REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON COMMITMENT OF INCOMPETENT DEFENDANTS UNDER K.S.A. 22-3303

DECEMBER 13, 2019

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 copy of the study request is attached at page 23.

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, 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

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.
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> 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 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, 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 is attached at page 68. The Committee is not aware of any further action taken after the task force reported its recommendations.

METHOD OF STUDY

The Committee held five meetings and one telephone conference during the summer and fall of 2019 to study the topic of commitment of incompetent defendants under K.S.A. 22-3303. A drafting subcommittee also met twice to work on the legislative proposal. The Committee invited Janis DeBoer, Deputy Secretary of the Kansas Department of Aging and Disability Services (KDADS) and Brad Ridley, Commissioner of Financial and Information Services for KDADS, to attend the November 1, 2019 meeting to discuss the Committee's draft and the work KDADS is

doing on improving services for people with developmental disabilities, brain injuries, and other such conditions.

In addition to the study request and the 2001 Task Force Report Concerning Persons Non-Restorable to Competency, copies of which are attached to this report, the Committee reviewed the following materials:

1. Legislative History prepared by Robert Gallimore, Principal Research Analyst for the Kansas Legislative Research Department, regarding the 2001 amendments to K.S.A. 22-3303 (2001 Session Laws Ch. 208, Sec. 8).
2. Kansas statutes relating to competency to stand trial, K.S.A. 22-3301 *et seq.*
3. Pertinent Kansas statutes from the Care and Treatment Act For Mentally Ill Persons, K.S.A. 59-2945 *et seq.*
4. Relevant case law, including: *Jackson v. Indiana*, 406 U.S. 715 (1972); *State v. Johnson*, 289 Kan. 870, 218 P.3d 46 (2009); and *In re Matter of Snyder*, 308 Kan. 626, 422 P.3d 85 (2018).
5. Statutes from a number of states, including: California, Delaware, Illinois, Maine, Maryland, Missouri, Montana, and Washington.

COMMITTEE DISCUSSION

This study was requested by Ronald D. Smith, 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 to conduct this study is comprised of individuals with varying points of view, including 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. The Committee acknowledged the potential for public safety concerns when defendants with certain conditions cannot be involuntarily committed, but would recommend a different approach to address those concerns than was taken in 2001. Although 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, the Committee believes the competency statutes can be amended 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 believes the issue is bigger and more long-standing. 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 this 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 mental 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.

Proposed Statutory Amendments

The Committee has drafted a proposed bill that contains both amendments to current language and new provisions. The Committee agrees the proposed legislation provides a process that better deals with the subject population while also specifically requiring that public safety be taken into account. The draft begins at page 14 of this report. In addition to the substantive amendments drafted by the Committee, the draft includes some renumbering changes recommended by the Office of Revisor of Statutes.

Comments on Individual Sections of Proposed Legislation

Section 1.

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.

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 a few cases in which the nature of a defendant's impairment is obvious to all. The Committee recommends giving the court a way, in the appropriate case, to divert the defendant to the new procedure as early as possible.

Section 3.

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.

This section sets forth the first step of the new proceeding the Committee is proposing. 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.

One Committee member objected to committing to the custody of KDADS all defendants charged with a person felony. This would involve a larger number of defendants than were impacted by the 2001 amendments, which applied only to off-grid and high-level felonies. The Committee considered the member's arguments, but was not persuaded. First, after the initial evaluation, only those defendants found to be likely to cause harm to self or others are subject to commitment. This finding of likelihood must be based on clear and convincing evidence and cannot be presumed based on the nature of the charges against the defendant. Secondly, even under current law, there is no guarantee that a defendant charged with a lower level crime is going to have the charges dismissed within a reasonable time. These are often the cases in which the defendant ends up stuck in a loop of attempted competency restoration for longer than the jail sentence the defendant would have received if tried and convicted. Finally, all defendants in the subject population will be treated more

fairly under the proposed legislation, and those charged with a person felony are given the opportunity to obtain the services and support they need to return to their communities and, hopefully, avoid future intersections with the criminal justice system.

The same Committee member also objected to committing to the custody of KDADS all defendants who are simply charged with a person felony without providing the defendant any opportunity to defend that charge or require the prosecutor to prove that charge to any standard with admissible evidence. The member noted that the proposed amendment will create a significant conflict of interest for criminal defense attorneys who may be forced to choose between (1) raising incompetency to stand trial, possibility resulting in indefinite confinement, even for charges where there is a strong defense and/or for charges that would result in short sentences and (2) allowing clients to go to trial believing that they are incompetent, therefore violating their clients' Due Process rights, but making sure that will at least get a day in court in the criminal case. The Committee understood the point this member was making, but countered that this is true under current law and is not a situation created by the proposed legislation, although, as noted previously, the proposed legislation would affect a larger class of felony offenses. The Committee also pointed out that commitment under the proposed process lasts only as long as there is a finding, based on clear and convincing evidence, that a defendant is likely to cause harm to self or others.

Section 5.

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.

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. Defendants on conditional release will be supervised by district court probation and parole services. 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.

Section 7.

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.

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.

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

Section 10.

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."

CONCLUSION

The Committee unanimously agrees that the current competency statutes do not work well for defendants who are incompetent solely because of conditions that cannot be improved through psychiatric treatment in the mental health system. The Committee has drafted a proposal that constitutes a new procedural scheme for handling competency proceedings involving such defendants. During a number of its meetings, the Committee reviewed gaps in community service options for the subject population. The Committee is aware 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 has been told that legislation concerning these kinds of services will be introduced in the upcoming legislative session. The Committee recommends that the legislature consider this and any other reasonable option in order to fill the service gaps. The Committee has been intentionally nonspecific in its proposal regarding what services should be provided to these defendants and who should provide them. The Committee is hopeful that KDADS will be able to provide the appropriate services these defendants need. It is also very important in improving the process for these defendants to have properly trained evaluators. Most psychologists who conduct competency evaluations do not have the expertise to deal with these defendants' conditions, which are outside the mental health sphere. 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.

COMMITTEE RECOMMENDATION

The Committee recommends that the Judicial Council request introduction of the attached proposed legislation in the 2020 session.

PROPOSED LEGISLATION

Section 1. K.S.A. 22-3301 is hereby amended to read as follows: 22-3301. (a) (1) For the purpose of this article, a person is "incompetent to stand trial" when ~~he~~ such person is charged with a crime and, because of mental illness or defect is unable:

~~(a)~~ (A) To understand the nature and purpose of the proceedings against ~~him~~ such person; or

~~(b)~~ (B) to make or assist in making ~~his~~ such person's defense.

(2) Whenever the words "competent," "competency," "incompetent" and "incompetency" are used without qualification in this article, they shall refer to the defendant's competency or incompetency to stand trial, as defined in ~~subsection (1) of this section~~ paragraph (1).

(b) As used in this article, "likely to cause harm to self or others" and "mentally ill person" mean the same as in K.S.A. 59-2946, and amendments thereto.

Section 2. K.S.A. 22-3302 is hereby amended to read as follows: 22-3302. ~~(1)~~ (a) At any time after the defendant has been charged with a crime and before pronouncement of sentence, the defendant, the defendant's counsel or the prosecuting attorney may request a determination of the defendant's competency to stand trial. If, upon the request of either party or upon the judge's own knowledge and observation, the judge before whom the case is pending finds that there is reason to believe that the defendant is incompetent to stand trial the proceedings shall be suspended and a hearing conducted to determine the competency of the defendant.

~~(2)~~ (b) If the defendant is charged with a felony, the hearing to determine the competency of the defendant shall be conducted by a district judge.

~~(3) (A)~~ (c)(1) The court shall determine the issue of competency and may impanel a jury of six persons to assist in making the determination. The court may order a psychiatric or psychological examination of the defendant. To facilitate the examination, the court may: ~~(a)~~ (A) Commit the defendant to the state security hospital or any appropriate state, county, private institution or facility for examination and report to the court, except that the court shall not commit the defendant to the state security hospital or any other state institution unless, prior to such commitment, the director of a local county or private institution recommends to the court and to the secretary for aging and disability services that examination of the defendant should be performed at a state institution; ~~(b)~~ (B) designate any appropriate psychiatric or psychological clinic, mental health center or other

psychiatric or psychological facility to conduct the examination while the defendant is in jail or on pretrial release; or ~~(c)~~ (C) appoint two qualified licensed physicians or licensed psychologists, or one of each, to examine the defendant and report to the court.

~~(B)~~ (2) If the court commits the defendant to an institution or facility for the examination, the commitment shall be for a period not to exceed 60 days or until the examination is completed, whichever is the shorter period of time. No statement made by the defendant in the course of any examination provided for by this section, whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding.

~~(C)~~ (3) Upon notification of the court that a defendant committed for psychiatric or psychological examination under this subsection has been found competent to stand trial, the court shall order that the defendant be returned no later than seven days after receipt of the notice for proceedings under this section. If the defendant is not returned within that time, the county in which the proceedings will be held shall pay the costs of maintaining the defendant at the institution or facility for the period of time the defendant remains at the institution or facility in excess of the seven-day period.

~~(4)~~ (d) If the defendant is found to be competent, the proceedings which have been suspended shall be resumed. If the proceedings were suspended before or during the preliminary examination, the judge who conducted the competency hearing may conduct a preliminary examination or, if a district magistrate judge was conducting the proceedings prior to the competency hearing, the judge who conducted the competency hearing may order the preliminary examination to be heard by a district magistrate judge.

~~(5)~~ (e) If the defendant is found to be incompetent to stand trial, the court shall proceed in accordance with K.S.A. 22-3303, and amendments thereto, except if the court finds by clear and convincing evidence that the defendant is not likely to attain competency to stand trial within six months and 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, the court shall proceed in accordance with section 4, and amendments thereto.

~~(6)~~ (f) If proceedings are suspended and a hearing to determine the defendant's competency is ordered after the defendant is in jeopardy, the court may either order a recess or declare a mistrial.

~~(7)~~ (g) The defendant shall be present personally at all proceedings under this section.

Section 3. K.S.A. 22-3303 is hereby amended to read as follows: 22-3303. ~~(1)~~ (a) A defendant who is charged with a crime and is found to be incompetent to stand trial shall be committed for evaluation and treatment to any appropriate state, county, private institution or facility. At the time of such commitment the institution of commitment shall notify the county or district attorney of the county in which the criminal proceedings are pending for the purpose of providing victim notification. Any such commitment shall be for a period not to exceed 90 days. Within 90 days after the defendant's commitment to such institution, the chief medical officer of such institution shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If such probability does exist, the court shall order the defendant to remain in an appropriate state, county, private institution or facility until the defendant attains competency to stand trial or for a period of six months from the date of the original commitment, whichever occurs first. If such probability does not exist, the court shall order the secretary for aging and disability services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, except 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, in which case section 4, and amendments thereto, shall apply. ~~When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21-3504, 21-3511, 21-3518, 21-3603 or 21-3719, prior to their repeal, or K.S.A. 21-5505 (b), 21-5506(b), 21-5508(b), 21-5604(b) or 21-5812(b), and amendments thereto, and commitment proceedings have commenced, for such proceeding, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in K.S.A. 59-2946(e), and amendments thereto, who is likely to cause harm to self and others, as defined in K.S.A. 59-2946(f)(3), and amendments thereto. The other provisions of K.S.A. 59-2946(f), and amendments thereto, shall not apply~~.

~~(2)~~ (b) If a defendant who was found to have had a substantial probability of attaining competency to stand trial, as provided in subsection (1), has not attained competency to stand trial within six months from the date of the original commitment, the court shall order the secretary for aging and disability services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, except 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, in which case section 4, and amendments thereto, shall apply. ~~When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21-3504, 21-3511, 21-3518, 21-3603 or 21-3719, prior to their repeal, K.S.A. 21-5505(b), 21-5506(b), 21-5508(b), 21-5604(b) or 21-5812(b), and amendments thereto, and commitment proceedings have commenced, for such proceeding, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in K.S.A. 59-2946(e), and amendments thereto, who is likely to cause harm to self and others, as defined in K.S.A. 59-2946(f)(3), and amendments thereto. The other provisions of K.S.A. 59-2946(f), and amendments thereto, shall not apply.~~

~~(3)~~ (c) When reasonable grounds exist to believe that a defendant who has been adjudged incompetent to stand trial is competent, the court in which the criminal case is pending shall conduct a hearing in accordance with K.S.A. 22-3302, and amendments thereto, to determine the person's present mental condition. Such court shall give reasonable notice of such hearings to the prosecuting attorney, the defendant and the defendant's attorney of record, if any. The prosecuting attorney shall provide victim notification. If the court, following such hearing, finds the defendant to be competent, the proceedings pending against the defendant shall be resumed.

~~(4)~~ (d) A defendant committed to a public institution under the provisions of this section who is thereafter sentenced for the crime charged at the time of commitment may be credited with all or any part of the time during which the defendant was committed and confined in such public institution.

New Section 4. (Committee wants to see these new sections in the same location as current procedure and requests that they be numbered sequentially if possible.)

(a) If the defendant is found incompetent to stand trial and the court is required to proceed under this section, the court shall review the nature of the charges. If the defendant is charged with a misdemeanor offense or nonperson felony offense, the court shall dismiss the criminal proceedings without prejudice and the county or district attorney shall provide victim notification. If the defendant is charged with a person felony offense, the court shall commit the defendant to the custody of the secretary for aging and disability services.

(b) Within 90 days after the defendant's commitment to the secretary for aging and disability services under subsection (a), the secretary shall send to the court a written evaluation report. The report to the court must contain an opinion as to: (1) whether the defendant is likely to cause harm to self or others; and (2) recommendations of a placement, program, or community service plan involving the least restrictive setting appropriate to meet the needs of the defendant and consistent with public safety. Upon receipt of the report, the court shall set a hearing on the secretary's report. The hearing shall be held within 30 days after the court receives the report.

(c) If the court finds by clear and convincing evidence that the defendant is likely to cause harm to self or others, the court shall order the least restrictive placement or conditions possible as necessary to protect the public, which may include:

(1) placing the defendant on conditional release in accordance with section 6, and amendments thereto; or

(2) committing the defendant to the state security hospital or another appropriate secure facility for treatment and safekeeping.

(d) If the court does not find that the defendant is likely to cause harm to self or others, the court shall dismiss the criminal proceeding without prejudice and discharge the defendant. The county or district attorney shall provide victim notification regarding the outcome of the hearing.

(e) This section shall be part of and supplemental to article 33 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.

New Section 5. (a) Whenever it appears to the secretary for aging and disability services or the secretary's designee that a defendant placed pursuant to section 4(c) is not likely to cause harm to self or others in a less restrictive environment, the secretary or secretary's designee may request that the district court order placement in a less secure setting, or discharge the defendant. Whenever it appears to the secretary for aging and disability services or the secretary's designee that a more restrictive setting is necessary, the secretary or secretary's designee may request that the district court order placement in a more secure setting.

(b) Before a change in placement, conditional release, or discharge of a defendant pursuant to subsection (a), the secretary or secretary's designee shall submit a report to the court that includes:

(1) a description of the defendant's current course of treatment;

(2) a current assessment of the defendant's mental status or condition;

(3) recommendations for future treatment, if any; and

(4) recommendations regarding the requested change in placement, conditional release, or discharge.

(c) Upon receiving the report from the secretary or secretary's designee, the district court shall order that a hearing be held on the proposed change in placement, conditional release, or discharge. The court shall give notice of the hearing to the facility in which the defendant is placed, to the district or county attorney, and to the defendant or the defendant's attorney. The county or district attorney shall provide victim notification regarding the hearing. The court may order the defendant to undergo an evaluation by a person designated by the court. If the court orders an evaluation, copies of the report shall be given to the district or county attorney and to the defendant or the defendant's attorney at least seven days prior to the hearing.

(d) At the hearing, the court shall receive all relevant evidence, including the written findings and recommendations of the secretary or secretary's designee, and shall determine whether the defendant's placement shall be changed to a more or less restrictive setting or whether the defendant shall be conditionally released pursuant to section 6, and amendments thereto, or discharged pursuant to section 7, and amendments thereto. The defendant shall have the right to present evidence at the hearing and to cross-examine any witnesses called by the district or county attorney. The county or district attorney shall notify any victims of the outcome of the hearing.

New Section 6. (a) If the court orders conditional release, the court may order the defendant be placed in an appropriate facility or community services program. A defendant on conditional release shall be supervised by the district court probation and parole services. The court may set conditions to the release to ensure the defendant's well-being and the public's safety.

(b) In order to ensure the safety and welfare of a defendant who is to be conditionally released and the citizenry of the state, the court may allow the defendant to remain in custody at a facility under the supervision of the secretary for aging and disability services for a period of time not to exceed 45 days in order to permit sufficient time for the secretary to prepare recommendations to the court for a suitable reentry program for the defendant and allow adequate time for the county or district attorney to provide victim notification. The reentry program shall be specifically designed to facilitate the return of the defendant to the community as a functioning, self-supporting citizen,

and may include appropriate supportive provisions for assistance in establishing residency, securing gainful employment, undergoing needed vocational rehabilitation, receiving marital and family counseling, and any other outpatient services that appear beneficial.

(c) At any time during the conditional release period, a conditionally released defendant, through the defendant's attorney, or the county or district attorney may file a motion for modification of the conditions of release, and the court shall hold an evidentiary hearing on the motion within 14 days of its filing. The court shall give notice of the time for the hearing to the defendant or the defendant's attorney, and the county or district attorney. If the court finds from the evidence presented at the hearing that the conditional provisions of release should be modified or vacated, the court shall so order.

(d) If at any time during the conditional release, the court is informed that the defendant is not satisfactorily complying with the provisions of the conditional release, the court, after a hearing for which notice has been given to the county or district attorney and the defendant or the defendant's attorney, may make orders:

(1) for additional conditions of release; or

(2) ordering that the defendant be placed in a more restrictive setting.

(e) This section shall be part of and supplemental to article 33 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.

New Section 7. (a) Placement under section 4(c), and amendments thereto, shall not exceed 24 months unless the court determines that the defendant remains likely to cause harm to self or others.

(b) At least annually, or more frequently as the court deems appropriate, the court shall conduct a hearing to review the status and placement of the defendant. A hearing under section 5 or 6, and amendments thereto, shall satisfy this requirement. The court may order that the defendant undergo an evaluation by a person designated by the court. If the court orders an evaluation, copies of the report shall be given to the district or county attorney and to the defendant or the defendant's attorney at least seven days prior to the hearing. If the court determines that the defendant remains likely to cause harm to self or others, the court shall determine whether the defendant's current placement and conditions remain the least restrictive as necessary to protect the public. The court

may order such changes in placement and conditions as are in the defendant's best interests and consistent with public safety.

(c) If at any time the court finds that the defendant is no longer a mentally ill person or is no longer likely to cause harm to self or others, the court shall dismiss the criminal case without prejudice unless the court determines that the defendant has attained competency. The county or district attorney shall provide victim notification. Before dismissal, the court may order the defendant to undergo an evaluation to determine whether the defendant has attained competency.

(d) This section shall be part of and supplemental to article 33 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.

New Section 8. (a) When a criminal case is dismissed without prejudice under this article, the period of limitation for the prosecution for the crime charged shall not continue to run until the defendant has been determined to have attained competency in accordance with K.S.A. 22-3302, and amendments thereto.

(b) This section shall be part of and supplemental to article 33 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.

Section 9. K.S.A. 22-3305 is hereby amended to read as follows: 22-3305. ~~(1)~~ (a) Whenever involuntary commitment proceedings have been commenced by the secretary for aging and disability services as required by K.S.A. 22-3303, and amendments thereto, and the defendant is not committed to a treatment facility as a patient, the defendant shall remain in the institution where committed pursuant to K.S.A. 22-3303, and amendments thereto. The secretary for aging and disability services shall promptly notify the court and the county or district attorney of the county in which the criminal proceedings are pending for the purpose of providing victim notification, of the result of the involuntary commitment proceeding.

~~(2)~~ (b) Whenever involuntary commitment proceedings have been commenced by the secretary for aging and disability services as required by K.S.A. 22-3303, and amendments thereto, and the defendant is committed to a treatment facility as a patient but thereafter is to be discharged pursuant to the care and treatment act for mentally ill persons, the defendant shall remain in the institution where committed pursuant to K.S.A. 22-3303, and amendments thereto, and the head of the treatment facility shall promptly notify the court and the county or district attorney of the county in which the criminal proceedings are pending for the purpose of providing victim notification, that the defendant is to be discharged.

(c) When giving notification to the court and the county or district attorney pursuant to ~~subsection (1) or (2)~~ this section, the treatment facility shall include in such notification an opinion from the head of the treatment facility as to whether or not the defendant is now competent to stand trial. Upon request of the county or district attorney, the court may set a hearing on the issue of whether or not the defendant has been restored to competency. If such hearing request is granted, the county or district attorney shall provide victim notification regarding the hearing date. If no such request is made within 14 days after receipt of notice pursuant to ~~subsection (1) or (2)~~ this section, the court shall order the defendant to be discharged from commitment and shall dismiss without prejudice the charges against the defendant~~, and the period of limitation for the prosecution for the crime charged shall not continue to run until the defendant has been determined to have attained competency in accordance with K.S.A. 22-3302, and amendments thereto~~. The county or district attorney shall provide victim notification regarding the discharge order.

Section 10. K.S.A. 59-2946 is hereby amended to read as follows:

. . .

(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; traumatic or acquired brain injury; organic personality syndrome; or an organic ~~mental~~ disorder.

. . .

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September 7, 2018

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Executive Director
Kansas Judicial Council
301 SE 10th Avenue, Ste 140
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RE: KSA 22-3303, 59-2946(e), 59-2946(f)(1)-(3) and 59-2966(a)

Dear Nancy:

Per your email request of August 30th, I am responding with a letter outlining a proposal for the Judicial Council probate subcommittee to review.

I have enclosed a 19 page "brief" and a recent case, *in re Matter of Clay Snyder.* It outlines the constitutional issues that I am going to raise once more with regard to the young man named Clay Snyder who is our client. However, the larger issue within these pages are the statutes dealing with competency to stand trial and then involuntary commitment to the mental health system if a district judge decides that a defendant is incompetent to stand trial and not likely to be competent any time in the future. Every six months the patient has a statutory right of a review hearing, and at that time for those like Mr. Snyder charged with an off-grid felony, even though he is developmentally disabled, he is not considered mentally ill in the medical literature, but also, he is found to be "dangerous to himself or other people" merely by having allegedly committed an off-grid felony. For the courts to make a statutory dangerousness finding when someone is not proven to be physically dangerous to others is what I call an anti-Galilean delusion that the earth remains flat. The reasoning in the Court of Appeals case is also attached as *in re the matter of Clay Snyder.*

You will note in the opinion that the judges have not ruled out reviewing these issues with regard to Section One of the Kansas Constitution's Bill of Rights, but with regard to the current statutes, they fell back on predictable use of the federal Bill of Rights and declared that under an equal protection analysis the state can do anything they want. We need to review these statutes that allow the developmentally disabled to be placed in Larned State Hospital as a "mentally ill" person when, in fact, medically they are not mentally ill. These statutes have a tendency to also scoop up the traumatic brain injury people who are at Larned State Hospital for competency issues as well but who commit sex crimes. See the two cases: *in re Kukovich* and *State v Johnson,* both attached.

It would be my request that the Judicial Council subcommittee look at requiring that when the developmentally disabled are incompetent to stand trial and sent into the mental health system in Larned State Hospital that the Pawnee and Miami County judges have authority to transfer them to Parsons State Hospital where they can get treatment for their developmental disability. The developmentally disabled need to be placed where they can get treatment, such as at Parsons, or in the new 2014 CDDO community based developmentally disabled organizations. Certainly, there ought to be one that can handle someone like Mr. Snyder who is not dangerous to other people. Every involuntary mentally ill or developmentally disabled patient has a right to treatment. Where they go should be based upon a judge assessing actual dangerousness to self or others that the judge would make.

If you have questions on these documents or my outline of the problem, please let me know, and I will try to make it bit more clear. Not having requested one of these studies before, I am at a bit of a loss to advise you further, and I would rather answer questions than try to anticipate your questions.

Very truly yours,

Smith, Burnett & Hagerman, LLC

Ronald D. Smith

RDS/js

Enclosures

THE CONSTITUTIONAL ARGUMENT
OPPOSING FURTHER INDEFINITE PREVENTIVE DETENTION
OF CLAY ROBERT SNYDER.

Pawnee County District Court

Nature of This Brief

Many believe state governments, their court systems, and their constitutional law underpinnings were a creation of either the federal constitution adopted in 1787 or the 1791 adoption of the first ten amendments. The opposite is true. Colonial Declarations of Rights of the thirteen colonies were the primary origin and model for the provisions set forth in the federal bill of rights [1] The 10th Amendment to the U. S. Constitution acknowledges this fact, reserving to the states all powers not granted to the federal government.

