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TO: Senate Judiciary Committee

FROM: Kansas Judicial Council – Doug McNett, Pawnee County Attorney

DATE: February 13, 2020

RE: Testimony in Support of SB 333 Regarding Procedure for Certain Incompetent Defendants under K.S.A. 22-3301 *et seq.*

On September 7, 2018, attorney Ronald D. Smith requested that the Kansas Judicial Council review the statutes governing competency to stand trial, specifically as they relate to defendants who are developmentally disabled, have a traumatic brain injury, or are otherwise deemed incompetent to stand trial and not likely to become competent, but who are not “mentally ill persons subject to involuntary commitment for care and treatment” under the Kansas Care and Treatment Act for Mentally Ill Persons (“Care and Treatment Act”), K.S.A. 59-2945 *et seq.* When the Judicial Council met on December 6, 2018, it agreed to accept the study request and created an ad hoc advisory committee to conduct the study. A list of the advisory committee members can be found on the last page of this testimony.

Background

Competency to stand trial is governed by K.S.A. 22-3301 *et seq.* If a district court finds a defendant is incompetent to stand trial, the defendant is committed to an appropriate facility or institution for evaluation and treatment under K.S.A. 22-3303(1). The chief medical officer of the institution must, within 90 days of the commitment, certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If so, the court orders the defendant to remain in an appropriate facility or institution until the defendant attains competency, or for six months from the date of the original commitment, whichever occurs first.

If the defendant does not have a substantial probability of attaining competency in the foreseeable future or does not attain competency within the six-month period after the original commitment, the court must order the secretary for aging and disability services to commence involuntary commitment proceedings under the Care and Treatment Act. Prior to 2001, this meant that the defendant had to meet the criteria for a “mentally ill person subject to involuntary commitment for care and treatment” as defined in K.S.A. 59-2946(e) and (f).

K.S.A. 59-2946(e): "Mentally ill person" means any person who is suffering from a mental disorder that is manifested by a clinically significant behavioral or psychological syndrome or pattern and associated with either a painful symptom or an impairment in one or more important areas of functioning, and involving substantial behavioral, psychological or biological dysfunction, to the extent that the person is in need of treatment.

K.S.A. 59-2946(f)(1): "Mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e), who also lacks capacity to make an informed decision concerning treatment, is likely to cause harm to self or others, **and whose diagnosis is not solely one of the following mental disorders: Alcohol or chemical substance abuse; antisocial personality disorder; intellectual disability; organic personality syndrome; or an organic mental disorder.**

The distinction between a “mentally ill person” and a “mentally ill person subject to involuntary commitment” was added to the Care and Treatment Act when it was updated in 1996. The Judicial Council’s comment to that change noted that the conditions listed in subsection (f)(1) are disorders that are generally professionally recognized as unresponsive to psychiatric treatment. The Care and Treatment Advisory Committee stated “there are certain mentally ill persons who should not be subject to involuntary proceedings to restrict their liberty.”

The 1996 revision of the Care and Treatment Act also impacted the criminal procedure statutes governing competency to stand trial, K.S.A. 22-3301 *et seq.* After 1996, a person who was found incompetent to stand trial and unlikely to become competent in the foreseeable future could no longer be involuntarily committed under the Care and Treatment Act if the person was diagnosed solely with one of the mental disorders listed in K.S.A. 59-2946(f)(1).

Following the 1996 changes in the civil commitment law, legislators heard concerns from judges and the Attorney General about individuals charged with crimes who could not be held in custody because they were incompetent to stand trial and could not be involuntarily committed because they did not meet the definition of a “mentally ill person subject to involuntary commitment for care and treatment.” There was concern that some of these individuals continued to be a risk to the safety of others when they were released back into the community.

Representative Tim Carmody, Chair of the House Judiciary Committee at the time, asked the Judicial Council to study the issue. The Council accepted the study request and assigned it to the Criminal Law Advisory Committee on May 8, 1998. The Committee reviewed statutes from other states and found that the issue is resource-driven and that funded programs are needed to provide proper services to those criminal defendants who suffer from a mental disorder that falls outside the definition of “mentally ill person subject to involuntary commitment for care and treatment.” The Committee agreed, however, that determining or recommending appropriate resources exceeded the scope of the study request. The Committee ultimately agreed to recommend amendments to K.S.A. 22-3303 that would revert to the pre-1996 definition of mental illness by excluding consideration of the exceptions in K.S.A. 59-2946(f)(1) when conducting involuntary commitment proceedings involving a defendant who has been found incompetent to stand trial and unlikely to attain competence in the foreseeable future.

