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To: House Corrections and Juvenile Justice Committee

From: Barry Wilkerson, Riley County Attorney, On behalf of the KCDAA

Date: March 6, 2012

Re: Testimony regarding House Bill 2497

Madam Chair Colloton and members of the committee:

Thank you for the opportunity to provide testimony regarding HB 2497. I am here today on behalf of the Kansas County and District Attorneys Association in opposition to HB 2497.

The first question to be answered by the committee is what is the purpose of HB 2497?

The overall impact of this bill will be a stalling the criminal justice; substantial increase in court hearings and increased costs due to the cost of employing experts to conduct unnecessary, in probably most cases; and additional competency evaluations. My conclusions are set forth below:

K.S.A. 22-3301 is currently the definition of in-competency is (a) someone who is unable to understand the nature and purpose of the proceedings against him or(b) someone who is unable make or assist in making his defense. K.S.A. 22-3301(a)(b)

The new definition: Sufficient present ability to consult with a reasonable degree of rational understanding and otherwise assist in the defense and a rational and factual understanding of the proceedings. (b)(1) and (2).

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All too often criminal defendants engage in behavior that a well-trained and seasoned lawyer would consider irrational, ie. the decision to testify, the decision to reject a favorable plea offer. A defendant who firmly believes he is innocent may want a trial even though he is facing a life sentence while a seasoned lawyer may believe he should agree to accept a deal that offers him probation or five years. Who decides rational behavior - the lawyer, or the defendant who has constitutional rights?

Sec. 4. The court is given guidelines on appointing evaluators with the qualifications set forth in section (a) and (b); who decides sufficient professional education, knowledge and training? Is this a discretionary finding by the judge raising another issue on appeal by the defendant or by the state on interlocutory appeal? The appropriate process is set forth in K.S.A. 60-456, 60-457 and 60-458 the rules of evidence which set forth the standards of expert testimony.

Section 6. The requirement of completing a thorough report in 21 days, if not impossible is clearly impractical given the lack of resources. What would be the penalty for delay? Would the defendant be prohibited from raising the issue of his/her competency?

Sec. 6(b)(3)(b) and (c) Referring back to the definition of incompetent, how can a court feel comfortable that someone who may not act rationally or understand the procedures, be in any way expected to show up for an outpatient evaluation? There is a good faith motion for competency and it is reasonable for a court to believe someone is going to appear for an outpatient evaluation. It should be presumed, the defendant will not appear for the outpatient evaluation.

Sec. 8 Statutorily defining who is capable of evaluating and preparing a report for competency, these are all matters subject to examination by the parties and the court, there is no need to add it the statute. Foundation is required before an expert can give an opinion, this issue is best left to the laws governing testimony of experts, see K.S.A. 60-456, 60-457 and 60-458.

Section 10 What if the court cannot hear the matter because of scheduling within seven days of a motion contesting the report? Do we interrupt murder trials, wrongful death civil cases, to hear a motion on a misdemeanor because either the state or the defense challenges the finding in a competency evaluation? Subsection(b) creates loser gets an independent evaluation, then what happens to the seven day rule in subsection(a)?

Subsection(d). How many times do the parties go through the competency evaluation prior to sentencing? If we go back to Sec. 8, the defendant is re-evaluated, one party contests the report, then an independent evaluator conducts a report, the question becomes what is the limit of infinity in the criminal justice system that once honored the concept of swift justice or better yet *justice delayed is justice denie*?

Sec. 11. Another seven day rule, sometime time limitation may be necessary but seven days is unworkable in Riley County, where judicial resources are stretched in terms of time availability. It is highly impractical given the present time constraints and packed court calendars to expect judges to set what could be a lengthy evidentiary hearing.

Sec. 12(3)(b) *The court may inquire of defense counsel about the professional attorney client relationship*---this would be akin to the attorney becoming a witness. An attorney representing a client faced with life imprisonment if his/her client is competent would be faced with a potential professional conflict of duty as an officer of the court versus duty to advocate for the client. After almost 22 years of prosecuting, I have heard many complaints, weekly in fact, of clients who are competent, who refuse to communicate effectively for a variety of reasons. People who are legally competent have unreasonable expectations of any number of professions on a frequent basis, however criminal defendants may have some of the highest levels of unreasonable expectations. How do you define effective communication? Will the Appellate Courts be called upon with great frequency to define a new legal concept—effective communication.

Section 14(b)(3). Is there any chance in the solar system that a defendant who is incompetent to assist in his defense, is going to follow out-patient treatment orders so that he can be tried for a crime for which he is accused? This is an irrational expectation on two levels: First if the defendant is truly incompetent, he/she will not be able to follow the orders. The outpatient treatment orders given by Osawatomie State Hospital are violated with great frequency under the care and treatment code. Secondly, if the person is marginally competent, the defendant will understand delays and refusals in seeking treatment, delay his facing the accuser and a possible penalty. Picture Judge D ordering a defendant to go and get treatment with words to this effect "We cannot try if you don't keep your outpatient treatment appointments". We actually tried it once in Riley County and the defendant never showed up for his appointments and after

several months the court had to incarcerate the defendant and send him to Larned State Hospital.

Section 15. Makes no sense, either (a) or (b). If a defendant is not maintaining a prescription regime necessary to maintain competency, how can he be declared competent? And how does someone who has not yet obtained competency, (they are still in treatment for a reason we should presume) enter a plea that will satisfy constitutional standards of a knowing, voluntary waiver of the right to trial and all the rights encompassed in the right to trial? The answer is he cannot. Any plea taken under such circumstances will be highly susceptible to being overturned on appeal, probably guaranteed unless the defendant is completely satisfied with the plea and sentencing.

Section 16. Why should the treatment provider file with the court and individualized treatment plan, unless the court has expertise in the field of treatment programs this appears to create unnecessary documentation requirements, that will mean providers spending more time documenting and less time evaluating and treating? This appears counter-productive.

Section 18(c)(3). Should be amended to state that if a defendant is charged with an off-grid felony or a level 1-5 person felony on the non-drug grid, the secretary shall not release the defendant/patient unless the defendant/patient is competent to stand trial or until the court in which the criminal charges stand is convinced by the secretary of social and rehabilitation services that the defendant no longer poses a threat to public safety or himself. The Secretary of Social and Rehabilitation Services shall under no conditions release the defendant/patient until the Court has held and hearing and judicially reviewed and approved the secretaries determination.

Section 18(c)(4) Should eliminate the secretaries, or treatment facilities ability to discharge the defendant under the care and treatment code until a hearing is held without the requirement of the prosecuting attorney requesting a hearing.

Conclusion

Are there issues, yes, however this bill addresses the wrong target, or as my late grandfather would put, "we are fishing in the wrong hole". The problems begin with the lack of funding under the care and treatment code and the lack of facilities for long-term inpatient treatment. Patients are released who suffer severe mental issues and who cannot be managed in the local community. They

are temporarily stabilized at Osawatomie State Hospital, released and then quit taking their medication within a short period of time. In the more severe cases these individuals commit serious crimes. The Riley County Attorney's Office prosecuted such an individual for the rape of an elderly woman.

The KCDAA respectfully ask that the committee not take any further action on this bill.