Each state coming into the Union was to have a constitution setting forth the basic political and government compact with its citizens. In 1861, Kansas came into the Union with the first state constitution created by its citizens at a constitutional convention, not in the backrooms and halls of Congress. Our lawmakers and judges of the time saw State constitutions as contracts with the people – not with the federal government. The state Courts were to be just as committed to justice as the federal government and its courts. The Kansas legislature recently stated in a preamble to an environmental law the broad authority given to the states regarding their own laws under the state constitution:

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[1] Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution,* 24 Rutgers L.J. 911, 911 (1993).

> "The tenth amendment to the constitution of the United States guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Kansas certain powers as they were understood at the time that Kansas was admitted to statehood in 1861. The guaranty of those powers is a matter of contract between the state and people of Kansas and the United States as of the time that the compact with the United States was agreed upon and adopted by Kansas in 1859 and the United States in 1861." Kan. Stat. Ann. § 32-1072 (West) (2014)

BASIC FACTS

Clay Snyder has been dually committed involuntarily to the state mental health hospital at Larned since March 21, 2017. Mr. Snyder was found to be incompetent to stand trial and the Saline County district judge ordered him committed under KSA 22-3303. For five years prior to this March 2017 hearing, Snyder was intermittently sent to LSH for competency hearings.

Snyder appealed the first commitment order. The appeal was elevated to the Supreme Court and combined for arguments with a habeus corpus appeal filed by Snyder's Saline County defense counsel. The Kansas Supreme Court was asked to construe federal constitutional provisions to show the various statutes confining Mr. Snyder were unconstitutional as applied to the developmentally disabled who were not also mentally ill. Oral arguments were January 28, 2018. The appeal was rejected by the Court. *The Matter of Snyder*, 117,512, 2018 WL 3599273, at *1–3 (Kan. July 27, 2018) (hereafter Snyder C&T).[2]

There have been other hospital reports since March 2017. He is entitled to review hearings now every six months. His status as "mentally ill" and "dangerous to others"

[2] Another Snyder case handed down the same day is nicknamed *Snyder Habeus Corpus* as it dealt with Snyder's habeus corpus appeal.)

has been subject to evaluation five times by LSH professionals.[3] Most recently, a sixth report became a hospital report based on the "Forensic Evaluation Report" by Dr. Lindsay Dees of Johnson County.[4]

Mr. Snyder's placement in Larned State Hospital is based on charges in 2012 with an off-grid felony, triggering a lengthy cycle of fourteen competency evaluations, Saline County judicial findings, and efforts at LSH to restore competency. Saline County Judge Jared Johnson found that Snyder was not only incompetent to stand trial but unlikely ever to gain competency because of his *mental retardation brought on by a birth defect.* (*Snyder C&T*, R. III, 31; R II, Exh. B, 3-4) Our Supreme Court agreed that restoration efforts on Snyder "have proven unsuccessful." *Matter of Snyder C&T*, 422 P.3d 85.

Since March 2017, Mr. Snyder remains in what can best be described as an indefinite preventive detention system. Mr. Snyder regularly works at the hospital greenhouse under the informal supervision of escorts and other hospital staff. He is not subject to handcuffs and belly-chains. He walks to and from the greenhouse. There have been no behavioral problems. *If he had misbehaved after months of good behavior, the report to the Court would prominently display reference to the notes.* There are none. The need for a "structured environment," routinely cited in past and current hospital reports, is available elsewhere within KDADS system.[5]

Current Report. For a sixth time a review hearing is scheduled for September 10, 2018. The basis of this review hearing is different. The Hospital report is based on a

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[3] The six hospital reports are e-filed with the Snyder district court file on March 14, 2017, June 7, 2017, September 6, 2017, December 28, 2017, February 16, 2018 and June 18, 2018.
[4] June 18th hospital report.
[5] The June 18, 2018 hospital report states Ms. Vonderchek's concern that "Mr. Snyder may not have adequate support or positive influences in the community."

"Forensic Evaluation Report" by Dr. Lindsay Dees. Her report resubmitted June 18, 2018 states that Mr. Snyder was referred to her for "evaluation to determine his sexual dangerousness and risk level." This is not care and treatment of the mentally ill. Debra Vondrachek, PhD, wrote the hospital report relying mainly on input from Dees' report. *A sexual dangerousness examination is not routinely made on LSH patients even those referred on a 59-*3303 dual commitment. This indicates the reason for holding Mr. Snyder is something other than current treatment and competency restoration.

A layperson looking at Dees' report would conclude, as she did, that Mr. Snyder is no more likely to reoffend than the average person. Ms. Vondrachek draws a conclusion that Ms. Dees' report means Mr. Snyder is dangerous to others. *Report from LSH Doc., e-filed 6-18-18.*

Where is the statutory or psychiatric authority in the care and treatment of Clay Snyder for <u>this</u> type of forensic evaluation at a Mental hospital? Nowhere in KSA 22-3305 or any other statute in Article 33 is there authorization for a determination of a patient's "sexual dangerousness and risk level." Such tests are not routinely administered at Larned State Hospital even on other patients in the system for restoring competency for an underlying sex crime.

KDADS is acting like a corrections department, and engaging in preventive detention which has no foundation in law. KDADS is not the Department of Corrections. A mental hospital is for healing mental illness, not long-term detention.[6] Statutes governing KDADS incarceration need to be weighed as a suspect classification against

[6] The Sexually Violent Predator program is an exception but the treatment for the SVP is for a "mental abnormality" within hardened criminals most of who have served prison time, not someone seeking restoration of competency to stand trial.

the newer state constitutional jurisprudence with heightened scrutiny standards because of the constitutional right of self-determination under § 1 of the Kansas Bill of Rights. The preventive detention here is based on statutory subjectivity, an artificial means of indefinite incarceration contrary to, and the ignoring of, the liberty interest in § 1 of the Kansas Bill of Rights.

Snyder now argues the nature of his confinement at Larned State Hospital has changed from that of a Care and Treatment patient with no means of working his way towards exit from this dual commitment program under KSA 22-3303. He receives no mental health treatment. He takes no psychotropic drugs. The nature of Kansas statutes involving the developmentally disabled who are incompetent to stand trial now creates for Mr. Snyder an **indefinite preventive detention system**. He is functionally an inmate of a state institution.

STANDARD OF REVIEW

Statutes have three levels of equal protection analysis: a rational basis test, a heightened scrutiny test, or strict scrutiny. In *Snyder C&T,* the Kansas Supreme Court adopted the rational basis test for review of the equal protection argument. Based primarily on the federal case law, the Supreme Court did not review the Kansas Bill of Rights § 1 argument for the aforementioned reason.

Upon review, and based on the five subsequent hospital reports, Snyder now can logically argue his classification as incompetent to stand trial that makes him a danger to others *solely* on an arbitrary legislative definition is a suspect classification contrary to the liberty and self-determination protections afforded in the state constitution. He

cannot do anything to make his physical intellect achieve competency and thus will spend an indefinite period in a mental hospital, possibly more than he would spend in prison if convicted for the crime. He stays without meaningful treatment for his developmental disability. The hospital has consistently stated in its reports that Mr. Snyder is not aggressive verbally or physically, can follow limited instructions and is capable of functioning within a structured environment. The statutory definition limits his future and thwarts his constitutional right of self-determination without a direct reason for the discrimination, and makes him part of a suspect class.

The U.S. Supreme Court, based on federal constitutional arguments only, has declined to define the mentally retarded as a suspect class. *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Cleburne*, the *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366, 121 S. Ct. 955, 963, 148 L. Ed. 2d 866 (2001). However, federal law does NOT preclude the state from providing rights by analyzing state laws affecting the DD patient or shows them to be a suspect class. A state is permitted to expand or broaden the constitutional rights of its citizens beyond federal guarantees if the state does not deny restrict, narrow, or interfere with federally guaranteed constitutional rights. *State v. Lawson*, 297 P.3d 1164, 1172 (Kan. 2013).

ANALYSIS OF § 1 OF THE KANSAS BILL OF RIGHTS

The constitution is like a warm coat in winter, into which every citizen is entitled to shelter from the cold indifference of government.[7] When the federal constitution, for various reasons of indifference, did not protect Kansans lives and liberty in a new territory in the late 1850s, Kansans created their own state constitution provisions. Mr. Snyder's situation must be reviewed in light of § 1 of the Kansas Bill of Rights, how it was crafted, why it was crafted, and the heightened scrutiny standard. As Judge Atcheson eloquently states in his concurring opinion in *Hodes and Nauser, MDs v. Derek Schmidt,* 52 Kan.App.2d 274, 295-296 (2016),

> "In July 1859, delegates gathered to draft a constitution that would govern the Kansas Territory upon its recognition as a state. The 35 Republicans and 17 Democrats labored under the watchful eyes of a nation then driven by fierce debate over what we now know as undebatable—the illegitimacy of slavery and the role of government in *denying an inherent right of self-determination to an entire race*. That nation, too, had begun to brace for a cataclysmic resolution of the debate [the American Civil War].
>
> In that unparalleled time, the new Republican Party and its prominent exponents, among them a lawyer from Illinois named Abraham Lincoln, aligned with the abolitionist cause. They had taken up words from the Declaration of Independence as a rallying cry: "[A]ll men are created equal ... endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." *The delegates to the Wyandotte Convention deliberately drew from those words to fashion the first section of the Kansas Constitution's Bill of Rights: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."* Today, more than 150 years removed from that time and place, we have had thrust upon us the task of applying § 1 of the Kansas Constitution Bill of Rights in a modern world to another aspect of self-determination more particularly associated with gender. It is not a task I would have sought out. Nor is it one for which we have much in the way of incisive guidance from our judicial predecessors." (emphasis added) *Hodes*, 52 Kan.App.2d at 295-296 (2016)

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[7] Louis Nowra, "Indifference Has Robbed Generations of Our History," The *Sydney Morning Herald*, December 27, 2008, discussing the historical plight of Australian aborigines.

As Judge Atcheson points out, the appellant doctors in *Hodes* relied on the Kansas Bill of Rights solely as protection against statutes restricting their medical activities. He continues in his analysis of § 1 by reviewing the importance of the era:

> "The intersection of Lincoln, the Declaration of Independence, and the Kansas Constitution is no accident of history. That intersection, amidst the bitter fight over slavery, imparts meaning to the Kansas Constitution and, in particular, § 1 of the [Kansas] Bill of Rights. *Hodes*, 52 Kan.App.2d at 298 (2016)

Mr. Snyder argues Bleeding Kansas, the 1859 Constitutional process, and exceptional provisions of the Kansas Bill of Rights gives *unique* authority and meaning to those rights. As Justice Oliver Wendell Holmes Jr. famously notes, "a page of history [is] worth a volume of logic". *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L. Ed. 963 (1921)

Background. Section 1 of the Kansas Bill of Rights was adopted in July 1859 at the Wyandotte Constitutional Convention. *Proceedings and Debates of the Kansas Constitutional Convention,* Convened in Wyandotte County, July 5, 1859, pp. 283, 285, 678-679. It states:

> "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

The state constitution is our paramount law. These words placed in the Kansas Bill of Rights restrain government from acting to limit rights set forth in the Bill of Rights. The language on liberty and the social contract that was natural law was not placed in the constitution's preamble. Preambles being aspirational, preambles are not a constitutional restraint on government. *State ex rel. Arn v. Consumers Co-op. Ass'n*, 183 P.2d 423, 439 (Kan. 1947) ("The preamble is not an essential part of [a statute], and cannot confer or enlarge powers. Express provisions in the body of the act cannot be controlled or

restrained by the preamble.")

However, §1 of the Kansas Bill of Rights is law that is unique in the country, and because it is part of an organic document it carries procedural due process constraints on government. We cannot just gloss over it. Judge Atcheson opined as to the importance of *placement* of §1 into the state constitution it becomes as a "rule of government":

> "Natural law exists outside the constructs of government. Courts, as creatures of the government, are empowered to construe and apply the *rules of the government as expressed in an organic document*, legislative enactments, and judicial precedent. They have no license to reach beyond those rules to decide the matters before them. *Section 1, however, constitutionalizes a segment of natural law defining self-determination*, thereby bringing that set of rights *within the rules of government and the body of law the Kansas courts may draw upon in settling legal disputes." Hodes,* 368 P.3d at 690

Mr. Snyder contends that § 1 of the Kansas Bill of Rights creates a *constitutional right of self-determination*, which prohibits statutes with anti-liberty practices being used to warehouse the developmentally disabled absent a conviction of crime or a personal aggressiveness that makes him an *actual* (as opposed to theoretical) danger to themselves or others. The current statutory scheme renders Mr. Snyder a danger to others solely because of an *arbitrary statutory definition of dangerousness* tied to the crime with which he is charged. That violates his liberty rights under §1 of the Kansas Bill of Rights.

Involuntary commitment under 22-3303 assumes the Mentally Ill patient can achieve competency with treatment. Treatment usually includes psychoanalysis, competency restoration classes, psychotropic drugs for certain overt signs of mental illness and counseling. No such treatment is available for the 22-3303 detainee like Clay Snyder who is developmentally disabled but not mentally ill. They came into the system under the same laws. The DD and the MI are housed at Larned State Hospital under the

same statutory commitment process. The lack of an exit system for the DD patient makes these statutes discriminatory.

There are constitutional arguments against such warehousing. However, in Snyder's previous appeal the Kansas Supreme Court indicated the Court will not consider a constitutional argument that was not presented first to the district court. Snyder C&T, at *9–10 (Kan. July 27, 2018). Section § 1 of the Kansas Bill of Rights creates unique civil liberty rights for Kansas constitutional analysis and is of paramount importance for development of an independent Kansas constitutional jurisprudence. No language like § 1 exists in any other state constitution. This brief complies with Supreme Court Rule 6.02(a)(5).

History gives us other examples of the uniqueness of our State constitution. The 1857 pro-slavery Lecompton Constitution, which was copied from the Missouri slave code included a "life, liberty and pursuit of happiness" clause in its *preamble* but not in constitutional language itself where abolitionists could have argued it secures freedom for runaway slaves who get to Kansas. "The difference [in placement in the document], especially with the importance those words bore for the Republicans, is compelling." Judge Atcheson, concurring, *Hodes,* 368 P.3d at 689.

Further, the 1859 Constitution's reliance on § 1 of the Kansas Bill of Rights came two years after the infamous *Dred Scott v Sandford*, 19 How. 393, 60 U.S. 393, 15 L.Ed 691 (March 6, 1857) Chief Justice Taney wrote that "slaves" were property and "incapable of bring suit" in a federal court. *Scott,* 60 U.S. at 453. Subsequent courts have called *Dred Scott* "the most judicially and morally reprehensible [opinion] ever

issued by the Court." H*odes* 368 P.3d at 682. Judge Robert H. Bork wryly noted in 1990, "There was something wrong with a judicial decision that took a civil war to overturn." [8]

Further, the 1856 Republican national platform read, in part,

> "*Resolved,* That Kansas should be immediately admitted as a state of the Union with her present free constitution, as at once the most effectual way of securing to her citizens the enjoyment of the rights and privileges to which they are entitled, and of ending the civil strife now raging in her territory."[9]
> http://www.wwnorton.com/college/history/archive/resources/documents/ch16_03.htm *(August 7, 2018)*

Dred Scott in 1857 basically ruled the 1856 national Republican party platform calling for freedom for slaves in the Territories was a lawless and unenforceable document and its proponents were seditionists. If it was morally and religiously a sin to hold men in bondage and the country's highest court perpetuated that immorality, is it any wonder Kansans and many Americans wondered in 1859 if the U. S. Constitution was worth defending? They certainly did not draw on the U.S. Constitution for language in the Kansas Bill of Rights.

Even so, there are historical headwinds to developing a state constitutional jurisprudence. Judge Leben is part of those headwinds, writing the main opinion in *Hodes* states

> "[F]or nearly a century that sections 1 and 2 of the Kansas Constitution Bill of Rights have much the same effect" as the Due Process and Equal Protection Clauses of the United States Constitution. *Hodes,* 52

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[8] Bork, *The Tempting of America; the Political Seduction of the Law,* New York Free Press (1990), p. 34.
[9] The Republicans in Kansas had an anti-slavery constitution in 1856 but the U. S. Senate would not ratify it, preferring instead the proslavery constitution in Lecompton.

> Kan.App.2d at 295-296 (2016), citing, among others, *State v. Limon,* 280 Kan. 275, 283, 122 P.3d 22 (2005); *State ex rel. Stephan v. Parrish,* 257 Kan. 294, Syl. ¶ 5, 891 P.2d 445 (1995); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority,* 230 Kan. 404, 426, 636 P.2d 760 (1981); *Manzanares v. Bell,* 214 Kan. 589, 602, 522 P.2d 1291 (1974). And while the Kansas Supreme Court has the freedom to extend greater protection to Kansas citizens under the Kansas Constitution than exists under comparable provisions of the federal Constitution, we generally have not done so. See *State v. Spain,* 269 Kan. 54, 59, 4 P.3d 621 (2000); *Murphy v. Nelson,* 260 Kan. 589, 597, 921 P.2d 1225 (1996); *State v. Morris,* 255 Kan. 964, 981, 880 P.2d 1244 (1994); *Schultz,* 252 Kan. at 826, 850 P.2d 818. *State v. Petersen-Beard*, 377 P.3d 1127, 1141 (Kan. 2016), *cert. denied,* 137 S. Ct. 226, 196 L. Ed. 2d 175 (2016),

The 1859 framers of our constitution, if reawakened today, would argue vociferously that Judge Leben is wrong. Frustration with federal meddling in Kansas politics left Free State radicals like John Brown and James H. Lane, to advocate a shooting war with the federal government to push onto the national stage the bloody business necessary to rid our society of evils of slavery. When moderates carried the day and avoided war, John Brown pushed that advocacy to Harpers Ferry, Virginia, in 1859, to begin a slave uprising, which failed. [10]

Given history, the District Court cannot gloss over the times in which how our constitution was crafted:

1. Before the civil war, Kansas was a territory and the federal constitution tolerated slavery.
2. The entire pre-civil war practice of allowing pairs of states into the Union – one free state and one slave state to keep the balance equal – was meant to preserve the Union only by preserving slavery.
3. The fugitive slave act in 1850 required federal and law enforcement officials in border states to assist slave-catchers from the South in

[10] Smith, Ronald, "*Thomas Ewing Jr.; Frontier Lawyer and Civil War General,*" University of Missouri Press; (2008), p. 44.

apprehending runaway slaves. Northern officials found this "law" abhorrent, and often arrested slave-catchers for kidnapping. Smith, "*Thomas Ewing Jr.; ibid,* pp 89-90.

4. When Kansas was a territory, their entry into the Union was predicated on adopting a constitution by a "free and fair" statewide vote. Proslavery men sent ruffians into Kansas to harass and even kill numerically superior Free State men in 1857 and 1858. Kansans had to physically fight off political interference by Missourians.
5. Federal cavalry at Fort Leavenworth were ordered by the Buchanan Administration to break up Free State political rallies.
6. By July 1859, when delegates met in Wyandotte County for a convention, Kansans had suffered through a half dozen fraudulent elections and did not trust Buchanan's administration or his cabinet, three of whom were later generals in the Confederate army. Smith, *A Kansas Lawyer Who Kept Kansas A Free State And Saved Lincoln's Presidency,* 81-DEC J. Kan. B.A. 30 (2012).

In 1859 the federal government was the *cause* of Kansas' misery and it was the federal government that usurped liberty, not only for runaway slaves in Kansas but also free whites. *The Kansas Judiciary can hold the constitution of 1859 was no greater in importance to Kansans than existing federal constitutional provisions only by ignoring our history! Kansans wanted more liberty in their state, not less.* Slavic allegiance to the federal constitution was, in 1859, unpopular.

Since 1859, the U. S. Constitution has not repealed the Kansas constitution of 1859. It is up to Kansas judges, endowed with a sense of history and the ability to read plain language, to uphold our state constitutional provisions.

Liberty is not hard to define. That Liberty should be a paramount part of self-determination to our citizens is both logical and an inalienable natural right, unless *convicted* of a crime. Of course, no one has a right of liberty to engage in dangerousness if they truly are physically assaultive of others. In his lengthy concurring opinion in

Hodes, Judge Atcheson states why prior case law equating § 1 of the Kansas Bill of Rights with federal 5th and 14th amendment provisions do not survive close scrutiny:

> "Some [Kansas] decisions describing § 1 and § 2 as akin to the due process and equal protection rights in the Fourteenth Amendment decide the disputed issues solely on equal protection grounds and, thus, do little more than mention due process. See, *e.g., Tri–State Hotel Co. v. Londerholm,* 195 Kan. 748, 759–61, 408 P.2d 877 (1965). Other decisions simply find no basis for relief in § 1 given the facts and, therefore, do not define the nature or scope of its protections. In *State v. Wilson,* 101 Kan. 789, 168 P. 679 (1917), (the court found statutory limits on the distribution and redemption of trading stamps implicated no fundamental rights protected in § 1 however the provision might be construed.) More recently in *Manzanares v. Bell,* 214 Kan. 589, 522 P.2d 1291 (1974), the court upheld compulsory no-fault auto insurance, rejecting a claim the statutory scheme impaired § 1 rights. The *Manzanares* decision can be read either to tacitly say § 1 and § 2 provide due process protections or to simply assume as much in rejecting plaintiffs' arguments. 214 Kan. at 608–09, 522 P.2d 1291. The negative conclusions in *Wilson* and *Manzanares* serve as examples of what § 1 does not protect and offer little to establish what § 1 does protect." *52 Kan.*App.2d at 319-321

What Judge Atcheson believes § 1 **does** protect is the following:

> "The "liberty" in § 1, however, is simply an example of a natural right. It does not absorb implicit constitutional rights and make them natural rights protected in § 1. In other words, *the liberty of § 1 is simply one expression of self-determination,* just as reproductive freedom is another. By contrast, the liberty of the Fourteenth Amendment's Due Process Clause is a repository for otherwise unexpressed federal constitutional rights. Those implicit rights are not natural rights. So the liberty of § 1 is neither the legal equivalent of nor interchangeable with the liberty of the Due Process Clause. *The protections of § 1 would exist as they are now even if there were no federal substantive due process.* In turn, federal law governing substantive due process, including privacy and abortion, has no particular application in construing [Kansas] § 1 either directly or by analogy." *Judge Atcheson concurring, Hodes, 52 Kan.*App.2d at 320-321 (emphasis added)

This writer draws no conclusion whether the §1 right of self-determination applies to medical professionals and statutes regulating reproductive freedom. Section 1 of the Kansas Bill of Rights has far wider reach than just that issue. We must recognize our §1

provision is independent of federal interpretation. *State v. Schultz,* 252 Kan. 819, 824, 850 P.2d 818 (1993); *State v. Lawson*, 297 P.3d 1164, 1172 (Kan. 2013)11

If we are to give life to the Kansas Bill of Rights we must breathe life into it. Judge Atcheson's lengthy discussion supports this view. Because of its location in the bill of rights, § 1 *must* mean something more than "glittering generalities."12 The liberty provision of § 1 provides rights that can be construed as being greater than federal rights. And because of its position in the Kansas Bill of Rights it can be used to resolve legal disputes. The three great natural rights of life, liberty and property all were under assault by the federal government during Bleeding Kansas. *The inalienable liberty section is language that is constitutionalized and protects the right by itself.* Life, liberty and pursuit of happiness placed into the operative parts of a constitution *creates a fundamental right of self-determination protected by law.*

What does this mean for Clay Snyder?

Kansas statutes create for the developmentally disabled an indefinite preventive detention of the developmentally disabled class of patients confined in mental health hospitals. To institutionalize them without meaningful treatment is unconstitutional

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[11] The Lawson Court tried to wiggle out of the argument to develop separate constitutional jurisprudence in Kansas because of our unique state constitution, offering a federal lockstep approach to "achieve a consistency so the state constitution shall not be taken to mean one thing at one time and another thing at another time." Citing *State v. Nelson,* 210 Kan. 439, 445, 502 P.2d 841 (1972). *Lawson*, 297 P.3d at 1169. However, this theory runs absolutely counter to history and what the framers of the Kansas constitution wanted.

[12] *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 3 P. 284, 286 (Kan. 1884)(Declarations of rights, or bills of rights, are the enumeration of certain great political truths essential to the existence of free government. In short, counsel seems to look upon [the Kansas Bill of Rights] as but little more than a compilation of "*glittering generalities.*" From this, as broadly as it is stated, we dissent.)

under §1 of the Kansas constitution because it shows no *direct* relationship between the effective classification of the statute (segregation of the developmentally disabled alleged wrongdoers) and the state's goal (public safety) that cannot be obtained in a different facility. *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976).