Under the resulting bill, 2001 HB 2084, an incompetent defendant who is unlikely to become competent could be involuntarily committed under the Care and Treatment Act if the defendant was a “mentally ill person” as defined in K.S.A. 59-2946(e) and likely to cause harm to self and others. In its testimony on the bill, the Judicial Council acknowledged the limitations of the proposal. “While this amendment addresses the statutory problem, it diverges for these limited purposes from the policy decision made by the Legislature and generally endorsed by the mental health community to move individuals from custodial, institutional environments to the community.” A number of opponents appeared to speak against the bill in the House and Senate Judiciary hearings. Follow-up written testimony from the Judicial Council stated “HB 2084 does not intend to limit SRS or local mental health centers in the development of programs deemed appropriate. Even the opponents admit there is a public safety gap under the current statutes. HB 2084 provides a procedural mechanism to close that gap. The programs that are implemented are left to the judgment of SRS and the Legislature.”

2001 HB 2084 passed out of House Judiciary with no amendments, but the bill was amended in Senate Judiciary to replace the definitional changes with an investigatory process by the Secretary of the Department of Social and Rehabilitation Services (“SRS”) that could lead to involuntary commitment or guardianship proceedings. The amended bill also provided for creation of a task force to further study the issue. The two versions of the bill progressed to conference, where compromise was reached and the revised substance of HB 2084 was moved into HB 2176 and passed into law. The current law, as passed in 2001, applies the definitional change proposed in the original bill only when the defendant is charged with an off-grid felony or other specified high-level crimes.

2001 HB 2176 also included passage of new K.S.A. 22-3306, which directed the Secretary of SRS to convene a task force to study the issue, including both the applicable law and the adequacy of Kansas programs and services. The task force created pursuant to that statute issued a report to the Secretary on December 14, 2001. A copy of the report can be found under “Studies and Reports” on the Judicial Council website: www.kansasjudicialcouncil.org. The Committee is not aware of any further action taken after the task force reported its recommendations.

Ronald D. Smith, who requested the Judicial Council study, is an attorney practicing in Larned, Kansas. Mr. Smith represents Clay Snyder, an individual who suffers from a severe intellectual disability arising from microcephaly. Mr. Snyder was charged in 2012 with several serious crimes, including an off-grid felony, and was later found incompetent to stand trial and unlikely to attain competency in the foreseeable future. He was civilly committed under the Care and Treatment Act as provided in K.S.A. 22-3303. The Kansas Supreme Court has found that Mr. Snyder's civil commitment, as applied via K.S.A. 22-3303, was not a violation of Mr. Snyder's rights to due process or equal protection. *In re Matter of Snyder*, 308 Kan. 626, 422 P.3d 85 (2018). Mr. Snyder has been confined in Larned State Hospital for over five years with no apparent way out, although he has not been convicted of a crime. Mr. Smith requested that the Judicial Council look at the competency statutes that allow the developmentally disabled and individuals with traumatic brain injuries to be "deemed" mentally ill and placed in the state psychiatric hospital.

The Committee created by the Judicial Council to conduct this study represent varying points of view. The Committee includes prosecutors, defense attorneys, representatives of KDADS, a judge, a state representative, and service providers. Committee members agreed early in the process that there are problems with the statutes governing competency proceedings that should be addressed. Although the Committee members acknowledged the potential for public safety issues when defendants with certain conditions cannot be involuntarily committed, they recommend a different approach to address those concerns than was taken in 2001. The Kansas Supreme Court found that involuntary commitment under the current statutory scheme did not violate Mr. Snyder's rights to due process or equal protection, but the Committee believes the competency statutes can be improved to make the process more fair to defendants while also specifically requiring consideration of public safety.

