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Testimony in Opposition to SB 374

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Senate Bill No. 374

To: Senate Committee on Judiciary
Committee Chair: Sen. Kellie Warren
Committee Vice Chair: Sen. Kenny Titus
Ranking Minority Member: Sen. Ethan Corson
and Committee Members

My name is G. Kassius Andersen, and I am an attorney at the Disability Rights Center of Kansas (DRC). You are most likely familiar with our Policy Director, Mike Burgess, who is a former Republican member of the Kansas House and former Committee Chairman. Mike sent me to this committee because of my expertise in this area of law. DRC is a public interest legal advocacy organization that is part of a national network of federally mandated organizations empowered to advocate for Kansans with disabilities. DRC is officially designated by the State of Kansas as the Protection and Advocacy system for individuals with disabilities. DRC is a private, 501(c)(3) nonprofit corporation, organizationally independent of state government and whose focus is the protection and enhancement of the rights of Kansans with disabilities.

Chair Warren, Vice Chair Titus, Ranking Minority Member Corson, and members of the committee, thank you for the opportunity to provide testimony in opposition to the proposed Senate Bill no. 374 (SB 374), which would amend K.S.A. 22-3303, 22-3305, and K.S.A. Supp. 59-2946, pertaining to involuntary commitment proceedings in criminal procedure.

The Disability Rights Center is strongly opposed to SB 374. DRC stands in a unique position, often tasked with monitoring the intersection of criminal procedure and civil rights, and we believe SB 374 will only further strain our state's mental health care and court systems, as well as threaten the rights of Kansans with mental health and intellectual disabilities.

Foundation

To preface, the Fifth Amendment of the United States Constitution provides that all individuals charged with a crime must be competent to stand trial. It is a denial of due process to try or sentence a defendant who is incompetent to stand trial.

In Kansas criminal proceedings, any party to the case may raise the question of competency, whether defense counsel, Prosecutors, or judge. If any member in these proceedings has reason to believe that the defendant is incompetent, they must raise that concern and move for a competency assessment. Competency assessments suspend criminal proceedings, and orders are put in for an assessor to visit with the defendant to determine whether they are competent to stand trial.

An adage of criminal defense attorneys' is that "competency is a low bar." For a defendant to be found competent to stand trial, they must merely demonstrate that they understand the proceedings and that they can assist in their own defense. In Kansas, this usually is determined by asking a defendant what each member of the courtroom does. For example: what does a prosecutor do? What does a judge do? What does a defense attorney do? What does a jury do?

Criminal competency is a much different standard than involuntary commitment. And this is by design. Our statutes for involuntary commitment are in an entirely separate section of law. We refer to the individual as a "mentally ill person subject to involuntary commitment for care and treatment."

If a defendant has not attained competency to stand trial within six months from the date of the original commitment, the court shall order the prosecuting attorney to commence involuntary commitment proceedings under the care and treatment act. To meet criteria for involuntary commitment, "a person must lack capacity to make informed decisions concerning treatment, is likely to cause harm to self or others, and have a diagnosis that is not solely one alcohol or chemical substance abuse, antisocial personality disorder, intellectual disability, organic personality disorder, or organic mental disorder."¹ The criteria of "likely to cause harm to self or others" is defined as "likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others, or substantial damage to another's property as evidenced by behavior, threatening, attempting, or causing such injury, abuse, or damage, or is substantially unable, except for reason of indigency, to provide for any person's basic needs, such as food, clothing, shelter, health, or safety, causing a substantial deterioration of the person's ability to function on the person's own."²

Involuntary commitment is utilized when an individual is in an acute mental health crisis requiring intervention by the state. It is a tool of last resort, when all else has failed. Individuals are deprived of rights and subjected to institutionalization by the state for their own protection. Involuntary commitment has both positives and negatives. While it may assist the individual in stabilization, the process of being forcibly committed into care against your will can cause trauma and fear, which may result in post-traumatic stress disorder.

Historically, in cases involving involuntary commitments, an individual is entitled to a number of procedural and substantive due-process rights. This is sharply contrasted on the criminal side, where the

¹ K.S.A. 59-2946(f)(1).

² *Id* at (f)(3).

Supreme Court has made it explicit that defendants convicted of crimes have fewer substantive rights regarding mental health treatment.³

The Supreme Court has specifically stated that “a finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the ‘mentally ill’ can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.”⁴

DRC is concerned that SB 374 will expand the use of involuntary commitment against Kansans in a way that strays from its core purpose – resulting in an overuse of involuntary commitment that leads to a strain on Kansas care systems and violates Kansans’ rights, as outline below. DRC is greatly concerned that SB 374 restricts the liberty rights of Kansans.