As the Court knows, charges brought against Clay Snyder in 2012 by the authorities without adjudication in a court of law is not a conviction.

One historical headwind makes Judge Atcheson's cogent arguments in *Hodes* about the nature and importance of § 1 to constitutional law in Kansas even more important. Section § 1's guarantees of liberty and the right of self-determination calls into doubt the statutory scheme created by the 2001 legislature to deal with the mentally ill and the mentally retarded defendants facing serious felonies. What was created was a *statutory preventive detention system* for the mentally ill. That sort of legislation is different than for the mentally retarded because the mentally ill have treatment that determines a path that might restore them to competency to stand trial and at least be out of the MH system. The intellectually disabled do not.

The Prosecution and the hospital want to lump the mentally ill and the developmentally disabled patients into the same detention scheme. This is discrimination between classes of patients held under the same detention statute, 22-3303. According to the state's suggestions in previous Snyder review hearings, "Dangerousness" is determined by what *crime* Snyder is *alleged* to have committed – not his actual actions since the 2012 arrest.

A statute based on this sameness is a self-fulfilling prophecy. Snyder cannot be released unless competent to stand trial (which he never will be). No amount of mental health treatment can make the developmentally disabled "well." Further, Larned State Hospital is not equipped to deal with the intellectually disabled. Parsons State Hospital is where the developmentally disabled are sent for treatment. The Secretary of KDADS has statutory authority to inter-departmentally transfer Mr. Snyder to Parsons but has failed to do so. [13] Therefore, with his legal status unresolved Mr. Snyder remains dangerous to others only because of an allegation of a crime never prosecuted.

The innerworkings of these laws on competency for the Developmentally disabled make them a suspect statutory classification. A heightened scrutiny equal protection analysis must be used. There must be a direct relationship between the statutory classification and the state's goal. *Craig v. Boren, supra.*

Conclusion

Judge Atcheson's review of § 1's liberty provisions and their historical basis as an inalienable right has importance to support a citizen's other civil liberties. His concurring opinion in *Hodes* indicates that § 1 of the Kansas Bill of Rights has not been studied and researched for what it really means in a constitutional sense. He believes at the least that the Section creates a right of self-determination. Because Mr. Snyder is part of a suspect class, the developmentally disabled, the state has the burden of showing a direct relationship between the classification and the state's public safety goal; in short, they

[13] Mr. Smith has sent three letters to the Secretary since March 2017, the most recent on August 8, 2018, requesting a change of hospitalization from LSH to Parsons under the Secretary's authority in KSA 59-2972(b). To date the Secretary has not acknowledged receipt of our letters.

must prove actual dangerousness, not statutory language. Kan. Stat. Ann. §§ 22-3303, 59-2946(e), 59-2946(f)(1)-(3), and 59-2966(a) fail the heightened scrutiny test.

The developmentally disabled are a special class. The legislature devoted considerable time to the Developmentally Disabled Reform Act, KSA 39-1801 et seq, which in 2014 set up Community Developmental Disability Organizations, for the assistance and the wellbeing of the intellectually disabled class, *especially those who are not physically violent*. Because the danger exists for the Intellectually disabled who commit any crime and who are sent to LSH for competency examinations to end up in long-term incarceration without hope of release, the intellectually disabled are a suspect class and under the *heightened scrutiny* analysis, a greater justification for the statutory discrimination must be shown. Resulting statutes must show a direct relationship between the statutory classification and the state's goal. *Craig v. Boren,* supra.

For all of the aforementioned reasons, Mr. Snyder respectfully requests that this District Court hold that Kan. Stat. Ann. §§ 22-3303, 59-2946(e), 59-2946(f)(1)-(3), and 59-2966(a) as applied to Mr. Snyder imposes an impermissible indefinite preventive detention contrary to the liberty clause and the right of self-determination in § 1 of the state Bill of Rights. Moreover, a heightened scrutiny analysis would require KDADS to show Clay Snyder's actual dangerousness, not a statutory dangerousness based on the nature of the crime.

Respectfully submitted,

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2018 WL 3599273
Only the Westlaw citation is currently available.
Supreme Court of Kansas.

In the MATTER OF the Care and Treatment of Clay Robert SNYDER.

No. 117,512
|
Opinion filed July 27, 2018.

Synopsis

Background: Kansas Department for Aging and Disability Services (KDADS) petitioned for involuntary civil commitment of defendant who was found incompetent to stand trial on sex offense charges including rape and aggravated criminal sodomy. The Pawnee District Court, Julie F. Cowell, Magistrate Judge, entered order of commitment. Defendant appealed.

Holdings: The Supreme Court, Stegall, J., held that:

[1] Kansas Care and Treatment Act for Mentally Ill Persons did not violate equal protection as applied;

[2] the Act did not violate due process as applied; and

[3] evidence was sufficient to involuntarily commit defendant.

Affirmed.

West Headnotes (15)

[1] **Appeal and Error**
Statutory or legislative law

Determining a statute's constitutionality is a question of law subject to unlimited review.

Cases that cite this headnote

[2] **Appeal and Error**
Statutory or legislative law

To the extent that the Supreme Court must engage in statutory interpretation, the Court's review is unlimited.

Cases that cite this headnote

[3] **Constitutional Law**
Statutes and other written regulations and rules

Under rational basis review for an equal protection challenge, a court determines whether a statutory classification bears some rational relationship to a valid legislative purpose. U.S. Const. Amend. 14.

Cases that cite this headnote

[4] **Constitutional Law**
Statutes and other written regulations and rules

Under rational basis scrutiny, a statutory classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. U.S. Const. Amend. 14.

Cases that cite this headnote

[5] **Mental Health**
Persons subject to control or treatment

Kansas Care and Treatment Act for Mentally Ill Persons excludes from involuntary civil commitment a mentally ill person solely diagnosed with an intellectual disability. Kan.

Stat. Ann. §§ 59-2946(e), 59-2946(f)(1)-(3), 59-2966(a).

Cases that cite this headnote

[6] **Constitutional Law**
Commitment
Mental Health
Persons subject to control or treatment

Involuntary civil commitment pursuant to Kansas Care and Treatment Act for Mentally Ill Persons did not violate equal protection as applied to defendant who was found incompetent to stand trial on an off-grid felony rape charge and who had an intellectual disability, notwithstanding the Act's general exclusion, from involuntary commitment, of mentally ill persons whose sole diagnosis was an intellectual disability; it was entirely rational for Legislature to limit the involuntary commitment of people who were mentally ill solely because of an intellectual disability to those charged with certain serious crimes, and it was not irrational for Legislature to conclude that a person charged with an off-grid felony, like rape of child, could be more dangerous to the public than someone charged with a lesser crime or not charged with any crime at all. U.S. Const. Amend. 14; Kan. Stat. Ann. §§ 22-3303, 59-2946(e), 59-2946(f)(1)-(3), 59-2966(a).

Cases that cite this headnote

[7] **Mental Health**
Control and custody in general

The Legislature has broad constitutional authority to adopt statutory programs to confine and treat people who might be dangerous to themselves or others and who suffer from some mental ailment, whether a mental abnormality, a personality disorder, or a mental illness as statutorily defined, but need not exercise this authority to the fullest extent.

Cases that cite this headnote

[8] **Constitutional Law**
Other particular issues and applications

Equal protection does not require the Legislature to civilly commit all mentally ill persons who pose a danger to themselves or others; instead, the Legislature may rationally distinguish between them based on the level of harm posed to the public. U.S. Const. Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**
Restraint, commitment, and detention

Civil commitment is a significant deprivation of liberty that requires due process protection. U.S. Const. Amend. 14.

Cases that cite this headnote

[10] **Constitutional Law**
Commitment and proceedings therefor

The Due Process Clause requires the State in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. U.S. Const. Amend. 14.

Cases that cite this headnote

[11] **Mental Health**
Persons subject to control or treatment

The medical community's definitions of mental health concepts are not binding on the Legislature in determining whether a person has a mental illness and is thus subject to potential involuntary civil commitment under the Kansas Care and

Treatment Act for Mentally Ill Persons. Kan. Stat. Ann. §§ 59-2946(e), 59-2946(f)(1)-(3), 59-2966(a).

Cases that cite this headnote

[12] **Constitutional Law**
Commitment and confinement
Mental Health
Persons subject to control or treatment

Involuntary civil commitment pursuant to Kansas Care and Treatment Act for Mentally Ill Persons did not violate due process rights as applied to defendant who was found incompetent to stand trial on sex offense charges and who was found to be likely to cause substantial physical injury or physical abuse to others, even if defendant's intellectual disability could not be cured or improved through treatment. U.S. Const. Amend. 14; Kan. Stat. Ann. §§ 59-2946(e), 59-2946(f)(3).

Cases that cite this headnote

[13] **Constitutional Law**
Confinement and conditions thereof

Due Process Clause does not obligate the State to release individuals from civil commitment who have been properly found to be mentally ill and dangerous simply because they cannot be successfully treated for their afflictions. U.S. Const. Amend. 14.

Cases that cite this headnote

[14] **Mental Health**
Particular cases
Mental Health
Confinement After Acquittal on Ground of Mental Disorder

Psychologist's testimony supported district court's finding that defendant was likely to cause harm to others, as would support his involuntary civil commitment following a determination that he was incompetent to stand trial on sex offense charges including rape and aggravated criminal sodomy; psychologist testified that defendant was aware that his charges related to the sexual abuse of a child but believed they were not serious. Kan. Stat. Ann. § 59-2946(f)(3).

Cases that cite this headnote

nd Error
nd Error
ce of, and deference to, lower court in

e sufficiency of the evidence is d, Supreme Court does not reweigh the and will not disturb a lower court's ndings when they are supported by competent evidence.

Cases that cite this headnote

hee District Court; JULIE F. COWELL,

w Firms

isability Rights Center of Kansas, of cause, and Ronald D. Smith, of Smith f Larned, was with her on the briefs for

, assistant solicitor general, argued the cause, and Bryan C. Clark, assistant solicitor general, and Derek Schmidt, attorney general, were with him on the brief for appellee.

Syllabus by the Court

**1 1. The Kansas Care and Treatment Act for Mentally Ill Persons, K.S.A. 59-2945 et seq., as applied via K.S.A.

2017 Supp. 22-3303 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. The Kansas Care and Treatment Act for Mentally Ill Persons, K.S.A. 59-2945 et seq., as applied via K.S.A. 2017 Supp. 22-3303 does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. On the facts of this case, the evidence was sufficient to involuntarily commit the defendant for care and treatment.

Opinion

The opinion of the court was delivered by Stegall, J.:

After the Saline County District Court found Clay Snyder not competent to stand trial, the Kansas Department for Aging and Disability Services (KDADS) initiated involuntary commitment proceedings against him. Ultimately, the Pawnee County District Court found Snyder was mentally ill and dangerous under K.S.A. 2017 Supp. 59-2946(e) and (f)(3) and ordered him committed to Larned State Hospital (Larned) for care and treatment. Snyder appeals from this commitment order, alleging equal protection and due process violations and challenging the sufficiency of the evidence. Finding Snyder's constitutional rights were not violated and the evidence was sufficient to involuntarily commit him, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012 Snyder was charged with rape, aggravated criminal sodomy, and aggravated indecent liberties with a child in Saline County. Snyder filed a motion to determine his competency to stand trial, triggering a lengthy cycle of competency evaluations, judicial findings of incompetency, treatment to restore competency, and renewed efforts by the State to take Snyder to trial. This process has now spanned years and has been interrupted and prolonged at least twice by involuntary commitment proceedings under the Kansas Care and Treatment Act for Mentally Ill Persons (Care and Treatment Act), K.S.A. 59-2945 et seq. Snyder's competency detainment is the subject of a separate case, this day decided. See *In re Habeas Corpus Petition of Snyder*, 307 Kan. ——, —— P.3d ——, 2018 WL 3596196 (2018) (No. 117,167, this day decided).

Thus far, competency restoration efforts have proven unsuccessful. In November 2016, the Saline County District Court again found Snyder was not competent to stand trial with no substantial probability that he would attain competency in the foreseeable future. Consequently, as directed by Kansas statute, the court ordered KDADS to commence involuntary commitment proceedings against Snyder. See K.S.A. 2017 Supp. 22-3303(1) ("If such probability does not exist, the court shall order the secretary for aging and disability services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated."). Three months later, KDADS filed a petition for determination of mental illness in Pawnee County, alleging Snyder was a mentally ill person subject to involuntary commitment for care and treatment at Larned.

***2** The Pawnee County District Court held a bench trial on March 21, 2017. KDADS presented one witness, psychologist Jessica Zoglman, who testified about a report she wrote to the court recommending that Snyder be committed for inpatient treatment at Larned. The parties entered five exhibits into evidence: (1) KDADS's petition for determination of mental illness, which included two of Snyder's competency evaluations; (2) Zoglman's curriculum vitae; (3) Zoglman's report to the court; (4) Snyder's recent Larned intake assessment; and (5) Snyder's petition for writ of habeas corpus in a separate case.

Zoglman testified that she reviewed Snyder's Larned admission records, which included an intake assessment completed by the admitting psychiatrist, and the two competency evaluations attached to the petition. She also conducted an interview with Snyder on March 10, 2017, and interacted with him in her duties as Larned unit psychologist. These records and interactions formed the basis of her report. Ultimately, she concluded Snyder was mentally ill, dangerous to others, and in need of treatment.

Zoglman testified that Snyder met the criteria for the diagnosis of "Intellectual Disability, mild as severity, as well as a number of different substance use disorders that are currently in remission." In her report, Zoglman stated she "ruled out a paraphilic related diagnosis at the present time" but noted Snyder's "[e]ncounter for mental health services for perpetrator of nonparental child sexual abuse" was a condition that might be the focus of clinical attention. Zoglman testified that she used the word "condition" because Snyder did not meet the "habit criteria" for a diagnosis.

A discrepancy between Zoglman's testimony and report caused confusion about whether Snyder fit the definition of a "mentally ill person" for purposes of involuntary commitment. In her report, Zoglman did not check the box to indicate that Snyder was a mentally ill person. As Zoglman explained, the standardized report form defined "mentally ill person" in accordance with K.S.A. 2017 Supp. 59-2946(f)(1), which *excludes* persons solely diagnosed with an intellectual disability from being mentally ill persons subject to involuntary commitment. But this definition did not apply to Snyder, who was charged with an off-grid felony and found incompetent to stand trial. Instead, Snyder was subject to the definition of "mentally ill person" found in K.S.A. 2017 Supp. 59-2946(e), which does not contain this exclusion. See K.S.A. 2017 Supp. 22-3303(1) ("[F]or such proceeding, 'mentally ill person subject to involuntary commitment for care and treatment' means a mentally ill person, as defined in subsection [e] of K.S.A. 59-2946 ... who is likely to cause harm to self and others, as defined in subsection [f][3] of K.S.A. 59-2946.").

Zoglman clarified that under the correct definition, she believed Snyder was a mentally ill person. Furthermore, Zoglman concluded Snyder met the "likely to cause harm" criteria set forth in K.S.A. 2017 Supp. 59-2946(f)(3) because, though he posed no immediate threat to himself, without supervision he could be dangerous to others because he did not understand the seriousness of the charges against him. As Zoglman explained,

> "The important piece is his lack of insight into that seriousness. You know when speaking with him for an interview ... he was aware that his charges are related to, you know a sexual offense of a child. However, he indicated that it wasn't serious and so to me ... he has a lack of insight, lack of appreciation for that seriousness. With the ... severity level of his charges being off grid, it is a concern that if he does not see that his current legal situation is a serious matter that potentially without supervision other actions or other things could happen."

***3** Finally, Zoglman testified that Snyder needed treatment. She explained that treatment would not "cure" Snyder's intellectual disability; however, treatment such as group and individual therapy could help Snyder interact more appropriately, function better, and live with less stress. She concluded that "intensive supervision in a locked facility is care that is needed for Mr. Snyder."

Snyder testified briefly about his disability and the competency restoration classes he took at Larned. He demonstrated a poor understanding of the nature of his disability and the legal proceedings against him. The defense called no other witnesses.

The district court found Snyder met the criteria for involuntary commitment under the Care and Treatment Act as modified by K.S.A. 2017 Supp. 22-3303, stating:

> "I'm making the finding at this point that you meet the criteria for 3303, you're charged with an off-grid felony, there is a belief by the person who prepared the report that there is potential for dangerousness, you meet the criteria, so what happens then is that we do a care and treatment action."

That same day, the court entered an order stating, "After hearing all the evidence, statements and arguments of counsel, the Court finds by clear and convincing evidence that Clay Robert Snyder is a mentally ill person subject to involuntary commitment for care and treatment."

Snyder timely appealed the commitment order to the Court of Appeals. We subsequently transferred the case to this court on our own motion. See K.S.A. 20-3018(c) ("At any time on its own motion, the supreme court may order the court of appeals to transfer any case before the court of appeals to the supreme court for review and final determination.").

ANALYSIS

1. Snyder was not denied equal protection.

Snyder argues he was denied equal protection under the Fifth and Fourteenth Amendments because K.S.A. 2017 Supp. 22-3303 subjected him to a different standard for involuntary commitment based on his off-grid felony rape charge. He lodges an as-applied challenge, claiming there is no rational basis to distinguish between him and others who share his diagnosis based on the severity of charges alone. We disagree and conclude a conceivable rational basis exists to make such distinction.

[1] [2]"Determining a statute's constitutionality is a question of law subject to unlimited review." *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446, 450, 264 P.3d 102 (2011). To the extent we must engage in statutory interpretation, our review is likewise unlimited. *Lozano v. Alvarez*, 306 Kan. 421, 423, 394 P.3d 862 (2017).

[3] [4]The parties agree rational basis scrutiny applies and

that is the standard we apply. See *Heller v. Doe*, 509 U.S. 312, 319-21, 113 S.Ct. 2637, 125 L.E (applying rational basis review to challenge involving the mentally ill whe to argue for heightened scrutiny). Ur review, we determine "whether a statu bears some rational relationship to a purpose." *Board of Miami County Comm Trails Conservancy, Inc.*, 292 Kan. 2 1186 (2011); see *Heller*, 509 U.S. at 32 This standard is a " 'very lenient' " or *and Grill v. State*, 294 Kan. 188, 195, 27 (quoting *Peden v. Kansas Dept. of Reve* 258, 930 P.2d 1 [1996]). As the United States Supreme Court directed, "[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Heller*, 509 U.S. at 320, 113 S.Ct. 2637; see *Downtown Bar and Grill*, 294 Kan. at 195, 273 P.3d 709.

***4** Under the Care and Treatment Act, a district court must find by clear and convincing evidence that a person is a "mentally ill person subject to involuntary commitment for care and treatment" in order to impose civil commitment. K.S.A. 2017 Supp. 59-2966(a). The definition of a "mentally ill person subject to involuntary commitment for care and treatment" breaks down as follows: (1) the individual must be "a mentally ill person"; (2) who "lacks capacity to make an informed decision concerning treatment"; (3) who is "likely to cause harm to self or others"; and (4) "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." (Emphasis added.) K.S.A. 2017 Supp. 59-2946(f)(1)-(3). "Mentally ill person" is defined as:

> "[A]ny person who is suffering from a mental disorder which 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. 2017 Supp. 59-2946(e).

[5]Thus, the Care and Treatment Act excludes from involuntary commitment a mentally ill person solely diagnosed with an intellectual disability. See *State v. Johnson*, 289 Kan. 870, 882, 218 P.3d 46 (2009) (holding that a person solely diagnosed with an organic mental disorder does not meet the definition of a "mentally ill person subject to involuntary commitment for care and treatment" under K.S.A. 59-2946[f][1]).

However, K.S.A. 2017 Supp. 22-3303 changes the definition of "mentally ill person subject to involuntary commitment for care and treatment" for an individual like Snyder who has been charged with an off-grid felony and found incompetent to stand trial. Under K.S.A. 2017 Supp. 22-3303, a district court must determine whether an incompetent defendant charged with a felony has "a substantial probability of attaining competency to stand trial in the foreseeable future." If no such probability exists, the court "shall order the secretary for aging and disability services to commence involuntary commitment proceedings" under the Care and Treatment Act. K.S.A. 2017 Supp. 22-3303(1). Importantly, the statute provides unique commitment criteria for incompetent defendants charged with certain high-severity crimes:

> "When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21-3504, 21-3511, 21-3518, 21-3603 or to their repeal, or subsection (b) of subsection (b) of 21-5506, subsection subsection (b) of 21-5604 or subsection 2, and amendments thereto, and ceedings have commenced, for such ntally ill person subject to involuntary care and treatment' means a mentally ill d in subsection (e) of K.S.A. 59-2946, thereto, who is likely to cause harm to s defined in subsection (f)(3) of K.S.A. endments thereto. *The other provisions of K.S.A. 59-2946, and amendments thereto, shall not apply.*" (Emphasis added.) K.S.A. 2017 Supp. 22-3303(1).

See *Johnson*, 289 Kan. at 880-81, 218 P.3d 46 (noting that odifies the definition of "mentally ill involuntary commitment for care and in high severity crimes).

2017 Supp. 59-2946(f)(1) generally voluntary commitment mentally ill diagnosis is an intellectual disability, 22-3303 removes this exclusion for one y ill persons—those charged with erein lies the distinction at the heart of ection challenge. The question before the fact that Snyder has been charged with one of these serious crimes provides a rational basis for treating Snyder differently from other persons who share his diagnosis for purposes of involuntary commitment under the Care and Treatment Act. See *Heller*, 509 U.S. at 320, 113 S.Ct. 2637; *Downtown Bar and Grill*, 294 Kan. at 195, 273 P.3d 709. The answer is

that it does.

*5 In arriving at this answer, we need look no further than our own precedent. In *State v. Johnson*, the defendant was charged with involuntary manslaughter for killing his passenger in a car accident. As a result of the accident, the defendant suffered a traumatic brain injury that rendered him incompetent to stand trial. Yet, we held the defendant could not be involuntarily committed for care and treatment "because his sole diagnosis was an organic mental disorder" and he was not charged with a specified crime under K.S.A. 22-3303. 289 Kan. at 880-82, 218 P.3d 46. In so holding, we recognized the competing interests the Legislature balanced in K.S.A. 22-3303:

> "As the legislature noted, the competing interests are protecting public safety on the one hand, and providing services and support for persons with disabilities on the other. If a person is incompetent to stand trial and also cannot be committed for mental illness treatment, that person is simply returned to the community without supervision, in derogation of public safety. Yet, if a person has a condition that cannot be improved through treatment, *e.g.*, a traumatic brain injury, then involuntarily committing that person under K.S.A. 59-2945 *et seq.* is akin to a life sentence without possibility of parole. In 2001, the legislature struck a balance between the competing interests by amending K.S.A. 22-3303(1) to add a provision which would permit the involuntary commitment of persons who are incompetent to stand trial because of one of the excepted diagnoses listed in K.S.A. 59-2946(f)(1), but who have been charged with certain crimes." 289 Kan. at 884, 218 P.3d 46.

Indeed, it is entirely rational for the Legislature to limit the involuntary commitment of people who are mentally ill solely because of an intellectual disability to those charged with certain serious crimes. It is not irrational for the Legislature to conclude that a person charged with an off-grid felony—like raping a child—could be more dangerous to the public than someone charged with a lesser crime, or not charged with any crime at all. Thus, the distinction made—and the resulting difference in treatment—between Snyder and others who share his diagnosis arising out of the charges against Snyder is a reasonable one.

[7]Furthermore, the Legislature "has broad constitutional authority to adopt statutory programs to confine and treat people who might be dangerous to themselves or others and who suffer from some mental ailment, whether a mental abnormality, a personality disorder, or a mental illness as statutorily defined," but need not exercise this authority to the fullest extent. *In re Care & Treatment of Hay*, 263 Kan. 822, 833, 953 P.2d 666 (1998). In *Hay*, we held the distinctions within the Sexually Violent Predator Act (SVPA), K.S.A. 59-29a01 et seq., did not violate equal protection because:

> "Equal protection of the law does not require the State to choose between attacking every aspect of public danger or not attacking any part of the danger at all. As we said in *Manzanares v. Bell*, 214 Kan. 589, 615, 522 P.2d 1291 (1974): ' "[T]he legislative authority ... is not bound to extend its regulations to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest.' " ' " *Hay*, 263 Kan. at 833, 953 P.2d 666.

[8]Stated differently, equal protection does not require the Legislature to civilly commit all mentally ill persons who pose a danger to themselves or others—instead, it may rationally distinguish between them based on the level of harm posed to the public.