Inherent Problems With Current Competency Statutes

Kansas law no longer allows a person to be involuntarily committed under the Care and Treatment Act if the person is diagnosed solely with one of the following disorders: alcohol or chemical substance abuse; antisocial personality disorder; intellectual disability; organic personality syndrome; or an organic mental disorder. This is because those disorders are not responsive to the type of treatment that is generally offered in a mental health facility, such as psychiatric medication and psychotherapy, and the Legislature determined in 1996 that the State should not be restricting a person's liberty by confinement in a mental health facility that does not offer the kind of treatment or services specific to that person's needs.

The 2001 amendments to K.S.A. 22-3303 carved out a very small subset of incompetent defendants who would otherwise not be subject to involuntary commitment – those charged with off-grid or other high-level felonies – and once again allowed them to be committed as part of the criminal competency process. Mr. Snyder belongs to that small subset, but the Committee found the problems with the process to be bigger and more long-standing than the carve-out created in 2001. The competency process has never been well-suited to any person who suffers from one of the

disorders listed in K.S.A. 59-2946(f)(1) and who has been charged with a crime and found to be unlikely to attain competency (the “subject population” in the Committee’s study). The competency process makes sense and is appropriate for a defendant who is found incompetent to stand trial and who has a mental illness. The statutes’ focus on competency restoration, often at Larned, is consistent with providing a mentally ill defendant with the specific care and treatment the defendant needs to get better, attain competency, and proceed to trial. If restoration is not possible and the mentally ill defendant is also a danger to self or others, commitment in a mental health facility will at least provide that individual with appropriate care and treatment. However, the competency process is ill-suited to an incompetent defendant who suffers from a condition that is not a mental illness, has little to no chance of ever improving, and who will likely never attain competence no matter what treatment or therapy is provided.

The current competency statutes force the subject population into a mental health system that has no services to offer them. Some individuals get caught in a loop of competency restoration attempts and repeated competency hearings. Committee members knew of numerous cases in which individuals were caught in this loop longer than the sentence they would have received if convicted of the crime charged. The situation is also untenable for someone like Mr. Snyder, who has been involuntarily – and perhaps indefinitely – committed to Larned. The lines have become blurred. Is the focus now care and treatment, although Larned has no treatment for his developmental disability? Or is the focus competency restoration, although evaluative reports have stated there is no possibility Mr. Snyder will ever be competent to stand trial? Even if Mr. Snyder is a danger to self or others, and his attorney contends he is not, is the state psychiatric hospital an appropriate long-term placement for a person who is not mentally ill?

The Committee agreed these situations are troubling and should be addressed. The Committee agreed the competency statutes do not work well for the subject population and should be amended so that those individuals are provided with an appropriate process rather than one that forces them into a system designed to treat mental illness. SB 333 contains a new procedural scheme for handling competency proceedings for defendants who are incompetent solely because of conditions that cannot be improved through psychiatric treatment in the mental health system. The earlier these defendants can be diverted to the new procedure, the more time and money are saved by discontinuing ineffective detentions and court proceedings, not to mention the fact that the new process will be much more fair to these individuals who are some of our most vulnerable fellow citizens.

During a number of its meetings, the Committee reviewed gaps in community service options for the subject population. The Committee was informed of an effort by providers of community services to these individuals to increase the availability and type of services that would assist this population in avoiding incarceration. The Committee was told that legislation concerning these kinds of services was being drafted for introduction in the 2020 legislative session. The Committee recommends that the legislature consider this and any other reasonable option in order to fill the service gaps.

Advisory Committee Comments on Individual Sections of SB 333

Section 1 – Amending K.S.A. 22-3301, Definitions.

To avoid repeated references to the Care and Treatment Act, the definition section in K.S.A. 22-3301 is amended to state that “likely to cause harm to self or others” and “mentally ill person” have the same meaning as the terms are defined in K.S.A. 59-2946.

Section 2 – Amending K.S.A. 22-3302, Proceedings to determine competency.