SB374 will put more of a burden on an already overtaxed system

SB 374 proposes sweeping alterations to the procedures regarding commitment of an incompetent defendant. The first change comes in provision 3 of the current statute, stripping away the ability of courts to order an incompetent defendant charged with a misdemeanor or felony offense to participate in outpatient evaluations and treatment conducted by any appropriate state, county, or private institution or facility.

This means that defendants must be committed to a state security hospital on an inpatient basis. This requirement will only further exacerbate a well-known problem in the state of Kansas: individuals are going to sit in custody for long periods of time before a bed is available for treatment.

In 2022, a class action lawsuit was brought on behalf of over 100 individuals seeking declaratory and injunctive relief for the unconstitutional, unlawful, and harmfully long wait times for competency evaluation and competency restoration treatment at Larned State Hospital (LSH).

In *Glendenning et al v. Laura Howard*, plaintiffs alleged that currently, when a defendant is deemed incompetent to stand trial, they often spend months in their local jail waiting for a bed space at Larned to receive competency restoration treatment.⁵ During those months, the mental states of defendants - already deemed to be such that there is a need for immediate intervention - further deteriorate while they wait, languishing in custody with little to absolutely no treatment. A criminal defendant will continue to spiral further, resulting in greater risks to their safety, as well as the safety of the correctional officers and other incarcerated individuals.

Larned is the designated facility for criminal competency restoration, operating the forensic unit which is dedicated to evaluation and treatment to people who are facing criminal charges. However, in response to

³ Michael L. Perlin, Deborah A. Dorfman, Naomi M. Weinstein, “*On Desolation Row*”: *The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 Tex. J. C.L. & C.R. 59 (2018)

⁴ *O’Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396 (1975).

⁵ *Glendenning as Next Friend of G.W. v. Howard*, 707 F. Supp. 3d 1089 (D. Kan. 2023).

the Glendening lawsuit, Osawatomie State Hospital (OSH) began to accept competency restoration clients for treatment in 2022 as well.

Kansas is already undergoing a staffing crisis when it comes to state hospitals. In August of last year⁶, the legislature reviewed that the state of Kansas invests more than \$60 million annually to hire contract nurses to work at both LSH and OSH. Even with this massive sum, both facilities report that they are chronically understaffed and unable to provide a greater expanse of services. The job vacancy rate at OSH was 35.5% as of August of 2025, with Larned sitting at 33.5%.

Per LSH's own reports, failure to provide adequate staff coverage may result in increased patient and staff injuries, reduction in the quality of care provided to patients, increased aggression towards staff, lack of responsiveness to serious situations, heightened risk of burnout among staff, and overall unsafe working conditions. For the forensic unit, 30 patient beds cannot be utilized due to a lack of staffing. Meaning 30 potential beds for defendants deemed incompetent to stand trial sit empty solely because Kansas has not allocated the funds for them to operate.

In mid-2022, due to the growing wait list, OSH converted one of its existing treatment programs into a secondary competency treatment program. This put additional pressure on the psychiatry staff to provide treatment and complete the necessary screenings require by the court. According to the 2024 budget report from OSH, 60% of the overall budget went to providing clinical services.

The budget for nursing has increased exponentially since 2019. LSH's budget for nursing contracts increased from \$5.9 million in 2019, to \$8.6 million in 2021, \$43.1 million in 2023, and \$46 million in 2025. For OSH, contracts have also increased from \$233,000 in 2019 to \$3.2 million in 2021, \$16 million in 2023, and \$15.4 million in 2025.

Local community mental health centers and other mental health facilities have provided some much-needed relief to the system through outpatient and jail-based competency programs. No longer are defendants required to attend competency restoration solely at a state hospital, but within the community that they are a part of with local support. Even still, the system remains consistently bloated and incapable of handling the influx of individuals deemed incompetent to stand trial. These cases have swelled to such an amount that county jails, like Shawnee County, have had to construct and implement an entire Mental Health unit to their facility to keep up.

Further, the expansion of criteria that a prosecutor can utilize to ensure an individual is eligible for civil commitment means more strain put on the civil commitment side of things as well. As criminally incompetent defendants are no longer provided any pathway to continue treatment before being subject to involuntary commitment, the ongoing overpopulation problem is only going to shift further into the civil side of proceedings.

SB 374 is only going to put further strain on these systems that are currently struggling to operate at full capacity in Kansas – so much so that the state has already been sued to address these issues, in *Glendening*.

⁶ Tim Carpenter, *Kansas Legislators despair about \$60 million annual cost of contract nurses at psychiatric hospitals*, Kansas Reflector, August 19, 2025, <https://kansasreflector.com/2025/08/19/kansas-legislators-despair-about-60-million-annual-cost-of-contract-nurses-at-psychiatric-hospitals/>

Not only will SB 374 exacerbate these existing challenges, but it will create legal concerns for Kansans facing involuntary commitment.