*6 Before concluding, we note that Snyder relies on *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed. 2d 435 (1972), to establish his equal protection challenge. But in *Jackson*, the Supreme Court held the indefinite detainment of a defendant solely on account of his incompetency to stand trial violated the Equal Protection Clause because it condemned him to "permanent institutionalization" without the showing required for civil commitment. 406 U.S. at 730, 92 S.Ct. 1845. Thus, the problem in *Jackson* was that the defendant was, in effect, institutionalized for life *without* the protection of a statutorily prescribed involuntary commitment procedure for care and treatment—a problem not presented here.

Because a rational basis exists to distinguish between Snyder and others who share his diagnosis based on his off-grid felony charge, we hold Snyder has suffered no equal protection violation.

2. Snyder was not denied due process.

Snyder claims his civil commitment violates due process because: (1) K.S.A. 2017 Supp. 22-3303 substitutes Snyder's charges for proof that he is dangerous; (2) Snyder's intellectual disability is not a mental illness; and (3) the State cannot provide treatment that will cure or improve his intellectual disability. We disagree and hold the Care and Treatment Act as applied to Snyder via K.S.A. 2017 Supp. 22-3303 does not violate due process. Furthermore, we hold the Due Process Clause does not

obligate the State to release individuals like Snyder from civil commitment simply because their mental conditions cannot be cured.

[9] [10]Civil commitment is a "significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed. 2d 323 (1979). As the Supreme Court has stated, "[T]he Due Process Clause requires the State in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous." *Jones v. United States*, 463 U.S. 354, 362, 103 S.Ct. 3043, 77 L.Ed. 2d 694 (1983); see *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed. 2d 501 (1997) ("We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.' "); *Cooper v. Oklahoma*, 517 U.S. 348, 368, 116 S.Ct. 1373, 134 L.Ed. 2d 498 (1996) ("[D]ue process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of 'surviving safely in freedom.' "); *Foucha v. Louisiana*, 504 U.S. 71, 75-76, 112 S.Ct. 1780, 118 L.Ed. 2d 437 (1992).

Snyder claims that K.S.A. 2017 Supp. 22-3303 substitutes the type of charges brought against him for proof that he is actually dangerous. However, a cursory review of the plain language of the statute makes it apparent that this is not the case. To involuntarily commit Snyder under the Care and Treatment Act as applied to Snyder via K.S.A. 2017 Supp. 22-3303, the State was required to prove not only that he was charged with an off-grid crime but also that he was "likely to cause harm to self and others, as defined in subsection (f)(3) of K.S.A. 59-2946." Consequently, this argument is without merit.

Snyder also argues the State failed to prove he is mentally ill because his intellectual disability is a "developmental disorder" that does not qualify as a "mental illness." He points to the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-5), which defines "neurodevelopmental disorders" to include intellectual disabilities. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. 33 (5th ed. 2013). But, he fails to define "mental illness" for purposes of this argument. Indeed, it appears the DSM-5 does not even use the nomenclature "mental illness."

*7 [11]Regardless, the medical community's definitions of mental health concepts are not binding on the Legislature in this context. In *Hendricks*, the Supreme Court rejected a similar argument that a "mental abnormality" cannot be a "mental illness" for purposes of civil commitment because the term "mental abnormality" is "a term coined by the Kansas Legislature, rather than by the psychiatric community." 521 U.S. at 358-59, 117 S.Ct. 2072. The Court held:

> "Contrary to Hendricks' assertion, the term 'mental illness' is devoid of any talismanic significance. Not only do 'psychiatrists disagree widely and frequently on what constitutes mental illness,' *Ake v. Oklahoma*, 470 U.S. 68, 81 [105 S.Ct. 1087, 84 L.Ed.2d 53] (1985), but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. See, *e.g.*, *Addington*, [441 U.S. at] 425-426 [99 S.Ct. 1804] (using the terms 'emotionally disturbed' and 'mentally ill'); *Jackson v. Indiana*, 406 U.S. 715, 732, 737 [92 S.Ct. 1845, 32 L.Ed.2d 435] (1972) (using the terms 'incompetency' and 'insanity'); cf. *Foucha*, 504 U.S. at 88 [112 S.Ct. 1780] (O'CONNOR, J., concurring in part and concurring in judgment) (acknowledging State's authority to commit a person when there is 'some medical justification for doing so').
>
> "Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13 [103 S.Ct. 3043, 77 L.Ed.2d 694] (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of 'insanity' and 'competency,' for example, vary substantially from their psychiatric counterparts. See, *e.g.*, Gerard, The Usefulness of the Medical Model to the Legal System, 39 Rutgers L. Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). Legal definitions, however, which must 'take into account such issues as individual responsibility ... and competency,' need not mirror those advanced by the medical profession. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxiii, xxvii (4th ed.1994)." 521 U.S. at 359, 117 S.Ct. 2072.

As we explained in *In re Vanderblomen*, 264 Kan. 676, 681, 956 P.2d 1320 (1998): "We do not believe there is any reason to link the constitutionality of a statute to the changing tides of psychiatric thought as reflected in the most recent version of the DSM." Because the DSM is frequently revised, "it would be foolhardy to allow its altered provisions to render otherwise valid and

comprehensible legislation unconstitutional." 264 Kan. at 681, 956 P.2d 1320. Likewise, we decline to substitute the "changing tides" of the DSM for the statutory definitions here for purposes of proceedings under the Care and Treatment Act.

[12]Indeed, Snyder does not contest the fact that according to the statutory definition applicable to him—K.S.A. 2017 Supp. 59-2946(e)—he is a "mentally ill person." The gravamen of Snyder's due process complaint is that in his view, involuntary commitment of a person who qualifies as a mentally ill person under Kansas law only because of an incurable disability is unconstitutional. The claim is essentially that such involuntary commitment can only be lawfully justified by treatment that has the potential to cure or improve a person's mental condition.

***8** Applying this novel rule, Snyder argues the State cannot confine him because his intellectual disability cannot be cured or improved (calling it "untreatable"). For purposes of our analysis, we will assume Snyder's disability will permanently impair him to some degree, regardless of treatment. Even so, the question remains—does the Due Process Clause forbid the State from civilly committing an individual like Snyder whose mental condition cannot be cured or improved through treatment? The answer is no.

Snyder cites *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed. 2d 396 (1975), and *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 2d 28 (1982), for the proposition that the State must provide treatment that can cure or improve his disability. However, Snyder misapprehends the import of these decisions. In *O'Connor*, the Supreme Court expressly declined to address the issue, stating, "[T]here is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State." 422 U.S. at 573, 95 S.Ct. 2486. In *Youngberg*, the Court held that a severely mentally disabled person subject to civil commitment had the right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." 457 U.S. at 319, 102 S.Ct. 2452. But, the *Youngberg* Court similarly declined to consider whether "a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom." 457 U.S. at 318, 102 S.Ct. 2452.

Instead, the Supreme Court has strongly indicated that a state may civilly commit an individual whose mental condition cannot be successfully treated. In *Hendricks*, the Court held the civil commitment of a sexually violent predator under the SVPA was nonpunitive even though his "mental abnormality" was untreatable. The Court emphasized that it had "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." 521 U.S. at 366, 117 S.Ct. 2072. As the Court explained,

> "A State could hardly be seen as furthering a 'punitive' purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Accord, *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 [22 S.Ct. 811, 46 L.Ed. 1209] (1902) (permitting involuntary quarantine of persons suffering from communicable diseases). Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions. Cf. *Greenwood v. United States*, 350 U.S. 366, 375 [76 S.Ct. 410, 100 L.Ed. 412] (1956) ('The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner'); *O'Connor v. Donaldson*, 422 U.S. 563, 584 [95 S.Ct. 2486, 45 L.Ed.2d 396] (1975) (Burger, C. J., concurring) ('[I]t remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of "cure" are generally low')." 521 U.S. at 366, 117 S.Ct. 2072.

See *Seling v. Young*, 531 U.S. 250, 262, 121 S.Ct. 727, 148 L.Ed. 2d 734 (2001) (In *Hendricks*, "We acknowledged that not all mental conditions were treatable. For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.").

***9** [13]Applying *Hendricks*, we hold the Due Process Clause does not obligate the State to release individuals from civil commitment who have been properly found to be mentally ill and dangerous "simply because they [can]not be successfully treated for their afflictions." 521 U.S. at 366, 117 S.Ct. 2072. Accordingly, the fact that Snyder's intellectual disability cannot be cured or improved through treatment does not prevent the State from civilly committing him in accordance with other statutory and constitutional safeguards.

3. The State presented sufficient evidence that Snyder is likely to cause harm to others.

[14]On appeal, Snyder also challenges the sufficiency of the evidence used to involuntarily commit him. Specifically, he argues the State did not present clear and convincing evidence that he is dangerous to himself or others. The State claims Zoglman's testimony provided sufficient evidence to support the lower court's findings that Snyder meets the "likely to cause harm" standard set forth in K.S.A. 2017 Supp. 59-2946(f)(3). We conclude the district court's finding was backed by substantial competent evidence and affirm.

[15]When the sufficiency of the evidence is challenged, we do not "reweigh the evidence and will not disturb a lower court's factual findings when they are supported by substantial competent evidence." *Doug Garber Construction, Inc. v. King*, 305 Kan. 785, 791, 388 P.3d 78 (2017).

The State was required to prove by clear and convincing evidence that Snyder was "likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others." K.S.A. 2017 Supp. 59-2946(f)(3). We conclude that Zoglman's testimony was sufficient to support the district court's finding that Snyder posed a danger to others. Zoglman reviewed the information contained in Snyder's competency file. She personally interviewed Snyder. She is a person with the necessary training and experience to opine on the likelihood and potential for future harm that may be caused by individuals with Snyder's diagnosis. She testified that Snyder was aware his charges were related to the sexual abuse of a child but believed they were not serious. As Zoglman summarized: "[D]ue to the severity of his charges and his lack of insight into the seriousness of his current legal situation, he is considered potentially dangerous to others without proper supervision." The district court was able to view and assess the credibility of the testimony of both Zoglman and Snyder.

Viewing the evidence in a light most favorable to the State, we hold the State presented sufficient evidence that Snyder was likely to "cause substantial physical injury or physical abuse" to others. K.S.A. 2017 Supp. 59-2946(f)(3). Though the evidence regarding Snyder's dangerousness was slim, it cleared the minimum threshold.

Lastly, Snyder raises two arguments that we decline to address today: (1) that his competency detainment violated due process under *Jackson*; and (2) that the long-term civil commitment of the intellectually disabled violates Section 1 of the Kansas Bill of Rights. The first argument is not within the scope of this appeal but is properly addressed in Snyder's habeas action this day decided. See *Snyder*, 307 Kan. ——, —— P.3d ——. The second is not preserved because Snyder raises it for the first time on appeal without invoking an exception to Kansas Supreme Court Rule 6.02(a)(5) (2018 Kan. S. Ct. R. 34). See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015).

***10** Finding no error, we affirm the order of Snyder's involuntary commitment.

Affirmed.

All Citations

--- P.3d ----, 2018 WL 3599273

385 P.3d 932 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

In the MATTER OF the Care and Treatment of Tim KUKOVICH.

No. 114,209
|
Opinion filed December 2, 2016
|
Review Denied September 28, 2017

Appeal from Pawnee District Court; JULIE COWELL, magistrate judge.

Attorneys and Law Firms

Mary Curtis and Catherine Johnson, of Disability Rights Center of Kansas, of Topeka, for appellant.

Natalie Chalmers, assistant solicitor general, and Derek Schmidt, attorney general, for appellee/intervenor.

Before Pierron, P.J., Atcheson and Arnold-Burger, JJ.

Mooted the case since release

MEMORANDUM OPINION

Per Curiam:

***1** After the Crawford County District Court found Tim Kukovich incompetent to be tried on a serious felony, the Pawnee County District Court involuntarily committed him for inpatient mental health treatment at Osawatomie State Hospital. Kukovich appealed the commitment order. About 3 months after the order was entered, the Miami County District Court reviewed Kukovich's hospitalization as required by K.S.A. 59-2969, determined he no longer met the requirements for involuntary commitment, and directed that he be released. Under the circumstances, we hold Kukovich's appeal to be moot and, therefore, dismiss it.

Given our disposition of the appeal, we dispense with a detailed recounting of the factual and procedural history. The parties know that information well. And, as we discuss, the record on appeal is unusually terse.

Kukovich was charged in Crawford County with rape based on an accusation of a teenaged girl who said he had sexually assaulted her years earlier. As we understand matters, law enforcement officers were unable to find any directly inculpatory or exculpatory evidence given the lapse of time between the alleged incident and the report. Kukovich has been diagnosed with "autism spectrum disorder," a chronic mental condition, and has an IQ in the 50s. He is by all accounts profoundly impaired intellectually. As we indicated, the Crawford County District Court found Kukovich to be incompetent to be tried in conformity with the standards in K.S.A. 22-3301(1). The expert who evaluated Kukovich was of the view that he would not likely become competent in the foreseeable future. The Crawford County Attorney has since dismissed the criminal charge against Kukovich without prejudice.

In the meantime, the State initiated an involuntary commitment proceeding against Kukovich in the Pawnee County District Court. After a hearing in June 2015, the Pawnee County District Court issued a commitment order under K.S.A. 2015 Supp. 22-3303 and the Care and Treatment Act for Mentally Ill Persons, K.S.A. 59-2945 *et seq.* The order required Kukovich's commitment be judicially reevaluated at 3-month intervals. Kukovich was hospitalized at the state facility in Osawatomie, so it fell to the Miami County District Court to handle the periodic evaluations. On the first review in September 2015, the Miami County District Court ordered Kukovich be released because he "is not likely to be a harm to himself or others at this time."

We have before us Kukovich's challenge to the original commitment order from the Pawnee County District Court. He contends that the court erroneously committed him for treatment and asks that the order be reversed. But events have outstripped the appeal, since Kukovich is no longer involuntarily committed under the Care and Treatment Act. Even if we were disposed to find for Kukovich, any ruling we issued would not affect the present legal rights of the parties. That is the hallmark of a moot case. A dispute becomes moot when "the actual controversy has ended" and a judgment "would not impact any of the parties' rights." *McAlister v. City of Fairway*, 289 Kan. 391, 400, 212 P.3d 184 (2009). Courts refrain from deciding moot issues because any ruling

effectively amounts to an impermissible advisory opinion. See *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, Syl. ¶ 15, 179 P.3d 366 (2008) (A court will not consider issues that have become moot.); 285 Kan. 875, Syl. ¶¶ 10–11 (A court exercises its authority "only when [a] question is presented in an actual case or controversy between the parties"; "[c]ourts do not have the power to issue advisory opinions.").

*2 Mootness, however, does not impose a jurisdictional bar. It is, rather, a permissive rule of justiciability. See *State v. DuMars*, 37 Kan. App. 2d 600, 605, 154 P.3d 1120, *rev. denied* 284 Kan. 948 (2007). In his appellate brief, Kukovich argues he has raised issues that are both of public importance and capable of repetition, thereby bringing his case within a limited exception to the mootness doctrine. 37 Kan. App. 2d at 605. Kukovich contends that his impairments are cognitive disabilities rather than a form of mental illness amenable to therapeutic care or treatment. So, he says, he does not meet the definition of a mentally ill person subject to involuntary commitment. And, he says, he or similarly situated individuals may be impermissibly committed in the future unless we decide the issues he has raised.

Even if we were disposed to disregard the obvious mootness of this case (and we aren't), the exceptionally limited record does not favor a judicial effort to address the substantive points Kukovich outlines. The parties did not request a record of the commitment hearing in Pawnee County District Court, so we have no transcript. The parties, instead, have prepared an 8–paragraph summary of the proceeding. We have no transcript from the hearing in the Miami County District Court resulting in Kukovich's discharge from Osawatomie State Hospital. The record, therefore, does not present a complete picture of Kukovich's mental capacity and mental health. The information about the nature of Kukovich's impairments seems, at best, fragmentary. We are disinclined to take up otherwise moot issues that purport to be of precedential importance to future cases when the available record fails to adequately develop what we see as the necessary factual predicates from which to fashion a sound ruling.

Kukovich also suggests we ought to consider his appeal because he has been socially stigmatized by the criminal charges and his involuntary commitment under the Care and Treatment Act. Neither suggestion persuades us that we should take up the merits of Kukovich's appeal. A ruling in his favor wouldn't provide much more of a restorative than he has already received. The Miami County District Court ruling certainly indicates Kukovich is not dangerous. He otherwise would not have been released. Even a ruling we might make reversing the original commitment order would simply underscore that assessment.

This appeal provides no platform for addressing the merits of the criminal charge. But Kukovich finds himself in the same posture as anyone else who has been charged with a serious criminal offense only to have the prosecutor dismiss the charge. The dismissal denies the person charged a day in court to secure a not guilty finding from either a judge or jury. As a result, clouds of suspicion may linger. The judicial process offers no mechanism to dispel those clouds. In reality, though, even a not guilty verdict stops well short of actual vindication; it simply signals that the judge or jury was not convinced beyond a reasonable doubt of the defendant's guilt.

In short, we find Kukovich's appeal to be moot. This case does not otherwise offer a good vehicle for taking up the issues Kukovich presses upon us.

Appeal dismissed.

All Citations

385 P.3d 932 (Table), 2016 WL 7031851

End of Document

289 Kan. 870
Supreme Court of Kansas.

STATE of Kansas, Appellant,
v.
Shawn M. JOHNSON, Appellee.

No. 96,526.
|
Oct. 30, 2009.

Please note the facts in this case

Synopsis
Background: In prosecution of defendant on involuntary manslaughter charges, the District Court, Reno County, Steven R. Becker, entered orders determining that defendant was incompetent to stand trial due to a brain injury, and dismissing involuntary commitment proceedings against defendant, and dismissed the case with prejudice. State appealed. The Court of Appeals, 2005 WL 1719379, reversed and remanded. On remand, the district court again dismissed involuntary commitment proceedings and denied state's motion for rehearing on defendant's competency to stand trial, and dismissed the pending charges without prejudice. State appealed. The Court of Appeals, 2007 WL 2080452, reversed and remanded.

Holdings: After granting defendant's petition for review, the Supreme Court, Johnson, J., held that:

[1] district court was not required to order involuntary commitment proceedings for defendant after determining that he was incompetent to stand trial, and

[2] reasonable grounds did not exist to require rehearing on defendant's competency to stand trial.

Court of Appeals reversed; district court affirmed.

West Headnotes (17)

[1] **Mental Health**
Custody and Confinement

Defendant who had suffered a traumatic brain injury was not a "mentally ill person" subject to involuntary commitment for care and treatment, and thus district court was not required to order involuntary commitment proceedings for defendant after determining that he was incompetent to stand trial on involuntary manslaughter charges. West's K.S.A. 22-3301, 22-3303, 59-2945 et seq.

1 Cases that cite this headnote

[2] **Criminal Law**
Statutory issues in general

The interpretation of a statute is a question of law over which the Supreme Court has unlimited review on appeal.

2 Cases that cite this headnote

[3] **Statutes**
Intent

The fundamental rule of statutory construction to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained.

1 Cases that cite this headnote

[4] **Statutes**
Language

The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted.

1 Cases that cite this headnote

[5] **Statutes**

Purpose and intent; unambiguously expressed intent

When a statute is plain and unambiguous, a court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be.

Cases that cite this headnote

[6] **Statutes**
Technical terms

Although ordinary words are to be given their ordinary meanings by a court construing a statute, technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings.

Cases that cite this headnote

[7] **Constitutional Law**
Making, Interpretation, and Application of Statutes
Statutes
Absent terms; silence; omissions

The doctrine of liberal construction does not allow a court to delete vital provisions or supply vital omissions in a statute; no matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct.

4 Cases that cite this headnote

[8] **Statutes**
Conjunctive and disjunctive words

The connecting word "or" contained in a statute ordinarily indicates that the connected items are in the disjunctive.

Cases that cite this headnote

[9] **Mental Health**
Mental disorder at time of trial

A person is statutorily defined as being incompetent to stand trial if the person has either a mental illness or a mental defect, either of which causes that person to be unable either to understand the nature and purpose of the criminal proceedings against the person or to make or assist in making his or her defense. West's K.S.A. 22–3301(1).

Cases that cite this headnote

[10] **Criminal Law**
Preliminary Proceedings
Criminal Law
Initiation by prosecution or sua sponte by court; absence of request

The issue of a defendant's competency to stand trial may be raised by the defendant, the defendant's counsel, the prosecutor, or sua sponte by the judge at any time between the filing of the charging document and the pronouncement of sentence. West's K.S.A. 22–3301, 22–3302.

1 Cases that cite this headnote

[11] **Mental Health**
Persons subject to control or treatment

A person whose sole diagnosis is an organic mental disorder, such as traumatic brain injury, is not a "mentally ill person" subject to involuntary commitment for care and treatment. West's K.S.A. 59–2945 et seq.

1 Cases that cite this headnote

[12] **Criminal Law**
Successive proceedings in general

Dismissal of involuntary commitment proceedings against defendant was irrelevant to determining whether reasonable grounds existed to order a rehearing on defendant's competency to stand trial on involuntary manslaughter charges, after defendant had been determined to be incompetent due to a permanent and irreversible traumatic brain injury. West's K.S.A. 22–3303(3).

Cases that cite this headnote

[13] **Criminal Law**
Competency to stand trial

On appeal from an order denying a motion for rehearing on a defendant's competency to stand trial, in determining whether reasonable grounds existed to revisit the competency issue, an appellate court should afford a great deal of deference to the trial court that conducted the original proceedings. West's K.S.A. 22–3303(3).

Cases that cite this headnote

[14] **Criminal Law**
Questions of Fact and Findings

It is not the function of an appellate court to weigh conflicting evidence, to evaluate witnesses' credibility, or to redetermine questions of fact.

9 Cases that cite this headnote

[15] **Criminal Law**
Successive proceedings in general

Mere passage of time was not sufficient to require a rehearing on defendant's competency to stand trial on involuntary manslaughter charges, after defendant had been determined to be incompetent due to a permanent and irreversible traumatic brain injury. West's K.S.A. 22–3303(3).

Cases that cite this headnote

[16] **Criminal Law**
Successive proceedings in general

Detective's affidavit, stating that detective had overheard defendant discuss computer software "in some technical detail" with a store clerk, was not sufficient to require a rehearing on defendant's competency to stand trial on involuntary manslaughter charges, after defendant had been determined to be incompetent due to a permanent and irreversible traumatic brain injury, since no foundation existed for detective's knowledge of computer programs. West's K.S.A. 22–3303(3).

Cases that cite this headnote

[17] **Criminal Law**
Successive proceedings in general

Physician's recommendations as to treatment for defendant's brain injuries did not provide reasonable grounds to require a rehearing on defendant's competency to stand trial on involuntary manslaughter charges, after defendant had been determined to be incompetent due to a permanent and irreversible traumatic brain injury; physician's recommendation that defendant engage in computer-assisted cognitive rehabilitation was not an acknowledgment that defendant could be rehabilitated to competency to stand trial, and even though physician testified as to accommodations that could be employed at a trial to mitigate the effects of defendant's brain

injuries were given as part of his testimony that defendant was incompetent to stand trial, he did not believe that the accommodations would resolve the problem. West's K.S.A. 22–3303(3).

Cases that cite this headnote

**48 *870 *Syllabus by the Court*

1. The connecting word "or" ordinarily means that the connected items are to be viewed in the disjunctive. Accordingly, a person is statutorily defined as being incompetent to stand trial if the person has either a mental illness or a mental defect, either of which causes that person to be unable either to understand the nature and purpose of the criminal proceedings against the person or to make or assist in making his or her defense.

2. The issue of a defendant's competency to stand trial may be raised by the defendant, the defendant's counsel, the prosecutor, or *sua sponte* by the judge at any time between the filing of the charging document and the pronouncement of sentence. If the judge has reason to believe that the defendant is incompetent to stand trial, the criminal proceedings are suspended and a competency hearing must be held. The judge can order a psychiatric or psychological examination of the defendant and may impanel a six-person jury to determine competency to stand trial.

3. If, after an initial competency hearing, a criminal defendant is found to be incompetent to stand trial, the district court shall order that the defendant be committed for evaluation and treatment to the state security hospital or any appropriate county or private institution; but such commitment shall not exceed 90 days. Within the 90–day commitment period, the chief medical officer of the institution shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future.

4. If the institution to which a defendant has been committed for evaluation and treatment certifies that the defendant does not have a substantial probability of attaining **49 competency to stand trial in the foreseeable future, the district court shall order the Secretary of Social and Rehabilitation Services to commence an involuntary commitment proceeding pursuant to K.S.A. 59–2945 *et seq.*, and amendments thereto.