K.S.A. 22-3302 governs the initial competency hearing in the district court. The amendment to this section provides that if the court finds by clear and convincing evidence that the defendant is not likely to attain competency within six months and is a mentally ill person solely because of one of the diagnoses excluded under the Care and Treatment Act, the court should skip the competency restoration process in K.S.A. 22-3303 and instead go directly to the new procedure beginning in Section 4 of the bill. The Committee thinks it is unlikely that many trial courts will be able to make that determination at such an early stage, but also agreed there are cases in which the nature of a defendant’s impairment is obvious to all. New subsection (e) allows the court, in the appropriate case, to divert the defendant to the new procedure as early as possible.

Section 3 – Amending K.S.A. 22-3303, Commitment of incompetent defendant; limitation; civil commitment proceedings; regained competency; credit for time committed; victim notification.

The proposed amendments to K.S.A. 22-3303 strike the 2001 amendments and require the court to proceed to the new procedure in Section 4 if the defendant is a mentally ill person solely because of alcohol or chemical substance abuse, antisocial personality disorder, intellectual disability, traumatic or acquired brain injury, organic personality syndrome, or an organic disorder and is not likely to attain competency in the foreseeable future or has not attained competency within six months of the defendant’s original commitment for competency restoration. Again, the intention is to identify the individuals who, for good reason, are treated differently under the Care and Treatment Act and treat them differently in competency proceedings as well.

The proposed amendments also eliminate the legal dilemma that KDADS can encounter under the current statute. Under K.S.A. 22-3303(1) and (2), the court must order KDADS to commence involuntary commitment proceedings under the Care and Treatment Act without regard for the possibility that the defendant may have a condition that precludes involuntary commitment. This dilemma would arise only in a case that did not fall within the 2001 amendments. In 2009 – prior to the name change from SRS to KDADS – the Kansas Supreme Court recognized that a statutory amendment was needed to deal with this legal dilemma. “We begin by describing the path which must be traversed to comport with the statutes governing a defendant’s competency to stand trial, albeit with the knowledge that our journey will dead end at the edge of a precipice which only the legislature can bridge.” After setting out the procedural history of the case, the Court continued: “Thus, we have reached our first statutory dead end. Although K.S.A. 22-3303(1) mandates that the district court order the SRS to commence proceedings to involuntarily commit a defendant who has

been adjudged incompetent to stand trial with no substantial probability of attaining competency in the foreseeable future, SRS cannot legally comply with that order under K.S.A. 59-2945 *et seq.* if the incompetency is due solely to an organic mental disorder, such as traumatic brain injury.” *State v. Johnson*, 289 Kan. 870, Syl. ¶ 6, 218 P.3d 46 (2009) (agreeing with trial court’s finding of no probable cause to believe defendant with traumatic brain injury was mentally ill person subject to involuntary commitment and affirming trial court’s dismissal of the criminal proceedings without prejudice).

Section 4 – NEW.

This section sets forth the first step of the new proceeding proposed by the Committee. At this point in the process, it has already been determined that a defendant is unlikely to attain competence in the foreseeable future and that the incompetence is solely due to a diagnosed condition that renders the defendant ineligible for involuntary commitment under the Care and Treatment Act. The court must first review the charges against the defendant. If the defendant is charged with a misdemeanor or a nonperson felony, the court must dismiss the criminal proceedings without prejudice, and the prosecutor must provide victim notification of the dismissal. If the defendant is charged with a person felony, the court must commit the defendant to the custody of the Secretary of KDADS for an initial evaluation.

Where to draw the line between those defendants whose charges will be dismissed without prejudice at this stage and those who will be referred to KDADS for further evaluation and services is a policy question that the Committee debated. All Committee members agreed that it is pointless and expensive to go down the road of competency restoration attempts with the subject population when the charges are minor. It was argued that there are some nonperson felonies that are fairly serious, but the majority of the Committee agreed that the person/nonperson dividing line is straight-forward and makes sense. The Committee believes this is a reasonable and appropriate way to deal with the subject population when the offenses charged are less serious, because this is where it will end up eventually under current law since these individuals cannot be involuntarily committed under the Care and Treatment Act. This certainty will put an end to repeated and futile attempts at competency restoration.

