. 22-3303 allows for commitment up to 180 days after having been determined incompetent to stand trial, after which civil commitment can occur. **By requiring commitment for 12 months, bed space and wait time issues could emerge or be exacerbated.**
8. The status of Kansas law regarding the issues of "competency to stand trial and the defense of lack of mental state" are well established and widely understood by Kansas Courts, defense attorneys and prosecutors. The proposed bill will significantly change the procedures followed by Kansas trial courts, prosecutors and defense counsel. **A side effect of such dramatic changes in criminal**

procedures is confusion which will result in an additional burden for Kansas Appellate Courts which obviously increases the costs associated with the proposed changes.