5. A person whose sole diagnosis is an organic mental disorder, such as *871 traumatic brain injury, is not a mentally ill person subject to involuntary commitment for care and treatment under K.S.A. 59–2945 *et seq.*

6. While K.S.A. 22–3303(1) purports to mandate that the district court order the Secretary of Social and Rehabilitation Services 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, the Secretary cannot legally comply with that order under K.S.A. 59–2945 *et seq.* if the incompetency is due to an organic mental disorder, such as traumatic brain injury, and the modified definition of mental illness in K.S.A. 22–3303 is inapplicable.

7. The provisions of K.S.A. 22–3305 addressing the competency to stand trial procedures to be employed after the Secretary of Social and Rehabilitation Services has commenced involuntary commitment proceedings under K.S.A. 59–2945 *et seq.* cannot be applied where the petition for involuntary commitment has been immediately dismissed for lack of probable cause to believe the proposed patient is a mentally ill person subject to involuntary commitment for care and treatment.

8. K.S.A. 22–3303(3) provides a mechanism for the district court to revisit the issue of the defendant's competency to stand trial where reasonable grounds exist to believe that the defendant has become competent.

Attorneys and Law Firms

Keith E. Schroeder, district attorney, argued the cause, and Karen S. Smart, assistant district attorney, and Phill Kline, attorney general, were with him on the brief for the appellant.

Lane Williams, of Disability Rights Center of Kansas, of Topeka, argued the cause, and Kirk W. Lowry, of the same firm, was with him on the briefs for the appellee.

Opinion

The opinion of the court was delivered by JOHNSON, J.:

*872 Shawn M. Johnson seeks review of the Court of Appeals' decision in *State v. Johnson*, No. 96,526, 2007

WL 2080452, unpublished opinion filed July 20, 2007 ("*Johnson II* "), which reversed the district court's dismissal of the criminal charges against Johnson, directed the district court to order Johnson to submit to a psychiatric or psychological examination, and instructed the district court to hold a hearing to determine whether Johnson has now become competent to stand trial. Finding that the district court followed the appropriate statutory procedures and that there were no reasonable grounds to support an order for another competency hearing, we reverse the Court of Appeals and affirm the district court's dismissal of the criminal proceedings.

This is the second time the Court of Appeals has reviewed this case and attempted to interpret the provisions of K.S.A. 22–3301 *et seq.*, dealing with the competency of a defendant to stand trial. See *State v. Johnson*, No. 91,797, 2005 WL 1719379, unpublished opinion filed July 22, 2005 ("*Johnson I* "). Unfortunately, on both occasions, the panels failed to review the cross-referenced provisions of Article 29 of Chapter 59 of the Kansas Statutes Annotated, relating to the involuntary commitment of mentally ill persons. That failure apparently led to a misunderstanding of how those involuntary commitment procedures could be applied in the competency determination of a person who has suffered a traumatic brain injury, *i.e.*, who does not fit the criteria for a "mentally ill person" for involuntary commitment under K.S.A. 59–2945 *et seq.*

The event precipitating this case occurred on November 24, 2001, when Johnson drove a vehicle into a tree, killing a passenger. Johnson was hospitalized with serious injuries, including a coma-inducing traumatic brain injury. Several months later, on July 8, 2002, the Reno County prosecutor's office charged Johnson with involuntary manslaughter, claiming that he was driving under **50 the influence when the fatality accident occurred. In October 2002, pursuant to K.S.A. 22–3302(1), the district court ordered an evaluation at Horizon's Mental Health Center to assess Johnson's competency to stand trial, and subsequently held hearings on December 18, 2002, and January 2, 2003.

*873 Delmar Thibault, a licensed masters-level psychologist from Horizons, testified on behalf of the State that he had met with Johnson for approximately 2 hours and had performed some limited testing, from which he concluded that Johnson was competent to stand trial. In contrast, Johnson presented the testimony of Mitchel A. Woltersdorf, Ph.D., a clinical and forensic neuropsychologist with the Midwest Brain Function Clinic. Dr. Woltersdorf gave a detailed description of the extensive battery of tests performed on Johnson on January 10, 2002, and repeated on July 31 and August 1, 2002, explaining that the nature of the testing done on head injury patients made separate testing for competency to stand trial unnecessary. Johnson showed some modest improvement on the second set of tests, but he still displayed widespread and severe deficits in memory, nonverbal reasoning, sensory-perception, and processing speed, indicating a permanent impairment in these areas. Dr. Woltersdorf opined that Johnson could understand the nature and purpose of the criminal proceedings against him, but would be unable to make or assist in making his defense, *i.e.*, that Johnson was not competent to stand trial.

The district court found that the conclusions of Dr. Woltersdorf, which were supported by more objective scientific data, were more credible than the conclusions of Dr. Thibault. Accordingly, the court held that Johnson was unable to assist his counsel in the making of a defense or assist his counsel during trial or hearing and therefore was incompetent to stand trial.

Next, the district court ordered that Johnson be committed for evaluation and treatment, pursuant to K.S.A. 22–3303(1), for a period not to exceed 90 days. Initially, the order was for commitment to Larned State Hospital, but ultimately, on April 18, 2003, Johnson was ordered to be committed to the Oklahoma NeuroRestorative Center (ONRC), a facility which presumably was better equipped to address Johnson's diminished cognitive abilities resulting from the traumatic brain injury. The facility's chief medical officer was directed to certify to the court within 90 days whether Johnson had a substantial probability of attaining competency to stand trial in the foreseeable future.

*874 On June 4, 2003, ONRC filed a neuropsychological evaluation report with the court. In the report, Dr. Roscoe G. Burrows opined that Johnson would be unable to effectively function at trial and that the doctor did not expect any dramatic or meaningful changes in Johnson's cognitive status. Based on the report, the district court found that there was not a substantial probability that Johnson would attain competency to stand trial in the foreseeable future. In accordance with K.S.A. 22–3303(1), the district court ordered the Secretary of Social and Rehabilitation Services (SRS) to commence involuntary commitment proceedings pursuant to Article 29 of Chapter 59 of the Kansas Statutes Annotated.

On December 3, 2003, SRS sent the prosecutor's office a letter acknowledging that nothing further had been done in the matter and inquiring about Johnson's location. The State then filed a motion for a status hearing. Attached to

the motion was an affidavit from the lead investigator on the case, Detective Stewart, who had observed Johnson engaged in a conversation with a store clerk in which Johnson was able to discuss a computer program "in some technical detail." Consequently, at the January 23, 2004, hearing on the motion, the State asked the court to reconsider its incompetency order in light of the new evidence from the detective. The court found that the detective's affidavit did not refute the expert evidence before the court and denied the request for reconsideration. The court took the matter of SRS's inaction under advisement and temporarily stayed its order to commence involuntary commitment proceedings.

In a subsequent memorandum opinion and order, the court reiterated that Johnson remained incompetent to stand trial and that there had been no evidence proffered to the **51 contrary. Further, the court found that a letter submitted by Kansas Advocacy and Protective Services, Inc. (KAPS) was persuasive on the question of the involuntary commitment proceedings. The memorandum decision recited that the letter was "attached hereto and incorporated by reference."

The KAPS letter pointed out that the evidence at the competency hearing established that Johnson was diagnosed with a traumatic brain injury, which "means non-degenerative, structural *875 brain damage resulting in residual deficits and disability that have been acquired by external physical injury. See Kansas Administrative Regulation 30–5–300(a)(48)." The letter succinctly stated: "Traumatic brain injury is not mental illness." That statement was corroborated by quoting the definitions of "mentally ill person" and "mentally ill person subject to involuntary commitment for care and treatment" contained in K.S.A. 59–2946(e) and (f)(1).

Additionally, the letter explained the disconnect in K.S.A. 22–3303's mandate that the court must order SRS to commence involuntary commitment proceedings pursuant to Article 29 of Chapter 59 of Kansas Statutes Annotated. For SRS to comply with that order, it must have a petitioner who is willing to sign a verified petition that alleges, *inter alia,* that the petitioner has a reasonable belief that the respondent "is a mentally ill person subject to involuntary commitment." K.S.A. 59–2957(b)(1). All of the evidence contradicted such an allegation.

Accordingly, the district court found, based upon the previously admitted medical testimony and reports, that Johnson was not a "mentally ill person" within the meaning of the involuntary commitment statutes, *i.e.,* the prerequisites for a petition under K.S.A. 59–2957 were not present. The court then opined that the law should not require the performance of a futile act, presumably meaning that SRS should not be required to file a perjurious or facially inadequate petition. The court set aside its prior order for commencement of involuntary commitment proceedings and dismissed the criminal case with prejudice.

The State appealed and the Court of Appeals reversed in *Johnson I. Johnson I* opined that the language of K.S.A.2004 Supp. 22–3303(1) is clear and mandatory in its requirement that the district court issue an order to the Secretary of the SRS to commence involuntary commitment proceedings. Slip op. at 11. The panel faulted the district court for failing to force SRS to comply with the initial order to commence Chapter 59 proceedings by utilizing its criminal contempt power, if necessary, and criticized the withdrawal of the order "based on the judge's own belief that Johnson was not, in fact, mentally ill." Slip op. at 11. The panel apparently ignored that portion of the district court's memorandum decision that incorporated *876 the KAPS letter and failed to review and discuss the involuntary commitment provisions of Article 29 of Chapter 59. Moreover, the opinion appeared to presume that a traumatic brain injury was a mental illness.

Consequently, *Johnson I* remanded the case to the district court with directions to order the Secretary of SRS to commence involuntary commitment proceedings pursuant to Article 29 of Chapter 59 of the Kansas Statutes Annotated. Slip op. at 15. The opinion also held that the district court's failure to comply with K.S.A. 22–3303(1) resulted in an abuse of discretion in denying a supplemental competency hearing and an erroneous dismissal with prejudice. Slip op. at 14.

Inexplicably, the Supreme Court denied Johnson's petition for review, and the case was remanded to the district court. Upon remand, the district court dutifully issued the mandated order to SRS on November 7, 2005. On March 24, 2006, the Secretary of SRS filed a verified petition in the District Court of Ness County. The pleading was carefully worded to clarify that it was being filed pursuant to a court order, rather than alleging the petitioner's belief that Johnson was a mentally ill person subject to involuntary commitment. The petition included the statutorily required certificate from a qualified mental health professional, but that certificate stated that "Mr. Johnson is a medical patient surviving a severe TBI & is *not* mentally ill." The certificate contained the recommendation "that the patient **not** be **52 detained and admitted to an appropriate inpatient treatment facility for further observation and treatment pending court proceedings." The petitioner also attached Dr.

Woltersdorf's evaluation from August 2002 and the ONRC evaluation from May 2003, as well as Johnson's Home & Community Based Services TBI Waiver Plan of Care.

Upon receiving the Chapter 59 petition, the district court found that there had been no showing of probable cause to believe that Johnson was a mentally ill person subject to involuntary commitment, as that term is defined at K.S.A. 59–2946(f). The court noted that the Secretary was required to file the petition under K.S.A. 22–3303, but opined that no useful purpose could be fulfilled by proceeding further. To the contrary, continuing the proceedings *877 "any further would serve only to delay or interrupt the appropriate provision of services to Mr. Johnson." The court dismissed the petition, released Johnson from the jurisdiction of the court, and directed that the Reno County District Court be notified of the dismissal.

SRS apparently notified the district attorney's office that the Ness County District Court had found that Johnson was not a mentally ill person. On March 29, 2006, the State filed a request for a hearing to determine whether Johnson had been restored to competency, specifically complaining that SRS had failed to comply with K.S.A. 22–3305(2), which requires an opinion from the head of the treatment facility as to whether Johnson was now competent to stand trial. The State argued that a new competency evaluation was justified because it had been approximately 4 years since the last set of competency evaluations. Johnson objected to the request, arguing that the State had presented no new evidence which would provide reasonable grounds to conduct a new hearing pursuant to K.S.A. 22–3303(3).

Apparently, the district court advised the parties by letter that it was not ordering Johnson to submit to a new competency evaluation, unless the State proffered new evidence to show that Johnson had been restored to competency. However, that letter is not in the record on appeal. On April 24, 2006, the prosecutor filed a motion requesting the district court to reconsider the State's request for a competency evaluation. The district court issued an order denying the State's requests for another competency evaluation and a hearing to determine whether competency had been restored. The court also denied the request for a court order directing SRS to supplement its notification pursuant to K.S.A. 22–3305(2), based on the simple fact that Johnson had not been detained or admitted to a psychiatric treatment facility during the pendency of the involuntary commitment proceeding. The pending charges were dismissed without prejudice.

The State again appealed to the Court of Appeals, which in *Johnson II* again reversed the district court's order dismissing the criminal charges. The Court of Appeals opined that the district court had "abused its discretion when it denied the State's motion for an *878 evaluation and hearing 'on the issue of whether or not the defendant has been restored to competency.' K.S.A. 2006 Supp. 22–3305(2)." *Johnson II*, slip op. at 12. It based that conclusion on several factors, including the provisions of K.S.A.2006 Supp. 22–3305(2) which direct a treatment facility to render an opinion as to current competency; the fact that the evidence of competency at the original hearing was controverted and limited to only one of the two statutory factors; the Court of Appeals' assessment that the evidence available since the original determination suggests that Johnson's mental processing, memory loss, and distractibility had shown some improvement over time; the panel's own view of the significance of Johnson's 2002 performance on the Trail's Test administered by ORNC; Detective Stewart's affidavit of the conversation he overheard between Johnson and the store clerk; the panel's belief that Dr. Woltersdorf's recommendation for computer-assisted cognitive rehabilitation was an acknowledgement that Johnson could get better; and Dr. Woltersdorf's discussion of strategies or accommodations which could be employed at trial to mitigate the effects of Johnson's brain injury.

The Court of Appeals then "endeavored to fashion a remedy that would provide relief to the State yet facilitate the prompt resolution of whether Johnson has been restored to **53 competency." *Johnson II*, slip op. at 21. It remanded the case to the district court with directions to order a psychiatric or psychological examination for the defendant in a manner provided by K.S.A. 22–3302(3), and, upon receipt of the examination report, the district court was directed to hold a hearing to determine whether the defendant has been restored to competency. Slip op. at 21.

STATUTORY PROVISIONS

[1] [2] 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. We will be called upon to interpret the statutes governing competency to stand trial, K.S.A. 22–3301 *et seq.*, and the statutory provisions for the care and treatment for

mentally ill persons, *879 K.S.A. 59–2945 *et seq.* The interpretation of a statute is a question of law over which this court has unlimited review. *LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19, 152 P.3d 34 (2007).

[3] [4] [5] Our journey is guided by certain rules of statutory construction:

> "The fundamental rule of statutory construction to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. [Citation omitted.]" *Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P.3d 364 (2003).

[6] [7] Although ordinary words are to be given their ordinary meanings, " '[t]echnical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings.' " *In re Vanderblomen*, 264 Kan. 676, 680, 956 P.2d 1320 (1998) (quoting *Galindo v. City of Coffeyville*, 256 Kan. 455, Syl. 5, 885 P.2d 1246 [1994]). Nevertheless, a court may only go so far in attempting to give effect to legislative intent.

> "It is also well established that the doctrine of liberal construction does not allow this court to delete vital provisions or supply vital omissions in a statute. No matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct. [Citation omitted.]" *Eveleigh v. Conness*, 261 Kan. 970, 978, 933 P.2d 675 (1997).

The criteria for the underlying competency inquiry is set forth in the definition contained in K.S.A. 22–3301(1):

> "(1) For the purpose of this article, a person is 'incompetent to stand trial' when he is charged with a crime and, because of mental illness or defect is unable:
>
> (a) To understand the nature and purpose of the proceedings against him; or
>
> (b) to make or assist in making his defense."

[8] [9] The connecting word "or" ordinarily indicates that the connected items are in the disjunctive. See 82 C.J.S., Statutes 331 ("and" ordinarily conjunctive; "or" ordinarily disjunctive). Thus, a person who is either unable to understand the criminal proceedings or unable to assist with his or her defense is considered incompetent *880 to stand trial. Further, the reason for the defendant's inability to comprehend can be caused by either a mental illness or a mental defect. In this case, it will be important to keep in mind that Johnson claimed to fall within the definition of a person incompetent to stand trial because of a mental defect that rendered him unable to make or assist in making his defense.

[10] The issue of a defendant's competency to stand trial may be raised by the defendant, the defendant's counsel, the prosecutor, or *sua sponte* by the judge at any time between the filing of the charging document and the pronouncement of sentence. If the judge has reason to believe that the defendant is incompetent to stand trial, the criminal proceedings are suspended and a competency **54 hearing must be held. K.S.A. 22–3302(1). The judge can order a psychiatric or psychological examination of the defendant and may impanel a six-person jury. K.S.A. 22–3302(3).

After the hearing, if the defendant is found to be competent, the criminal proceedings are resumed. K.S.A. 22–3302(4). If the defendant is found to be incompetent to stand trial, the defendant shall be committed for evaluation and treatment to the state security hospital or any appropriate county or private institution; such commitment shall not exceed 90 days. K.S.A. 22–3302(5); K.S.A. 22–3303(1). Within that 90–day period, the chief medical officer of the commitment institution "shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future." K.S.A. 22–3303(1). If such probability exists, the defendant is ordered to remain in the institution for 6 months from the date of the original commitment or until he or she attains competency to stand trial, whichever occurs first. K.S.A. 22–3303(1).

If the institution's certification states that a substantial probability of attaining competency does not exist or if a detained defendant does not attain competency within 6 months of the original date of commitment, the court "shall order the secretary of social and rehabilitation services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto." K.S.A. 22–3303(1), (2). However, for certain high severity level crimes, which *881 are not involved in this case, the definition of a "mentally ill person subject to involuntary commitment for care and treatment" is modified. That modification will be briefly discussed

below.

To this point in our case, the district court had strictly followed the statutory scheme. The issue of competency was timely raised, and the district court formed a belief that Johnson was incompetent to stand trial. The judge referred Johnson to Horizons for a competency evaluation. The defendant obtained an evaluation from Dr. Woltersdorf and submitted a report with his own motion for a competency hearing. A full hearing was conducted, after which the district court made findings on the credibility of the evidence presented and on the ultimate issue, declaring that Johnson was not competent to stand trial. The court committed Johnson to ONRC for up to 90 days. Dr. Burrows, the chief medical officer of ONRC, made the requisite certification to the district court, which then made the finding that there was not a substantial probability that Johnson was likely to be competent to stand trial in the foreseeable future. Pursuant to K.S.A. 22–3303(1), the district court ordered the Secretary of SRS to commence involuntary commitment proceedings under Article 29 of Chapter 59 of the Kansas Statutes Annotated.

Then, however, progress on the case halted. In *Johnson I,* the Court of Appeals appeared perplexed as to why SRS had not commenced the involuntary commitment proceedings and why the district court had not invoked its contempt powers to force SRS to do so. Perhaps if the panel had carefully considered that portion of the district court's memorandum decision that incorporated by reference the KAPS letter, it would have discerned that the answers were to be found in the provisions of K.S.A. 59–2945 *et seq.*

Again, we will begin our review of the applicable statutory provisions by looking at the fundamental definitions underlying the Act. K.S.A. 59–2946 provides:

> "When used in the care and treatment act for mentally ill persons:
>
> ....
>
> "(e) 'Mentally ill person' means any person who is suffering from a mental disorder which is manifested by a clinically significant behavioral or psychological syndrome or pattern and associated with either a painful symptom or an impairment ***882** 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.
>
> "(f)(1) 'Mentally ill person subject to involuntary commitment for care and treatment' means a mentally ill person, ****55** 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; mental retardation; organic personality syndrome; or an organic mental disorder."

Prior to the 1996 enactment of the current Care and Treatment Act for Mentally Ill Persons, K.S.A. 59–2945 *et seq.,* the predecessor act, the Treatment Act for Mentally Ill Persons, K.S.A. 59–2901 *et seq.,* only contained a definition for "mentally ill person," which was found in K.S.A. 59–2902(h). See *In re Vanderblomen,* 264 Kan. at 680, 956 P.2d 1320. In providing separate definitions for "mentally ill person" and "mentally ill person subject to involuntary commitment for care and treatment," the new Act clarified " 'that there are certain mentally ill persons who should not be subject to involuntary proceedings to restrict their liberty.' " *In re Vanderblomen,* 264 Kan. at 682, 956 P.2d 1320 (quoting comments of the Care and Treatment Advisory Committee of the Judicial Council). The mental disorders listed in K.S.A. 59–2946(f)(1) as being specifically *not* subject to involuntary commitment were intentionally excluded because they " 'are generally professionally recognized as unresponsive to psychiatric treatment.' " *In re Vanderblomen,* 264 Kan. at 682, 956 P.2d 1320 (quoting comments of the Care and Treatment Advisory Committee of the Judicial Council).

[11] According to all of the evidence in the record, including all of the professional diagnoses, Johnson was afflicted with a traumatic brain injury. We have previously clarified that a traumatic closed head injury resulting from a motor vehicle accident is an " 'organic mental disorder,' which ... [is] one of those diagnoses which will not justify an involuntary commitment." *In re Vanderblomen,* 264 Kan. at 683, 956 P.2d 1320. Like Vanderblomen, Johnson was not a mentally ill person subject to involuntary commitment for care and treatment because his sole diagnosis was an organic mental disorder.

***883** Armed with that knowledge, we proceed to consider what the SRS had to do to commence the court-ordered involuntary commitment proceedings. K.S.A. 59–2957 sets forth the requirements of a petition to obtain a judicial determination of mental illness, an obvious prerequisite to an involuntary mental illness commitment. First, the petition must be verified, *i.e.,* the petitioner must swear an oath that the statements contained in the petition

are true and correct. One of the statements required to be contained in the petition is "[t]he petitioner's belief that the named person is a mentally ill person subject to involuntary commitment and the facts upon which this belief is based." K.S.A. 59–2957(b)(1). Thus, the first hurdle for the Secretary of SRS was how to swear an oath that the Secretary believed Johnson to be a mentally ill person subject to involuntary commitment and how to state the true and correct facts upon which that belief was based when all of the facts available to the Secretary refuted such a belief. Because Johnson was solely diagnosed with an organic mental disorder, he was statutorily excluded from the definition of a mentally ill person subject to involuntary commitment, and the Secretary could not swear otherwise.

Furthermore, the petition must be accompanied by a certificate from a physician, psychologist, or qualified mental health professional stating that such professional has personally examined the person and any available records and has found that the person, in such professional's opinion, is likely to be a mentally ill person subject to involuntary commitment for care and treatment under the Act. K.S.A. 59–2957(c)(1). The provision provides an exception where the proposed patient has been so uncooperative as to prevent an examination, but that was not the case here. Johnson had cooperated with all of the examiners and, presumably, SRS had access to the reports from Dr. Woltersdorf, Dr. Burrows, and Mr. Thibault. However, none of those professionals' diagnoses would support an allegation that Johnson was mentally ill for involuntary commitment purposes. SRS was simply unable to comply with the certificate requirement.

**56 Thus, we have reached our first statutory dead end. Although K.S.A. 22–3303(1) mandates that the district court order SRS to *884 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. The district court understood that dilemma, as evidenced by the statement in the memorandum decision that the law should not require a futile act. Even the legislature apparently understood the problem as early as 2001, when it enacted K.S.A. 22–3306, entitled "Task force to study programs for alleged offenders with disabilities who are potentially incompetent to stand trial and make recommendations," which provides:

> "The secretary of social and rehabilitation services shall convene a task force to study current programs and laws for alleged offenders with disabilities that render such offenders potentially incompetent to stand trial, *but who do not meet the criteria for involuntary commitment under Kansas law.* The task force shall review and make recommendations on the adequacy of Kansas programs and services, and current Kansas law, in protecting public safety and in providing services and support to such alleged offenders. The secretary shall report to the judiciary committee during the 2001 interim and shall make a final report including programmatic and statutory recommendations to the 2002 legislature." (Emphasis added.)

As the legislature noted, the competing interests are protecting public safety on the one hand, and providing services and support for persons with disabilities on the other. If a person is incompetent to stand trial and also cannot be committed for mental illness treatment, that person is simply returned to the community without supervision, in derogation of public safety. Yet, if a person has a condition that cannot be improved through treatment, *e.g.*, a traumatic brain injury, then involuntarily committing that person under K.S.A. 59–2945 *et seq.* is akin to a life sentence without possibility of parole. In 2001, the legislature struck a balance between the competing interests by amending K.S.A. 22–3303(1) to add a provision which would permit the involuntary commitment of persons who are incompetent to stand trial because of one of the excepted diagnoses listed in K.S.A. 59–2946(f)(1), but who have been charged with certain crimes. The added provision states:

> *885 "When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21–3504 [aggravated indecent liberties with a child], 21–3511 [aggravated indecent solicitation of a child], 21–3518 [aggravated sexual battery], 21–3603 [aggravated incest] or 21–3719 [aggravated arson], and amendments thereto, and commitment proceedings have commenced, for such proceeding, 'mentally ill person subject to involuntary commitment for care and treatment' means a mentally ill person, as defined in subsection (e) of K.S.A. 59–2946, and amendments thereto, who is likely to cause harm to self and others, as defined in subsection (f)(3) of K.S.A. 59–2946, and amendments thereto. *The other provisions of subsection (f) of K.S.A. 59–2946, and amendments thereto, shall not apply.*" (Emphasis added.) K.S.A. 22–3303(1).