SB 374 violates due process

Involuntary commitment, as mentioned above, is not a provision under the criminal law statutes of Kansas. The statutes governing involuntary commitment are found under Chapter 59, article 29, titled as the Care and Treatment for Mentally Ill Persons. Again, this is because they operate on two separate standards of law.

Involuntary commitment assessments are focused on the immediacy of the mental health crisis and the ability for that individual to find treatment. It is noted as a substantial deprivation of rights that is only applicable in very certain and limited circumstances. The focus is on treatment, and on the individual's health at that moment. It does not assess past criminal history, and it does not assess pending criminal charges, because that is not the focus of the involuntary commitment process. However, SB 374 would change Kansas statutes to allow those factors to be considered, improperly shifting the focus and purpose of these hearings.

The rationale for the rigorous burden of proof in civil commitment comes from a broad historical context. The standard is “the product of a fundamental recognition of the priority of preserving personal liberties in civil commitment cases. The tension between the protection of personal liberties and the provision of medical help to persons with mental disorders can be relieved only if courts strictly adhere to the statutory requirements for involuntary commitment and ensure that there is an evidentiary basis that satisfies each of those requirements.”⁷

In both criminal and civil law, character evidence, such as someone's general disposition or propensity to commit violence, is generally not admissible to prove how a person acted during the alleged incidents of a case. Prior criminal history cannot be used to prove that a defendant must have committed a new crime solely because of prior bad acts. Further, courts around the nation have jointly agreed that the standard should be focused solely on the “current” indicators as the best metric for the danger to self or others analysis.⁸

Allowing prosecutors to attend involuntary commitment hearings and present witnesses and testimony regarding an individual's alleged crimes is textbook propensity evidence and is not admissible. Any case that challenges the alleged testimony and evidence put on by a prosecutor to prove that an individual is a “danger” to self or others will immediately be struck down in court as violative of the rules of evidence.

Further, allowing a prosecutor into the involuntary commitment hearings to put on evidence for a probable cause finding to prove an individual's guilt in the pending criminal matter is violative of an individual's right to counsel. While an individual has the right to counsel in involuntary commitment proceedings, that counsel is only presented with the facts and evidence regarding the medical documentation and treatment protocols of an alleged individual – as that should be the purpose of the hearing. That counsel, usually a civil attorney, is not equipped to defend an individual in a criminal matter at what is essentially a preliminary hearing. And, as an individual's defense counsel has no right to be

⁷ *State v. D.P.*, 208 Or. App. 453, 464, 144 P.3d 1044, 1051 (2006)

⁸ *Id.*

notified of the care and treatment proceedings, without their appearance, the rights of a defendant are not guaranteed to be protected.

Again, any challenge to an individual's right to counsel at an involuntary commitment proceeding where a prosecutor was allowed to put on evidence in a criminal case as evidence to the danger of an individual without an opportunity for that individual's counsel to cross examine or put on evidence to the contrary will be held as unconstitutional and a violation of an individual's sixth amendment right to counsel. But that is the very thing SB 374 proposes Kansas law should not allow.

Further, the added language to K.S.A. 22-3305 will now invest in judges far more power to determine if an individual is eligible for involuntary commitment beyond the limitations of the current statute. If a defendant that has been found criminally incompetent yet not eligible for criminal commitment ,if a court "determines that a probability still does not exist that a defendant will regain competency within the foreseeable future, the court shall consider the nature of the pending criminal proceedings to determine if additional evaluation and treatment are necessary." This invests in the court the ability to determine the medical likelihood of an individual's capability of treatment, as well as encourages judges to make arbitrary and capricious decisions based on their untrained observations. Further, to allow this "second bite" at the apple runs afoul of res judicata, or rather, that you cannot raise the same claim twice.

Instead, all of this puts into the hands of judges and prosecutors the powers of a medical practitioner, something that they are not equipped to handle. All of this to the extreme detriment of Kansan's with disabilities, who will be subject to higher rates of involuntary commitment that bring back dark memories of the dangerous mental institutions our laws have been drafted to prevent.

The changes put forth in SB 374 will not advance the rights of Kansan's facing criminal competency proceedings, but instead mire down an already overburdened system, violate of the rights of an individual to the extent that they will not stand in any further court proceeding challenging them, and also are a bad faith attempt to further criminalize mental health in the state.

For these reasons, DRC asks this subcommittee to oppose SB 374, and consider alternative options for how to treat this matter - such as further funding to state hospitals to support and expand treatment options, and to consider funding more community resources to provide mental health services in the community so that individuals facing mental health crisis may find local resources before the matter escalates to a criminal nature.

Thank you, again, for considering our request, and for the opportunity to offer opponent testimony.