If the defendant is charged with a person felony, the defendant is committed to the custody of KDADS for an initial evaluation. The lack of explicit direction to KDADS is intentional and allows KDADS to determine the most appropriate place for the defendant. Following this commitment to KDADS custody, the agency must produce to the court within 90 days an evaluation report setting forth whether the defendant is likely to cause harm to self or others and recommendations regarding a placement or plan for the defendant. KDADS must consider the least restrictive setting appropriate to meet the defendant’s needs that is consistent with public safety. If, after a hearing on the report, the court finds by clear and convincing evidence that the defendant is likely to cause harm to self or others, the court’s options for placement are set out. If the court does not make that finding, the court must dismiss the criminal proceeding without prejudice and discharge the defendant. The Committee agrees there is no point in confining a defendant who is not likely to cause harm to self or others and is not competent to stand trial.

Section 5 – NEW.

If a defendant has been found likely to cause harm to self or others and is placed pursuant to Section 4, this section sets out a procedure that can be used to move the defendant to a more or less secure setting based on changes in the defendant’s condition or behavior. The court must hold a hearing on a proposed change in placement, and the section establishes the defendant’s right to present evidence and cross-examine witnesses at the hearing.

Section 6 – NEW.

This section sets forth requirements for conditional release, which is intended to be a mechanism to return a defendant to the community with the appropriate services in place to meet the defendant’s needs and ensure public safety. As with the original placement, which can be modified under Section 5, conditional release conditions can be vacated or increased through the hearing process set forth in this section.

The Judicial Council was made aware that court service officers, who normally supervise probation cases, do not have the specialized training necessary to deal with individuals who have the kinds of conditions and disabilities the subject population have. The Judicial Branch will be proposing an amendment that requires the court to appoint an appropriate individual, other than a court services officer, to monitor a defendant on conditional release. The Judicial Council has no objection to this amendment.

Section 7 – NEW.

The Committee believes the procedures under these statutes for the subject population need to have a time limit. Under this section, the original placement under Section 4 cannot exceed 24 months unless the court determines the defendant remains likely to cause harm to self or others. Under this section the court must, at least annually, review the defendant’s status and placement. This is intended to avoid long-term detention based solely on incompetence. If the defendant cannot attain competency, the defendant’s liberty should not be restricted unless the confinement has been justified by a court finding of likelihood to cause harm to self or others.

Section 8 – NEW.

This section is simply restating tolling language that already existed in K.S.A. 22-3305 so that the tolling provision will now apply to any dismissals in the act, including the ones that have been added in this proposal.

Section 9 – Amending K.S.A. 22-3305, Procedure when defendant not civilly committed or to be discharged; order of discharge; request for hearing on competency; charges dismissed; statute of limitations not to run; victim notification.

The tolling language moved to Section 8 is stricken from K.S.A. 22-3305.

Section 10 – Amending K.S.A. 59-2946, Definitions.

The Committee recommends adding “traumatic or acquired brain injury” to the list of conditions in K.S.A. 59-2946(f)(1) that preclude involuntary commitment under the Care and Treatment Act. The Committee also recommends striking as unnecessary the word “mental” as used in the condition “organic mental disorder.”

COMMITTEE MEMBERSHIP

The members of the Judicial Council Advisory Committee on Commitment of Incompetent Defendants Under K.S.A. 22-3303 are:

Hon. Julie Fletcher Cowell, Chair, District Magistrate Judge; Larned

Dwight Carswell, Assistant Solicitor General; Topeka

Dr. Mike Dixon, Superintendent of Parsons State Hospital and State Hospital Interim Commissioner, Kansas Department For Aging & Disability Services; Parsons

Matt Fletcher, Executive Director, InterHab; Topeka

Lori Hinman, Eligibility Coordinator, CDDO of Southeast Kansas; Columbus

Randall Hodgkinson, Kansas Appellate Defender Office and Visiting Professor at Washburn University School of Law; Topeka

Jean Krahn, Executive Director, Kansas Guardianship Program; Manhattan

Kimberly Lynch, Former Special Counsel, Kansas Department For Aging & Disability Services; Topeka

H. Philip Martin, Practicing Attorney; Larned

Rep. Leonard A. Mastroni, Representative, 117th District; LaCrosse

Doug McNett, Pawnee County Attorney; Larned

Lane Williams, Legal Director, Disability Rights Center of Kansas; Topeka