Unfortunately, *Johnson I* did not appear to pick up on the legislatively recognized problem, because it remanded with directions for the district court to reinstate and enforce the order for SRS to commence involuntary commitment proceedings, even though Johnson had not

been charged with one of the crimes with a modified definition of mentally ill person subject to involuntary commitment for care and treatment. One can only imagine the consternation and frustration the district court and SRS must have experienced when faced with an appellate court mandate to do that which could not be done.

As it turned out, the district court's prediction was accurate. The filing of the commitment petition was truly a futile and superfluous act, correctly resulting in an immediate dismissal for lack of probable **57 cause to believe that Johnson was a mentally ill person subject to involuntary commitment. See K.S.A. 59–2959(d)(3) (at temporary custody hearing, court must find probable cause or, lacking probable cause, "the court shall terminate the proceedings and release the person"); K.S.A. 59–2962 (court must find probable cause to order mental evaluation; lacking probable cause, "the court shall terminate the proceedings").

With the dismissal of the involuntary commitment petition, the disconnect with the competency statutes continued. Both *Johnson I* and *Johnson II* discuss K.S.A. 22–3305, which addresses what is to happen after SRS has commenced the Chapter 59 involuntary commitment proceedings. If the defendant is not admitted as a patient in the treatment facility to which he or she was sent for evaluation, the defendant is to remain in that institution and the *886 SRS is to notify the court and prosecutor of the county where the criminal proceedings are pending. K.S.A. 22–3305(1). Also, if a defendant has been admitted as a patient but is thereafter to be discharged, he or she is to remain at the institution while the court and prosecutor are notified. K.S.A. 22–3305(2). When giving the required notification to the court and prosecutor, the treatment facility is to include "an opinion from the head of the treatment facility as to whether or not the defendant is now competent to stand trial." K.S.A. 22–3305(2). The prosecutor may then request a hearing on the issue of competency restoration, but if such request is not made within 10 days of receipt of the treatment facility notification, "the court shall order the defendant to be discharged from commitment and shall dismiss without prejudice the charges against the defendant." K.S.A. 22–3305(2).

Obviously, this provision does not contemplate an immediate dismissal of the involuntary commitment petition for lack of probable cause to believe the patient is mentally ill, because without probable cause the defendant cannot be sent to a treatment facility for evaluation. If the defendant never gets to a treatment facility, then that non-existent facility cannot continue to detain the defendant and the head of the phantom facility cannot form an opinion as to the absent defendant's competency to stand trial.

In *Johnson II,* the Court of Appeals chastised SRS for failing to comply with the plainly-stated mandate of K.S.A. 22–3305(2) to provide a competency opinion from the head of the treatment facility. Again, the Court of Appeals looked solely at the competency statutes, without considering the interface with K.S.A. 59–2945 *et seq.*, and opined that SRS should have done the impossible. This time, however, it was not only legally impossible for SRS to comply with the provisions of the competency statutes, but it was physically impossible as well because there was no treatment facility from which to obtain an opinion. Accordingly, *Johnson II's* reliance on a violation of K.S.A. 22–3305(2) is misplaced.

Finally, we come to the only statute which has any relevance to Johnson's case at this time. K.S.A. 22–3303(3) provides a mechanism for the district court to revisit the competency issue. It states, "When reasonable grounds exist to believe that a defendant who *887 has been adjudged incompetent to stand trial is competent, the court in which the criminal case is pending shall conduct a hearing in accordance with K.S.A. 22–3302 and amendments thereto to determine the person's present mental condition." K.S.A. 22–3303(3).

REHEARING ON COMPETENCY

[12] [13] The Court of Appeals applied an abuse of discretion standard of review, presumably relying on the language in K.S.A. 22–3305(2) that says the court "may" set a hearing after notification of discharge from the treatment facility. Here, we are dealing with K.S.A. 22–3303(3), which says the court "shall conduct a hearing." Nevertheless, in determining whether reasonable grounds existed to revisit the competency issue, we should afford a great deal of deference to the trial court that conducted the original proceedings.

On the existence of reasonable grounds to believe that Johnson had become competent to stand trial, the district court made the following findings:

> **58 "2. The defendant was found incompetent to stand trial as a result of brain trauma and the evidence established the effects of the trauma are permanent and irreversible, and therefore, the passage of time is not a reasonable ground to believe the defendant is competent.

"3. The recent dismissal of involuntary commitment proceedings in Ness County District Court Case No.2006–CT–02 does not provide reasonable grounds to believe that the defendant is competent as contemplated by K.S.A.2005 Supp. 22–3303(3)."

The district court was absolutely correct in its assessment of the relevance of the dismissal of the involuntary commitment proceedings. That action simply meant that there was no probable cause to believe that Johnson was a mentally ill person subject to involuntary commitment for care and treatment because his sole diagnosis was an organic mental disorder. An organic mental disorder is, however, a mental defect within the meaning of the competency statutes. As noted previously, the district court understood the distinction; the prosecutor should have understood it as well.

**888 The district court's finding as to the nature and extent of Johnson's traumatic brain injury is directly supported by the opinions of both Dr. Woltersdorf and Dr. Burrows. Even Mr. Thibault, who testified for the State, did not dispute the diagnosis, but rather he simply disputed the effect of the injury on Johnson's ability to assist with his defense. Even then, Mr. Thibault acknowledged that Dr. Woltersdorf's testing was considerably more thorough. The district court specifically found Dr. Woltersdorf's testimony to be more credible.

[14] Nevertheless, it is not the function of an appellate court to weigh conflicting evidence, to evaluate witnesses' credibility, or to redetermine questions of fact. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009). The Court of Appeals appeared to do all three in *Johnson II*.

[15] One of factors the Court of Appeals cited as supporting a new competency evaluation and hearing was a belief that the original competency hearing "was both controverted and limited in scope." *Johnson II*, slip op. at 16. A determination of whether reasonable grounds existed to have a second competency hearing should not lead an appellate court to redetermine the factual questions from the original hearing. Moreover, as we noted, incompetency can occur if the defendant is *either* unable to understand the nature and purpose of the proceedings against him *or* unable to make or assist in making his defense. The fact that only one of the alternative definitions of incompetency was present in the case does not provide reasonable grounds to believe that competency has been restored.

The Court of Appeals not only weighed the evidence, it endeavored to provide its own analysis of the significance of certain test scores. That task was best left to the experts. Two of those experts, Dr. Woltersdorf and Dr. Burrows, opined that, given the lapse of time since the accident, they would not expect to see any significant improvement in Johnson's cognitive abilities. In rendering those opinions, the experts had the benefit of Johnson's results on the base line tests in January 2002 and the results from the same tests which were given subsequently. Although the experts noted slight improvement on the later tests, part of that was attributed to the **889 patient's familiarity with the tests the second time around. Nevertheless, the experts had the test results when opining that Johnson would not significantly improve. We should not question the credibility of those opinions based upon our own lay analysis of what the test results show.

Moreover, the experts' opinions directly refute *Johnson II's* assertion that the passage of time since the last medical evaluation of Johnson's cognitive abilities provides a reasonable ground to believe he is now competent. If the diagnosis is permanent and irreversible brain damage, the relative date of that assessment is immaterial.

[16] Further, any reliance on the detective's affidavit setting forth the conversation he overheard between Johnson and a store clerk is suspect. The State provided no foundation as to the detective's knowledge of computer programs to give context to his **59 statement that the conversation contained "some technical detail." For the uninformed, gibberish can sound like technical detail. Moreover, we do not know whether Johnson's part of the conversation was responsive to that of the clerk. Nevertheless, the district court considered the affidavit and opined that it did not override the expert opinions that were contained in the court file. We agree. If the State wanted an assessment of what the conversation may have meant on the issue of competency, it should have submitted the information to an expert for analysis.

[17] Also, we question the Court of Appeals' characterization of Dr. Woltersdorf's recommendation that Johnson engage in computer-assisted cognitive rehabilitation. *Johnson II* viewed it as an acknowledgment that Johnson could be rehabilitated to competency to stand trial. We are unwilling to put those words in the doctor's mouth. The more likely reason for the treatment recommendation was to assist Johnson in reaching some level of independent living, rather than to attain competency to stand trial.

Finally, the Court of Appeals believed it was a factor that

Dr. Woltersdorf had testified about "certain strategies or accommodations which could be employed by the district court during a trial of this matter in an effort to mitigate the effects of Johnson's brain injury." *Johnson II*, slip op. at 20. However, the doctor discussed ***890** those possible strategies while giving his opinion that Johnson was incompetent to stand trial; he did not say that the strategies would resolve the problem. To the contrary, the doctor said that he knew of no adjustments in the courtroom which could compensate for Johnson's slow mental processing, which emanated from a nonhealing area of the brain.

In conclusion, the district court's finding that the State had not proffered any evidence to establish reasonable grounds to believe that Johnson had been restored to competency to stand trial is supported by the record. In fact, the record provides reasonable grounds to believe that Johnson will never be restored to competency to stand trial. Accordingly, we reverse the Court of Appeals' decision and affirm the district court's order dismissing the criminal proceedings without prejudice.

All Citations

289 Kan. 870, 218 P.3d 46

Kansas Department of Social and Rehabilitation Services

Report of the Secretary's Chapter 208, Section 9 Task Force

Concerning Persons Non-Restorable to Competency

December 14, 2001

Janet Schalansky,
Secretary of Social and Rehabilitation Services

Contents:

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Report to the Secretary
Concerning Persons Non-Restorable to Competency
(In response to Section 9 of Chapter 208 of the 2001 Session Laws of Kansas)

December 14, 2001

Madam Secretary:

Your task force met regularly over the course of approximately three months this past fall and carefully studied the provisions of Chapter 22, Article 33 of the Kansas Statutes Annotated, including the recent amendments to K.S.A. 22-3303. These amendments were enacted during the 2001 Legislative Session and appear at Section 8, Chapter 208 of the 2001 Session Laws of Kansas. Your task force also carefully studied the programs within S.R.S. (both those within institutional settings and those available through community based programs) which would be applicable to persons found not competent to proceed with criminal proceedings. Finally, your task force carefully studied how the S.R.S. systems respond to such persons now, both formally, in light of the current laws concerning incompetency, and informally, when those laws don't seem to provide further direction.

- Our conclusion is that the current laws, even as they were amended last Session, clumsily deal with such persons and makes understanding what actually happens in their circumstances difficult to follow and fully comprehend. We conclude that there exists a great deal of mis-understanding with regard to these matters, which the current laws contribute to. We further conclude that the current laws concerning these matters hinders, rather than helps, in ensuring the public's safety and the delivery of appropriate services to individuals who are not restorable to competency.

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Finally, your task force carefully and fully considered five alternative approaches which might be adopted with regard to these individuals, and recommends to you what we refer to as the "services matching" approach.

The Problem With the Current Laws

We found that the current provisions of Article 33 create, at least on paper, for a small but significant number of persons who are not competent to proceed with criminal proceedings a "dead end." It is this apparent "dead end" that leads to feelings of frustration and the mis-understanding that there is nothing that can be done.

- For those persons who are not "mentally ill" (as that term is now defined for most persons who are not competent, even after the 2001 amendments, and as it was defined and understood in Article 33 proceedings for all defendants prior to the amendments that were passed last session), the law makes no provisions for what is to happen after the Secretary's required Chapter 59 petition is filed, but denied and dismissed. This is the "dead-end" that creates the mis-understandings that exist with regard to what actually happens to these individuals.

- The 2001 amendments to K.S.A. 22-3303 do not, for the overwhelming majority of persons who are found to be incompetent to proceed for reasons other than "mental illness," correct this problem.

- The 2001 amendments to K.S.A. 22-3303, by their limiting provisions, will apply to very few, if any, actual cases. We conclude that, contrary to what we presumed to have been the Legislature's expectation, the amendments will likely fail to fix the problem even with regard to those persons at which those amendments were aimed. Nor, do we conclude, that any

extension of those amendments would improve matters. Instead, we believe any extension would only make matters worse.

While the provisions in Article 33 that require a mental illness proceeding make good sense and lead to appropriate services for persons who are actually mentally ill, any attempt to "force-fit" persons who will not benefit from mental health services into that system will both drain and waste limited resources available to that system, and make it less likely that appropriate services will be timely provided to them. Not only do the present requirements that the Secretary file and prosecute a mental illness case on individuals for whom it is apparent at the outset that such proceedings will result only in wasted effort and expense seem silly, but by that very waste of time, effort and expense, the law creates a false sense that no appropriate resources exist. Such is simply not the case.

- We found that, in fact, many resources and programs already exist to serve such persons, and such services are capable of being delivered in ways that protect the public's safety, but because utilizing these alternative resources and programs depends upon informal means of obtaining access to them, a false understanding that there is "nothing that can be done" is fostered among persons who are not aware of the "informal" proceedings that often do take place in these cases.

Chapter 208, Section 8 Represents a False Solution to the Problem

Our conclusion was that the 2001 amendments to K.S.A. 22-3303 will not likely have much effect. To date, they have not been applied in any case of which we became aware of. Because

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the provisions of the 2001 amendments apply in such narrow circumstances, we concluded that they will rarely, if ever, be actually applied. In the unlikely event that they were, we conclude that any positive effect these provisions might have will be far outweighed by the negative consequences they will likely generate, not the least of which would be the impact upon the individual who is "force fitted" into services and programs not geared to meet their needs. We also noted that the costs which would be associated with the application of the 2001 amendments would far exceed the costs that would otherwise be associated with a more appropriate solution.

- To keep a person institutionalized in a S.R.S. facility costs, on average, $160.00 per day. That adds up to $4,800.00 per month, and $57,600.00 per year!

- Only rarely would a person who is incompetent to stand trial require institutionalization in order to meet either their needs or the public's need for their safekeeping.

- Instead, community based programs designed to both manage and care for persons with disabilities costs only a fraction of the costs of their institutionalization.

The Problem Is Not So Large
That It Can Not Be More Efficiently Addressed

We found that the numbers of persons annually to whom Article 33 requirements apply are quite small. Strictly speaking, there are at most only a total of no more than 35 to 40 or so of these cases a year. We did hear from the representatives on our task force who are or have been prosecutors that there have been in the past, and likely continues to be, a few other cases which are never formally filed because of the false understandings that exist among many Judges and attorneys with regard to what actually can be done. We concluded, however, that in many of

those cases the same informal solutions that are utilized in the cases that actually do get filed, but that require "informal" resolutions, are being utilized in these cases as well, such that those unaccounted for cases become a "wash" in accounting for the numbers.

We found that in most of the 40 or so cases in which Article 33 requirements apply, that mental illness does account for the reason why the individual was found to be incompetent, and in those cases, mental health services are appropriate and are generally appropriately provided. It is the few cases, and as best as we could determine, in maybe only 10 or, at most, 15 cases a year that create the problems and mis-understandings. This figure accounts for all cases, including misdemeanors, juvenile offenses and felonies, in which a person is found to be not competent for reasons involving disabilities other than mental illness.

Of this 10 or 15 cases, at most only 1 or 2 cases a year, presents to S.R.S. serious concerns for public safety. In many years, we were advised that the number is actually zero cases that present serious concerns for public safety. For those 1 or 2 cases, S.R.S. deals with those individuals by arranging the appointment of a guardian and having the guardian admit the person to an inpatient facility, usually Parsons State Hospital. The charges pending against those persons may or may not have been of a serious nature. It is, instead, circumstances peculiar to that individual that often makes the person particularly dangerous. This small number of actual cases involved belies any necessity to try to deal with this problem through broadly worded statutory amendments. To do so only invites unforseen complications and difficulties.

Our Recommended Solution

We recognize that while the numbers of cases as a whole may be small, any one case

may be of significant concern to the local community in which it arises. We recognize the current "dead end" provisions cause considerable consternation in those cases where it arises. A solution is called for. In attempting to find one, we reviewed five principal approaches to solving this problem. One of those was the mental illness definition approach taken by the 2001 amendments to K.S.A. 22-3303. Other approaches reviewed included other civil commitment schemes, custodial approaches, automatic guardianships and a "match-making" approach. We compared how each of these approaches would "dove-tail" into current services and resources, and how each of these various approaches might be implemented and enforced.

- We concluded that an approach which provided a mechanism for "matching" individuals with existing services, from the full range of available services, everything from institutionalization to varying degrees of community supervision and assistance, and which provided for formal accountability in the context of legal proceedings to review the selected services, would best meet the requirements of providing for both public safety and the delivery of appropriate services to the individual.

We dubbed this the "services matching" approach. It would involve making a specified individual or agency initially responsible for determining what specific services were most appropriate to an individual who had been found incompetent, on whatever basis that finding had been made, and then, taking into account legitimate concerns for public safety, arranging for and ensuring the delivery of appropriate services. At the same time, we would require a mechanism whereby that decision-making person can be made to explain and justify their determinations, and we would require an opportunity for appropriate input to those determinations by the court and attorneys in the case from which the incompetency finding arose. Only when all parties were

satisfied that both concerns for public safety and the appropriateness of the services to be provided had been adequately addressed would we conclude the first phase of legal proceedings. Thereafter, we would recommend a process of ongoing review and revision of those services and safety concerns, overseen through judicial proceedings. We recommend that this process continue indefinitely, until such time as the defendant is either found to be competent, or all concerns about safety are resolved to the satisfaction of that judicial oversight.

- Only through this case-by-case approach, with judicial oversight, could we feel comfortable that appropriate, customized services would be provided in the safest and most effective and efficient manner.

Our recommended "services matching" approach is somewhat closely described by the Senate version of HB2084 (2001 Session), but we would recommend adding and using differing language to clarify the court's authority to oversee the provision of appropriate or necessary services and to issue orders of conditional release. (See our attached recommended statutory language.) We further recommend that someone be asked to take the lead in educating the Judges and attorneys who would be involved in such cases as to enforcement actions that are already available to them and which could be taken should the person fail to comply with any requirements placed upon them by the courts or by their treatment providers.

- We find that no approach, including institutionalization, can reduce to absolute zero the risk that a person who has been found not competent to proceed would not re-offend.

- Many services, including one-to-one supervision, are available through community based programs, even when the assessed risk of re-offense is determined to be high.

- The actual risk of re-offense is often quite different from what some persons

assume that risk to be.

The greatest concern we had with our recommended solution was the identity of the person or agency to whom would be given the initial responsibility for determining needs, assessing the public's safety concerns, and "matching" the incompetent individual to services. We, therefore, recommend that initially, and until the original parties to the criminal court proceedings are satisfied, that responsibility be assigned to the Secretary of S.R.S. Thereafter, if a continuing need exists, we believe the responsibility for continued monitoring and decision making can be passed to a court appointed guardian. Doing so ensures continuing accountability in a formal manner, because of the on-going supervision a guardian can be provided by the court that appoints and oversees a guardianship.

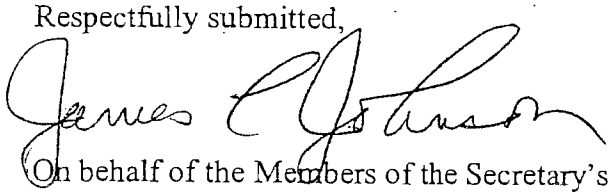
While Kansas' current reliance upon an all-volunteer cadre of "public" guardians makes this secondary assignment more difficult, the small numbers involved has to date made this solution feasible. However, we did come to the conclusion that in the long run, Kansas will need to supplement that system with a limited, professional component, particularly so in order to be fair to the volunteers who participate in our current program, who should more appropriately handle other, less demanding, cases.

- We recommend that the State consider adopting some form of a professional public guardianship program that is financed by local and/or state funds. We recognize that the additional financial obligation that would entail is probably not feasible at this time, given the State's current fiscal situation, however, when we compared the costs of such a system with the costs that we anticipate would be associated with any expansion of the institutionization approach the Legislature started to take last Session, we became convinced that our approach

would be a cost savings measure in the final analysis. We recommend that another task force be assembled and given responsibility to explore how a limited, professional component to the State's guardianship resources could be developed and implemented in a manner which would supplement the State's current "all-volunteer" program.

We attach hereto copies of certain of the materials the task force reviewed, and the points of agreement we reached prior to making our recommendations and this report. Thank you for the opportunity to have served you in this manner.

Respectfully submitted,



On behalf of the Members of the Secretary's
Chapter 208, Section 9 Taskforce

We recommend the following amendments to K.S.A. 22-3303 and K.S.A. 22-3305:

22-3303. (1) A defendant who is charged with a felony and is found to be incompetent to stand trial shall be committed for evaluation and treatment to the state security hospital or to any appropriate county or private ~~institution~~ treatment facility. A defendant who is charged with a misdemeanor and is found to be incompetent to stand trial shall be committed for evaluation and treatment to a state psychiatric hospital or to any appropriate ~~state,~~ county or private ~~institution~~ treatment facility. Any such commitment shall be for a period of not to exceed 90 days. Within 90 days after the defendant's commitment to such ~~institution~~ state hospital or treatment facility, the chief medical officer of such ~~institution~~ state hospital or treatment facility shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If such probability does exist, the court shall ~~order~~ again commit the defendant to ~~remain in an~~ that or another appropriate state, county or private ~~institution~~ treatment facility for further care and treatment until the defendant either attains competency to stand trial or for a period of six months from the date of the original commitment, whichever occurs first. If such probability does not exist, the court shall order the defendant to remain in the state hospital or treatment facility where originally committed and shall order the secretary of social and rehabilitation services to ~~commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statues Annotated, and any amendments thereto. For such proceedings, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e) of K.S.A. 2000 Supp. 59-2946, and amendments thereto, who is likely to cause harm to self or others, as defined in subsection (f)(3) of K.S.A.2000 Supp. 59-2946, and amendments thereto. The other provisions of subsection (f)~~

~~of K.S.A. 2000 Supp. 59-2946, and amendments thereto, shall not apply~~ conduct an investigation concerning the circumstances of the defendant and, based upon the reasons for which the defendant was found not competent to stand trial and any other factors relevant to the defendant's circumstances, determine what services would be appropriate for the defendant, or what placement of the defendant involving the least restrictive setting would be appropriate, to meet both the needs of the defendant and that are consistent with public safety. Whenever such shall be appropriate, the secretary shall commence an involuntary commitment proceeding pursuant to either article 29 or article 29b of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, or a guardianship proceeding pursuant to article 30 of chapter 59 of the Kansas Statutes Annotated, and amendments thereto. The secretary shall report to the court, the defendant's attorney and to the county or district attorney of the county in which the criminal proceedings are pending, the secretary's findings, recommendations and actions concerning the defendant. Thereafter, the court shall set a hearing upon the secretary's report. At the conclusion of such hearing, the court may enter such orders as are appropriate, including ordering the secretary to further review and report upon the defendant's needs or community concerns, or to provide or cause to be provided such services as the secretary determines appropriate to meet the needs of the defendant. Upon a showing to the court that the defendant's needs are being met and that the public's safety is reasonably assured, including, when appropriate, by the exercise of continuing jurisdiction by a court pursuant to a care and treatment proceeding instituted pursuant to article 29 or article 29b of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, or a guardianship proceeding instituted pursuant to article 30 of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, the court shall conditionally release the defendant

and dismiss without prejudice the charges then pending against the defendant, and the period of limitation for the prosecution for the crime charged shall not continue to run until the defendant has been determined to have attained competency in accordance with K.S.A. 22-3302 and amendments thereto.

(2) If a defendant who was found to have had a substantial probability of attaining competency to stand trial, as provided in subsection (1), has not attained competency to stand trial within six months from the date of the original commitment, the court shall then order the secretary of social and rehabilitation services to ~~commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto. For such proceeding, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (c) of K.S.A. 2000 Supp. 59-2946, and amendments thereto, who is likely to cause harm to self and others, as defined in subsection (f)(3) of K.S.A.2000 Supp 59-2946, and amendments thereto. The other provisions of subsection (f) of K.S.A. 2000 Supp. 59-2946, and amendments thereto, shall not apply~~ conduct an investigation concerning the circumstances of the defendant and, based upon the reasons for which the defendant was found not competent to stand trial and any other factors relevant to the defendant's circumstances, determine what services would be appropriate for the defendant, or what placement of the defendant involving the least restrict setting would be appropriate, to meet both the needs of the defendant and that are consistent with public safety. The secretary shall commence such involuntary commitment proceedings or guardianship proceedings as may be appropriate and report to the court, as provided for in subsection (1). Thereafter the court shall set a hearing upon the secretary's report and proceed as provided for in subsection (1).

