February 10, 2012

The Honorable Pat Colloton

House Committee on Corrections and Juvenile Justice

Kansas State Capitol

300 SW 10th Street, Room 144-S

Topeka, Kansas 66612

Re: Support of House Bill # 2497

Madam Chairwoman and Members of the Committee:

Thank you for this opportunity to testify in support of House Bill #2497. My name is Adam Hall, and I am a general practice attorney from Lawrence, Kansas. I have worked with legal and mental health professionals on the subject of legislative action in the area of competency to stand trial. As such, I am very interested in House Bill #2497.

I write in support because House Bill #2497 represents a tremendous step forward in competency law in Kansas. It is reasonably designed to meet several deficiencies in the current statute, it addresses known problems in Kansas courts, and it is modeled on the venerable American Bar Association Criminal Justice Mental Health Standards (the "ABA Standards"). However, notwithstanding my general support, I have three concerns that lead me to negatively comment on House Bill #2497 as currently written. Specifically, House Bill #2497 does not exhaustively describe the legal concept of "incompetence to stand trial;" it – hopefully by accident and not design – defines incompetence to stand trial in a difficult to decipher, and ultimately erroneous, manner; and it employs a procedure that does not guarantee that competency evaluations are performed by qualified professionals.

House Corrections and Juvenile Justice
Committee
2012 Session
Date 3-6-12
Attachment # 6-1

First, House Bill #2497 limits the definition of incompetence to cases of "mental illness or defect." Certainly, incompetence to stand trial can result from mental illness or defect, but it is not sufficient to define incompetence to include only those cases. The ABA Standards explicitly define incompetence to include "mental illness, physical illness, disability, retardation or other developmental disability, or other etiology so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings." ABA Standards § 7-4.1(c). The failure to draft this broader definition into House Bill #2497 is a substantial deficiency because, as explained by the ABA commentary, the American criminal justice system "rests on the assumption that a defendant will be a conscious participant in presenting the defense case; the trial of one incapable of fulfilling that expectation does not reflect 'a reasoned interaction between an individual and his community' but societal 'invective against an insensible object.'" *Id.* at § 7-4.1, commentary (quoting Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 458 [1967]). In other words, the important question in an incompetence inquiry is a functional one, and the peculiar source of the dysfunction is irrelevant to this inquiry. *See id.* at § 7-4.1, commentary ("If defendants are capable of meeting the articulated requirements for competence, the presence or absence of mental illness is irrelevant.").

Second, House Bill #2497 instructs that a defendant is "incompetent" when he or she does not have "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding and otherwise assist in the defense," "<u>and</u>" "a rational and factual understanding of the proceedings." See HB 2497, Sec. 1(b). The use of the conjunction "and" in this context makes the two standards of competence alternative to one another. In other words, under this formulation of the definition, a person <u>is</u> competent to stand trial if they can "assist in the defense" <u>or</u> "understand the proceedings." Such a formulation is contrary to established federal law. See *Dusky v. United States*, 383 U.S. 402, 402 (1960) ("[The] test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as factual understanding of the proceedings against him."); and *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). Such a formulation is also contrary to the ABA Standards. See ABA Standards § 7-4.1(b).

Finally, House Bill #2497 requires that the court only appoint evaluators who have "sufficient" education, training, and experience for the competency evaluation, as well as "sufficient" understanding of the legal matter and the purpose of the evaluation. These required determinations are laudable in intent, but their location in the procedure of the evaluation, and the lack of more specific legislative guidance, taken together, is concerning. Certainly, every evaluator should have "sufficient" qualifications, but the

word "sufficient" is inherently subjective when it is not coupled with some objective measure. As a result, use of that word alone will foreseeably cause an unequal application of law across the state as each judge applies his particular measure of what is "sufficient." Also, at trial an expert is limited to expressing opinions and drawing inferences that the court finds are "(1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness." See K.S.A. 60-456. These same principles should guide the formation of the appropriate evaluation procedure. In other words, absent an objective method of measurement or a State certification system for experts which would be available to a judge prior to making an appointment, a judge likely would not know if a potential evaluator was qualified to give an expert opinion on a particular matter until he or she had received and reviewed the expert's credentials, evaluative procedure, and had otherwise considered the expert report.

I reiterate that despite my criticisms I am writing in support of House Bill #2497, but there are three critical matters which should be addressed in the body of the bill. House Bill #2497 does not exhaustively describe the legal concept of "incompetence to stand trial;" it defines incompetence to stand trial in a difficult to decipher, and ultimately erroneous, manner; and it employs a procedure that does not guarantee that competency evaluations are performed by qualified professionals. Thank you again for this opportunity to testify in support of House Bill #2497.

Adam M. Hall