(3) When reasonable grounds exist to believe that a defendant who has been adjudged incompetent to stand trial is competent, the court in which the criminal case is pending shall conduct a hearing in accordance with K.S.A. 22-3302 and amendments thereto to determine the ~~person's~~ defendant's present mental condition. Reasonable notice of such hearings shall be given to the prosecuting attorney, the defendant and the defendant's attorney of record, if any. If the court, following such hearing, finds the defendant to be competent, the proceedings pending against the defendant shall be resumed.

(4) A defendant committed to ~~a~~ an inpatient public ~~institution~~ treatment facility under the provisions of this section who is thereafter sentenced ~~for~~ with respect to the ~~crime charged~~ charges pending at the time of commitment may be credited with all or any part of the time during which the defendant was committed and confined in such inpatient public ~~institution~~ treatment facility.

22-3305. (1) Whenever involuntary commitment proceedings pursuant to article 29 or 29b of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, have been commenced by the secretary of social and rehabilitation services as required by K.S.A. 22-3303 and amendments thereto, ~~and~~ but the defendant is not committed to a treatment facility as a patient, the defendant shall remain in the ~~institution~~ treatment facility where committed pursuant to K.S.A. 22-3303 and amendments thereto, or where detained pursuant to the proceedings instituted pursuant to article 29 or 29b of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, and the secretary shall promptly notify the court, and the county or district attorney of the county in which the criminal proceedings are pending, within or as a supplement

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to the secretary's report required by K.S.A. 22-3303 and amendments thereto, of ~~the~~ this result of the involuntary commitment proceeding. Thereafter, the court shall proceed as provided for in subsection (1) of K.S.A. 22-3303 and amendments thereto.

(2) Whenever involuntary commitment proceedings pursuant to article 29 or 29b of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, have been commenced by the secretary of social and rehabilitation services as required by K.S.A. 22-3303 and amendments thereto, and the defendant is committed to a treatment facility as a patient, but thereafter is determined to be appropriate to be discharged pursuant to the provisions of ~~care and treatment act for mentally ill persons~~ article 29 or 29b of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, the defendant shall remain in ~~the institution~~ treatment where committed pursuant to ~~K.S.A. 22-3303~~ either article 29 or 29b of chapter 59 of the Kansas Statutes Annotated, and amendments thereto, and the head of the treatment facility shall promptly notify the court and the county or district attorney of the county in which the criminal proceedings are pending that the defendant is appropriate to be discharged.

When giving such notification to the court and the county or district attorney ~~pursuant to subsection (1) or (2)~~, the head of the treatment facility shall include ~~in such~~ with that notification an opinion ~~from the head of the treatment facility~~ as to whether or not the defendant is now competent to stand trial. Upon request of the county or district attorney, the court may set a hearing on the issue of whether or not the defendant has been restored to competency. If no such request is made within 10 days after receipt of the head of the treatment facility's notice ~~pursuant to subsection (1) or (2)~~, the court shall order that the head of the treatment facility may discharge the defendant ~~to be discharged~~ from commitment ~~and shall dismiss without prejudice the charges~~

~~against the defendant, and the period of limitation for the prosecution for the crime charged shall not continue to run until the defendant has been determined to have attained competency in accordance with K.S.A. 22-3302, and amendments thereto.~~

Note: similar amendments should also be made to K.S.A. 38-1638 and K.S.A. 38-1639, within the Juvenile Offenders Code.

Secretary's Chap. 208, Sec. 9 Task Force
Points of Agreement Concerning Persons Not Restorable to Competency

1. The "definitions" approach taken by Chapter 208, Sec. 8, doesn't make much sense.

    - It is unlikely to make much difference given its limiting language. Few persons, if any, who are not restorable to competency are likely to come within its terms.

    - It fails to address, for the most part, the underlying problems presented by Article 33.

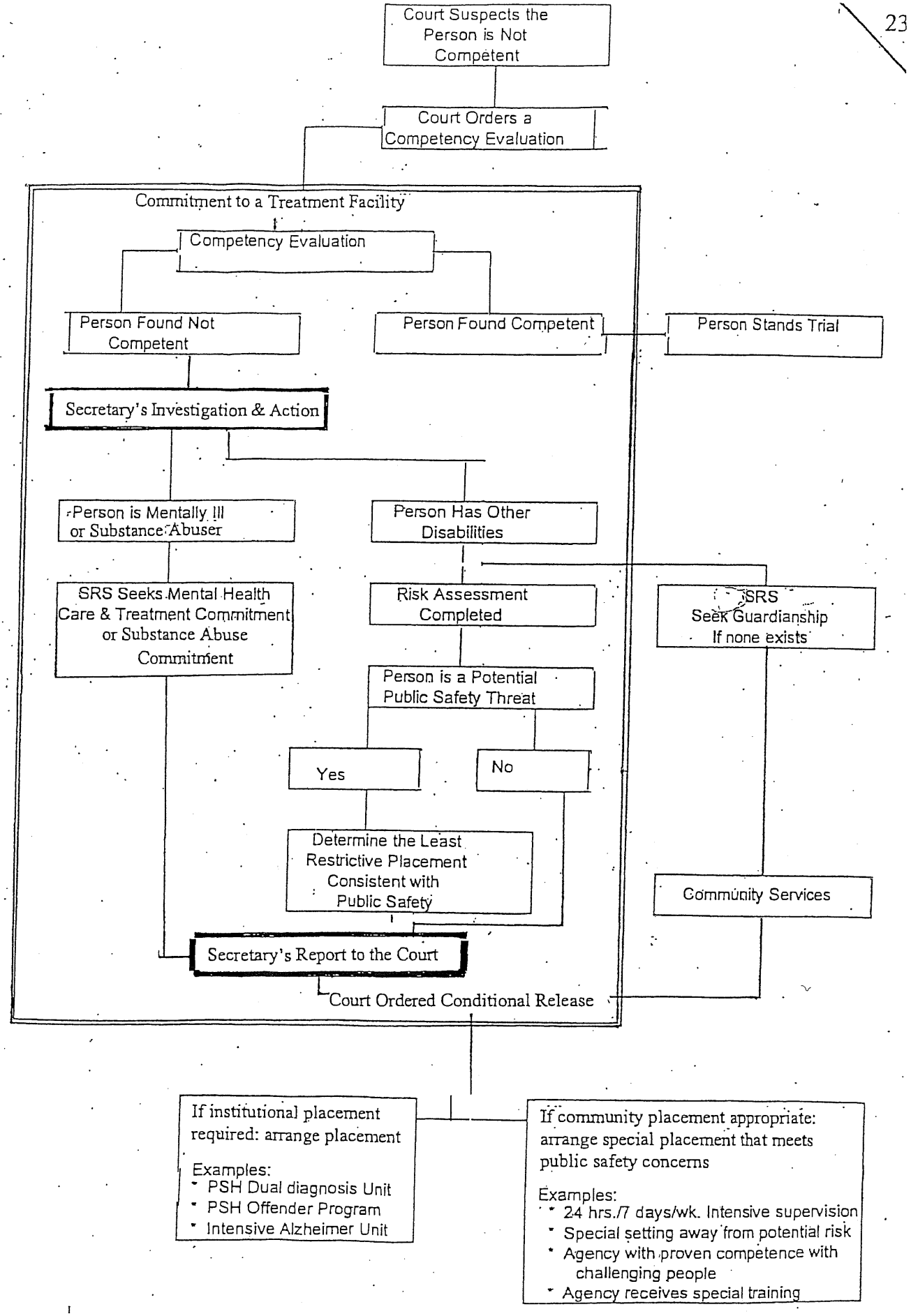
    - In concept, it necessarily burdens the mental health services delivery system and could result in significant, ill-affordable additional costs to that system, if expanded.

2. Any approach which attempts to deal with this complex problem in a simplistic "legal" way must, necessarily, approach persons who are not restorable to competency as a group (definitions, codes & automatic custodial concepts necessarily must be applied across a whole spectrum of persons to which the letter of the law would apply). However, the problem is, at heart, a case-by-case problem, which needs to be addressed with case-by-case solutions.

3. The numbers of persons who are not restorable that this problem involves is not so large that it can not be addressed on a case-by-case basis. To this point, that is what has been done informally whenever the "formal" solution provided for by law does not fit the circumstances of the individual at hand. However, the lack of a formal forum in which the solutions selected to deal with any specific situation can be discussed and critiqued has lead, in certain cases, to both some information being missed and to some parties being left out "of the loop."

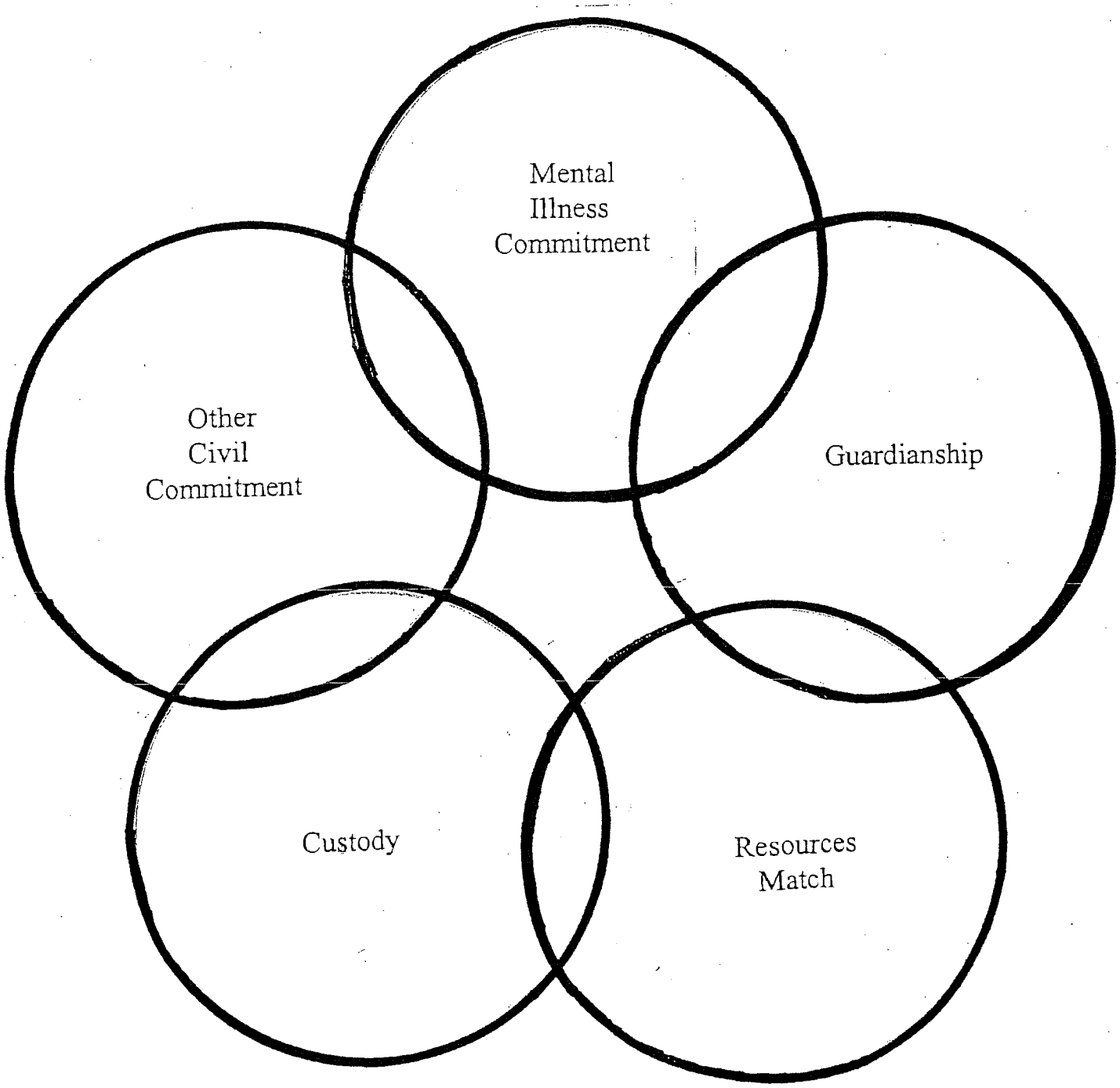
4. The solution to the problem of what to do with persons who are not restorable is one of management of their risk to "re-offend." As in all cases of risk management, the solution requires a balancing between a tolerance of the risk (a determined actual risk, as opposed to an assumed risk) and the costs associated with the management technique employed. In this regard, it must be acknowledged that no management technique that can be employed will reduce the actual risk to zero.

5. The ability of any system to manage risk is directly proportional to the resources available to be used in that effort. For this problem, there are considerable resources available, particularly with regard to community based programs that can manage and provide services to individuals who have been found not competent. Some gaps do still exist, however. Prominent among those gaps is a lack of qualified guardians, knowledgeable of the tools available to a guardian to "enforce" selected management options. This State's reliance upon an all-volunteer system of "public" guardians seriously hampers any program that depends upon having guardians in place to make key determinations, and often limits their understanding of how they might use the legal systems that are already in place. A professional supplement to Kansas' all-volunteer pool of guardians would significantly reduce this gap.


Court Suspects the Person is Not Competent
Court Orders a Competency Evaluation
Commitment to a Treatment Facility
Competency Evaluation
Person Found Not Competent
Person Found Competent
Person Stands Trial
Secretary's Investigation & Action
Person is Mentally Ill or Substance Abuser
Person Has Other Disabilities
SRS Seeks Mental Health Care & Treatment Commitment or Substance Abuse Commitment
Risk Assessment Completed
SRS Seek Guardianship If none exists
Person is a Potential Public Safety Threat
Yes
No
Determine the Least Restrictive Placement Consistent with Public Safety
Community Services
Secretary's Report to the Court
Court Ordered Conditional Release
If institutional placement required: arrange placement
Examples:
PSH Dual diagnosis Unit
PSH Offender Program
Intensive Alzheimer Unit
If community placement appropriate: arrange special placement that meets public safety concerns
Examples:
24 hrs./7 days/wk. Intensive supervision
Special setting away from potential risk
Agency with proven competence with challenging people
Agency receives special training

Appendix

Alternative Approaches to Dealing With the Incompetent Person:



Alternative Approaches to Dealing With the Incompetent Person:

1. Current Article 33 System (Mental Illness)

* What definition of mental illness?

* What to do about the non-mentally ill?

2. Other Civil Commitment

* Based on "mental incompetence"? How defined?

* Committed to where? (in-patient)

* Olmstead requirement for out-patient? Committed to where?

3. Resources Match (SRS/Senate 2084 Alternative)

* Accountability after matched placement?

4. In Custody of SRS

* What does that mean in an adult context?

5. Secretary of SRS as Legal Guardian

* Based upon a presumption of disability?

* What if the person is not disabled as defined in the guardianship code?

* Conservator too?

Reasons why someone might be incompetent to stand trial:

Juveniles:

1. Immaturity (young age)

   Note: K.S.A. 38-1602(a) - a "juvenile" who can be charged as an offender is someone who is age 10 and up.

   * may simply require that the child has to "grow-up" in order for them to become competent

Juveniles or Adults:

2. Doesn't understand or speak English

   * may require a translator

   * what about "cultural incompetency"?

3. Medical illness or other medical condition

   * including coma, quarantine, bed-fast and other medical conditions confining a person to a treatment facility of some type, or rendering them otherwise unable to participate in the criminal proceedings

4. Actively psychotic or otherwise impaired by reason of a mental illness

   * mental illness treatment may relieve those symptoms

5. Drug/Alcohol induced psychosis or other impairment

* detox may relieve those symptoms

6. Mental Retardation/Developmental Disability

* education may help

7. Organic brain dysfunction

* including brain injury, brain tumor, Alzheimer's Disease, etc. (but a condition that does not confine a person to a medical care facility)

8. ?_____

Article 33.—COMPETENCY OF DEFENDANT TO STAND TRIAL

22-3301. Definitions. (1) For the purpose of this article, a person is "incompetent to stand trial" when he is charged with a crime and, because of mental illness or defect is unable:

(a) To understand the nature and purpose of the proceedings against him; or

(b) to make or assist in making his defense.

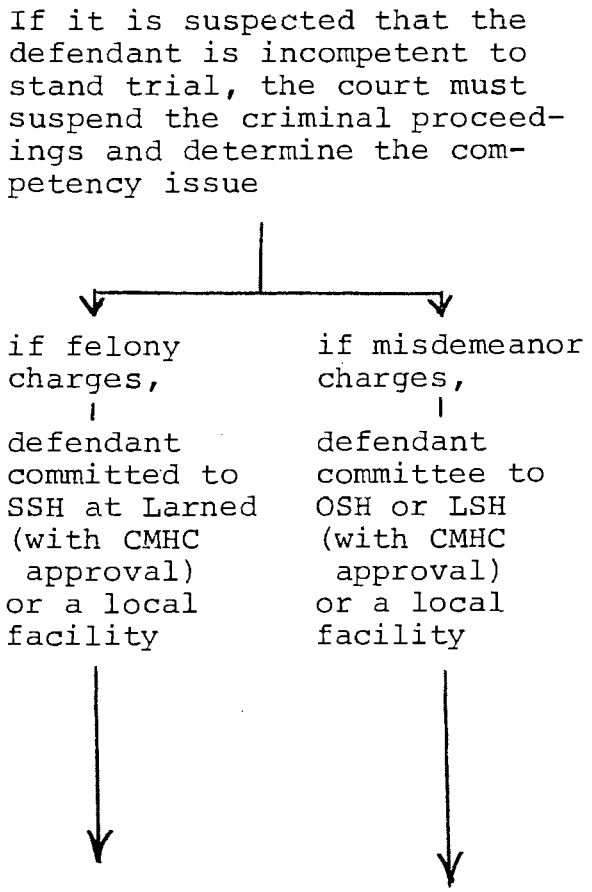
(2) Whenever the words "competent," "competency," "incompetent" and "incompetency" are used without qualification in this article, they shall refer to the defendant's competency or incompetency to stand trial, as defined in subsection (1) of this section.

History: L. 1970, ch. 129, § 22-3301; July 1.

22-3302. Proceedings to determine competency. (1) At any time after the defendant has been charged with a crime and before pronouncement of sentence, the defendant, the defendant's counsel or the prosecuting attorney may request a determination of the defendant's competency to stand trial. If, upon the request of either party or upon the judge's own knowledge and observation, the judge before whom the case is pending finds that there is reason to believe that the defendant is incompetent to stand trial the proceedings shall be suspended and a hearing conducted to determine the competency of the defendant.

(2) If the defendant is charged with a felony, the hearing to determine the competency of the defendant shall be conducted by a district judge.

(3) The court shall determine the issue of competency and may impanel a jury of six persons to assist in making the determination. The court may order a psychiatric or psychological examination of the defendant. To facilitate the examination, the court may: (a) If the defendant is charged with a felony, commit the defendant to the state security hospital or any county or private institution for examination and report to the court, or, if the defendant is charged with a misdemeanor, commit the defendant to any appropriate state, county or private institution for examination and report to the court, except that the court shall not commit the defendant to the state security hospital or any other state institution unless, prior to such commitment, the director of a local county or private institution recommends to the court and to the secretary of social and rehabilitation services that examination of the defendant should



be performed at a state institution; (b) designate any appropriate psychiatric or psychological clinic, mental health center or other psychiatric or psychological facility to conduct the examination while the defendant is in jail or on pretrial release; or (c) appoint two qualified licensed physicians or licensed psychologists, or one of each, to examine the defendant and report to the court. If the court commits the defendant to an institution for the examination, the commitment shall be for not more than 60 days or until the examination is completed, whichever is the shorter period of time. No statement made by the defendant in the course of any examination provided for by this section, whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding. Upon notification of the court that a defendant committed for psychiatric or psychological examination under this subsection has been found competent to stand trial, the court shall order that the defendant be returned not later than five days after receipt of the notice for proceedings under this section. If the defendant is not returned within that time, the county in which the proceedings will be held shall pay the costs of maintaining the defendant at the institution or facility for the period of time the defendant remains at the institution or facility in excess of the five-day period.

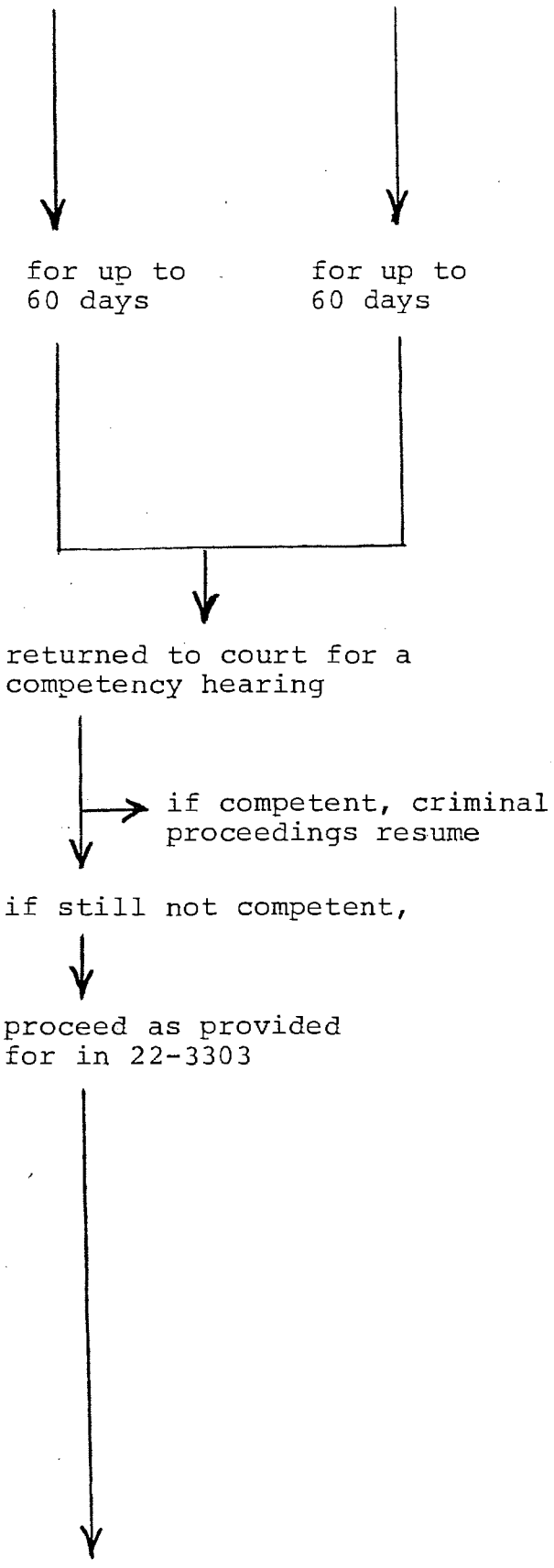
(4) If the defendant is found to be competent, the proceedings which have been suspended shall be resumed. If the proceedings were suspended before or during the preliminary examination, the judge who conducted the competency hearing may conduct a preliminary examination or, if a district magistrate judge was conducting the proceedings prior to the competency hearing, the judge who conducted the competency hearing may order the preliminary examination to be heard by a district magistrate judge.

(5) If the defendant is found to be incompetent to stand trial, the court shall proceed in accordance with K.S.A. 22-3303 and amendments thereto.

(6) If proceedings are suspended and a hearing to determine the defendant's competency is ordered after the defendant is in jeopardy, the court may either order a recess or declare a mistrial.

(7) The defendant shall be present personally at all proceedings under this section.

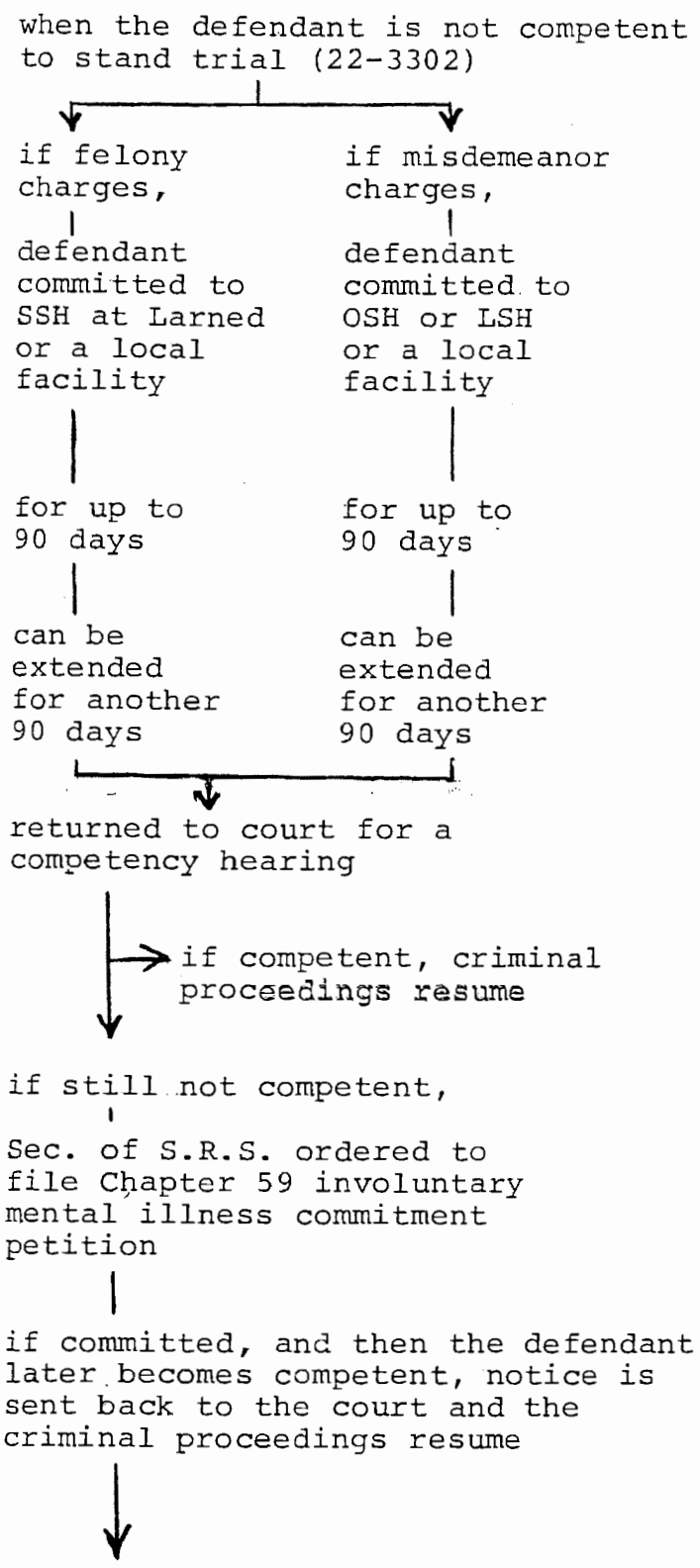
History: L. 1970, ch. 129, § 22-3302; L. 1971, ch. 114, § 6; L. 1976, ch. 163, § 17; L. 1977, ch. 121, § 1; L. 1982, ch. 148, § 1; L. 1984, ch. 128, § 1; L. 1986, ch. 115, § 64; L. 1986, ch. 299, § 2; L. 1986, ch. 133, § 2; L. 1992, ch. 309, § 1; July 1.



22-3303. Commitment of incompetent; limitation; civil commitment proceedings; regained competency; credit for time committed. (1) A defendant who is charged with a felony and is found to be incompetent to stand trial shall be committed for evaluation and treatment to the state security hospital or any appropriate county or private institution. A defendant who is charged with a misdemeanor and is found to be incompetent to stand trial shall be committed for evaluation and treatment to any appropriate state, county or private institution. Any such commitment shall be for a period of not to exceed 90 days. Within 90 days after the defendant's commitment to such institution, the chief medical officer of such institution shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If such probability does exist, the court shall order the defendant to remain in an appropriate state, county or private institution until the defendant attains competency to stand trial or for a period of six months from the date of the original commitment, whichever occurs first. If such probability does not exist, the court shall order the secretary of social and rehabilitation services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto.

(2) If a defendant who was found to have had a substantial probability of attaining competency to stand trial, as provided in subsection (1), has not attained competency to stand trial within six months from the date of the original commitment, the court shall order the secretary of social and rehabilitation services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto.

(3) When reasonable grounds exist to believe that a defendant who has been adjudged incompetent to stand trial is competent, the court in which the criminal case is pending shall conduct a hearing in accordance with K.S.A. 22-3302 and amendments thereto to determine the person's present mental condition. Reasonable notice of such hearings shall be given to the prosecuting attorney, the defendant and the defendant's attorney of record, if any. If the court, following such hearing, finds the defendant to be competent, the proceedings pending against the defendant shall be resumed.



(4) A defendant committed to a public institution under the provisions of this section who is thereafter sentenced for the crime charged at the time of commitment may be credited with all or any part of the time during which the defendant was committed and confined in such public institution.

History: L. 1970, ch. 129, § 22-3303; L. 1977, ch. 121, § 2; L. 1992, ch. 309, § 2; July 1.

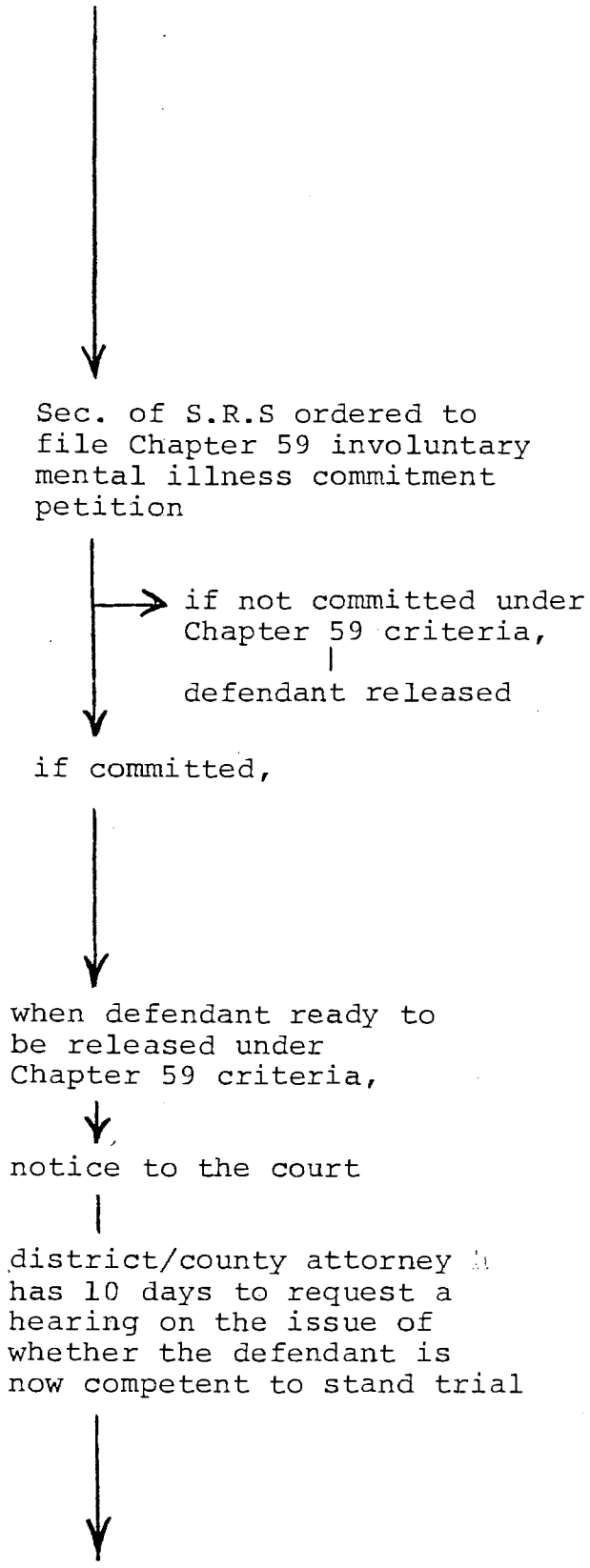
22-3304.

History: L. 1970, ch. 129, § 22-3304; Repealed, L. 1977, ch. 121, § 4; April 14.

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. (1) Whenever involuntary commitment proceedings have been commenced by the secretary of social and rehabilitation services as required by K.S.A. 22-3303 and amendments thereto, and the defendant is not committed to a treatment facility as a patient, the defendant shall remain in the institution where committed pursuant to K.S.A. 22-3303 and amendments thereto, and the secretary shall promptly notify the court and the county or district attorney of the county in which the criminal proceedings are pending of the result of the involuntary commitment proceeding.

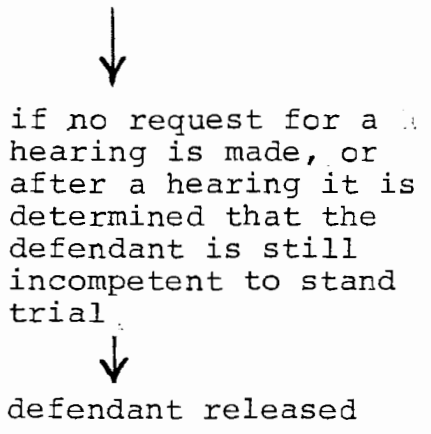
(2) Whenever involuntary commitment proceedings have been commenced by the secretary of social and rehabilitation services as required by K.S.A. 22-3303 and amendments thereto, and the defendant is committed to a treatment facility as a patient but thereafter is to be discharged pursuant to the care and treatment act for mentally ill persons, the defendant shall remain in the institution where committed pursuant to K.S.A. 22-3303 and amendments thereto, and the head of the treatment facility shall promptly notify the court and the county or district attorney of the county in which the criminal proceedings are pending that the defendant is to be discharged.

When giving notification to the court and the county or district attorney pursuant to subsection (1) or (2), the treatment facility shall include in such notification an opinion from the head of the treatment facility as to whether or not the defendant is now competent to stand trial. Upon request of the county or district attorney, the court may set a hearing on the issue of whether or not



the defendant has been restored to competency. If no such request is made within 10 days after receipt of notice pursuant to subsection (1) or (2), the court shall order the defendant to be discharged from commitment and shall dismiss without prejudice the charges against the defendant, and the period of limitation for the prosecution for the crime charged shall not continue to run until the defendant has been determined to have attained competency in accordance with K.S.A. 22-3302 and amendments thereto.

History: L. 1977, ch. 121, § 3; L. 1987, ch. 116, § 1; L. 1996, ch. 167, § 44; Apr. 18.



Sec. 6. This act shall take effect and be in force from and after its publication in the Kansas register.

Approved May 22, 2001.

Published in the *Kansas Register* May 31, 2001.

CHAPTER 208

HOUSE BILL No. 2176

AN ACT concerning crimes, punishment and criminal procedure; amending K.S.A. 21-3701, 21-4614, 22-3303 and 38-1611 and K.S.A. 2000 Supp. 21-2511, 21-3106, 21-3520, 21-3764, 22-4902, 22-4904, 22-4905, 22-4906, 22-4907, 22-4908 and 22-4909 and repealing the existing sections.

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

Section 1. K.S.A. 2000 Supp. 21-3520 is hereby amended to read as follows: 21-3520. (a) Unlawful sexual relations is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person who is not married to the offender if:

(1) The offender is an employee of the department of corrections or the employee of a contractor who is under contract to provide services in a correctional institution and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy *is a person 16 years of age or older who* is an inmate; or

(2) the offender is a parole officer and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy *is a person 16 years of age or older who* is an inmate who has been released on parole or conditional release or postrelease supervision under the direct supervision and control of the offender; or

(3) the offender is a law enforcement officer, an employee of a jail, or the employee of a contractor who is under contract to provide services in a jail and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is confined by lawful custody to such jail; or

(4) the offender is a law enforcement officer, an employee of a juvenile detention facility or sanctions house, or the employee of a contractor who is under contract to provide services in such facility or sanctions house and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is confined by lawful custody to such facility or sanctions house; or

(5) the offender is an employee of the juvenile justice authority or the employee of a contractor who is under contract to provide services in a juvenile correctional facility and the person with whom the offender is

Sec. 8. K.S.A. 22-3303 is hereby amended to read as follows: 22-3303. (1) A defendant who is charged with a felony and is found to be incompetent to stand trial shall be committed for evaluation and treatment to the state security hospital or any appropriate county or private institution. A defendant who is charged with a misdemeanor and is found to be incompetent to stand trial shall be committed for evaluation and treatment to any appropriate state, county or private institution. Any such commitment shall be for a period of not to exceed 90 days. Within 90 days after the defendant's commitment to such institution, the chief medical officer of such institution shall certify to the court whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If such probability does exist, the court shall order the defendant to remain in an appropriate state, county or private institution until the defendant attains competency to stand trial or for a period of six months from the date of the original commitment, whichever occurs first. If such probability does not exist, the court shall order the secretary of social and rehabilitation services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto. *When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21-3504, 21-3511, 21-3518, 21-3603 or 21-3719, and amendments thereto, and commitment proceedings have commenced, for such proceeding, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e) of K.S.A. 2000 Supp. 59-2946, and amendments thereto, who is likely to cause harm to self and others, as defined in subsection (f)(3) of K.S.A. 2000 Supp. 59-2946, and amendments thereto. The other provisions of subsection (f) of K.S.A. 2000 Supp. 59-2946, and amendments thereto, shall not apply.*

(2) If a defendant who was found to have had a substantial probability of attaining competency to stand trial, as provided in subsection (1), has not attained competency to stand trial within six months from the date of the original commitment, the court shall order the secretary of social and rehabilitation services to commence involuntary commitment proceedings pursuant to article 29 of chapter 59 of the Kansas Statutes Annotated, and any amendments thereto. *When a defendant is charged with any off-grid felony, any nondrug severity level 1 through 3 felony, or a violation of K.S.A. 21-3504, 21-3511, 21-3518, 21-3603 or 21-3719, and amendments thereto, and commitment proceedings have commenced, for such proceeding, "mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e) of K.S.A. 2000 Supp. 59-2946, and amendments thereto, who is likely to cause harm to self and others, as defined in subsection (f)(3) of K.S.A. 2000 Supp. 59-2946, and amendments thereto. The other pro-*

visions of subsection (f) of K.S.A. 2000 Supp. 59-2946, and amendments thereto, shall not apply.

(3) When reasonable grounds exist to believe that a defendant who has been adjudged incompetent to stand trial is competent, the court in which the criminal case is pending shall conduct a hearing in accordance with K.S.A. 22-3302 and amendments thereto to determine the person's present mental condition. Reasonable notice of such hearings shall be given to the prosecuting attorney, the defendant and the defendant's attorney of record, if any. If the court, following such hearing, finds the defendant to be competent, the proceedings pending against the defendant shall be resumed.

(4) A defendant committed to a public institution under the provisions of this section who is thereafter sentenced for the crime charged at the time of commitment may be credited with all or any part of the time during which the defendant was committed and confined in such public institution.

New Sec. 9. The secretary of social and rehabilitation services shall convene a task force to study current programs and laws for alleged offenders with disabilities that render such offenders potentially incompetent to stand trial, but who do not meet the criteria for involuntary commitment under Kansas law. The task force shall review and make recommendations on the adequacy of Kansas programs and services, and current Kansas law, in protecting public safety and in providing services and support to such alleged offenders. The secretary shall report to the judiciary committee during the 2001 interim and shall make a final report including programmatic and statutory recommendations to the 2002 legislature.

Sec. 10. K.S.A. 2000 Supp. 22-4902 is hereby amended to read as follows: 22-4902. As used in this act, unless the context otherwise requires:

(a) "Offender" means: (1) A sex offender as defined in subsection (b);

(2) a violent offender as defined in subsection (d);

(3) *a sexually violent predator as defined in subsection (f);*

(4) any person who, on and after the effective date of this act, is convicted of any of the following crimes when the victim is less than 18 years of age:

(A) Kidnapping as defined in K.S.A. 21-3420 and amendments thereto, except by a parent;

(B) aggravated kidnapping as defined in K.S.A. 21-3421 and amendments thereto; or

(C) criminal restraint as defined in K.S.A. 21-3424 and amendments thereto, except by a parent;

~~(4)~~ *(5)* any person convicted of any of the following criminal sexual conduct if one of the parties involved is less than 18 years of age:

FELONY CRIMES
SORTED BY SEVERITY LEVEL AND THEN BY STATUTE NUMBER

REFERENCE	DESCRIPTION	F/M	LEVEL
21-3401	Murder in the first degree	F	Offgrid
21-3801	Treason	F	Offgrid
21-3439	Capital Murder	F	Offgrid
21-3412(c)(3)	Domestic battery; third or subsequent w/in last 5 years	F	Nongrid
8-1567(f)	Driving under the influence of alcohol or drugs; third or subsequent conviction	F	Nongrid
21-3401	Murder in the first degree; Attempt (21-3301)	F	1
21-3402(a)	Intentional second degree murder	F	1
21-3421	Aggravated kidnapping	F	1
21-3801	Treason; Attempt (21-3301)	F	1
65-4142(e)(4)	Knowingly or intentially receiving/acquiring proceeds or engaging in transactions involving proceeds... > $500,000	F	1D
65-4159(b)	Drugs; Unlawfully manufacture controlled substance	F	1D
65-7006	Drugs; Possession of ephedrine, pseudoephedrine or phenylpropanolamine; precursor to illegal Substance, etc.	F	1D
65-4160(c)	Drugs; Opiates or narcotics; Possession; third and subsequent offense	F	1D
65-4161(c)	Drugs; Opiates or narcotics; Sale, poss. w/intent to sell, etc.; third and subsequent offense	F	1D
21-3502(a)(1)	Rape; sexual intercourse with a person who does not consent; overcome by force, fear, etc.	F	1
21-3502(a)(2)	Rape; sexual intercourse with a child < 14 yoa	F	1
65-4142(e)(3)	Knowingly or intentially receiving/acquiring proceeds or engaging in transactions involving proceeds... ≥ $100,000 < 500,000	F	2D
21-3401	Murder in the first degree; Conspiracy (21-3302)	F	2
21-3402(b)	Murder in the second degree (reckless)	F	2
21-3801	Treason; Conspiracy (21-3302)	F	2
HB2007*	Prohibited acts involving fetal organs and tissue	F	2
65-4160(b)	Drugs; Opiates or narcotics; Possession; second offense	F	2D
65-4161(d)	Drugs; Opiates or narcotics; Sale, poss. w/intent to sell, etc. 1st off. w/in 1,000' of school property	F	2D
65-4161(b)	Drugs; Opiates or narcotics; Sale, poss. w/intent to sell, etc.; second offense	F	2D
65-4163(b)	Drugs; Depressants, stimulants, hallucinogenics, etc.; Sale, possession w/intent to sell, etc. w/in 1,000' of a school	F	2D
21-3502(a)(3)	Rape; knowing misrepresentation that sexual intercourse medically/therapeutically necessary procedure	F	2
21-3502(a)(4)	Rape; knowing misrepresentation that sexual intercourse legally required procedure w/in scope of authority	F	2
21-3506(a)(1)	Aggravated criminal sodomy; sodomy with a child < 14 yoa	F	2
21-3506(a)(2)	Aggravated criminal sodomy; causing a child < 14 yoa to engage in sodomy with a person or animal	F	2
21-3506(a)(3)	Aggravated criminal sodomy; sodomy with person who does not consent; overcome by force, etc.	F	2
65-4159(b)(1)	Drugs; Unlawfully manufacture controlled substance; first offense	F	2D
65-4142(e)(2)	Knowingly or intentionally receiving or acquiring proceeds or engaging in transactions involving proceeds... ≥ $5,000 < $100,000	F	3D
21-3401	Murder in the first degree; Solicitation (21-3303)	F	3
21-3403	Voluntary manslaughter	F	3
21-3406(a)(1)	Assisting suicide (force or duress)	F	3
21-3420	Kidnapping	F	3
21-3427	Aggravated robbery	F	3
21-3801	Treason; Solicitation (21-3303)	F	3
21-4219(b)	Criminal discharge of a firearm at occupied dwelling or vehicle resulting in great bodily harm	F	3
65-4161(a)	Drugs; Opiates or narcotics; Sale, poss. w/intent to sell, etc.; first offense	F	3D
65-4163(a)	Drugs; Depressants, stimulants, hallucinogenics, etc.; Sale, possession w/intent to sell, etc.	F	3D
21-3415(b)(1)*	Aggravated battery on an LEO; intentional, great bodily harm or w/motor vehicle	F	3
21-3504(a)(1)	Aggravated indecent liberties w/child; ≥14 yoa, but < 16 yoa; sexual intercourse	F	3
21-3504(a)(3)	Aggravated indecent liberties w/child; <14 yoa; lewd fondling or touching	F	3
21-3505(a)(2)	Criminal sodomy; sodomy with a child ≥14 yoa, but < 16 yoa	F	3
21-3505(a)(3)	Criminal sodomy; causing child ≥14 yoa, but <16 yoa to engage in sodomy with a person or animal	F	3
21-3719(b)(1)	Aggravated arson; substantial risk of bodily harm	F	3
65-4142(e)(1)	Knowingly or intentionally receiving or acquiring proceeds or engaging in transactions involving proceeds known to be derived from any violation of the uniform controlled substances act, < $5,000	F	4D
65-4152	Drugs; Poss. of paraphernalia w/intent to use for planting, growing, harvesting, manuf., etc. any controlled substance	F	4D
65-4153(a)(3)	Drugs; Sim controlled substances/paraphernalia; deliver to someone less than 18	F	4D
65-4153(a)(4)	Drugs; Sim controlled substances/paraphernalia	F	4D
21-3440	Injury to a pregnant woman in the commission of a felony	F	4
21-3442	Involuntary manslaughter in the commission of a DUI	F	4
65-4160(a)	Drugs; Opiates or narcotics; Possession; first offense	F	4D
65-4162(a)	Drugs; Depressants, stimulants, hallucinogenics, etc.; Possession; second and subs.	F	4D
65-4164(a)	Drugs; Substances in K.S.A. 65-4113; Sale, possession with intent to sell, deliver, etc.	F	4D
21-3414(a)(1)(A)	Aggravated battery - intentional, great bodily harm	F	4
21-3504(a)(2)	Aggravated indecent liberties w/child; ≥14 yoa, but < 16 yoa; lewd fondling or touching without consent	F	4
21-3419a(d)	Aggravated criminal threat; ≥ $25,000 loss of productivity	F	4
21-4220(b)(3)	Unlawful endangerment; setup, build device to protect controlled substance; serious physical injury	F	5
21-3419a(c)	Aggravated criminal threat; ≥ $500 but less than $25,000 loss of productivity	F	5

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FELONY CRIMES
SORTED BY SEVERITY LEVEL AND THEN BY STATUTE NUMBER

REFERENCE	DESCRIPTION	F/M	LEVEL	P/N
21-3440	Injury to a pregnant woman in commission of K.S.A. 21-3412 (aggravated assault), K.S.A. 21-3413(a)(1), battery or KSA 21-3517, sexual battery	F	5	P
21-3404	Involuntary manslaughter	F	5	P
21-3426	Robbery	F	5	P
21-3518	Aggravated sexual battery; intentional touching, without consent, who is ≥16 yoa; force, fear, etc.	F	5	P
21-3604a	Aggravated abandonment of a child	F	5	P
21-3609	Abuse of a child; involves child < 18 yoa; intentional torture, cruelly beating, etc.	F	5	P
21-3716	Aggravated burglary	F	5	P
21-4219(b)	Criminal discharge of a firearm at occupied dwelling or vehicle resulting in bodily harm	F	5	P
21-3413(a)(2)	Battery against a correctional officer	F	5	P
21-3413(a)(3)	Battery against a juvenile correctional facility officer	F	5	P
21-3413(a)(4)	Battery against a juvenile detention facility officer	F	5	P
21-3413(a)(5)	Battery against a city/county correctional officer/employee	F	5	P
21-3414(a)(2)(A)	Aggravated battery - reckless, great bodily harm	F	5	P
21-3503(a)(1)	Indecent liberties w/child; child ≥14 yoa, but <16 yoa; lewd fondling or touching	F	5	P
21-3503(a)(2)	Indecent liberties w/child; child ≥14 yoa, but <16 yoa; soliciting to engage in lewd fondling, etc.	F	5	P
21-3516(a)(1)	Sexual exploitation of a child; employing, etc. child <18 yoa to engage in sexually explicit conduct	F	5	P
21-3516(a)(2)	Sexual exploitation of a child; possessing visual medium of child <18 yoa engaging in such conduct	F	5	P
21-3516(a)(3)	Sexual exploitation of a child; guardian permitting child <18 yoa to engage in such conduct	F	5	P
21-3516(a)(4)	Sexual exploitation of a child; promoting performance of child <18 yoa to engage in such conduct	F	5	P
21-3603(a)(2)(A)	Aggravated incest; Otherwise lawful sexual intercourse or sodomy with relative ≥16 yoa, but <18 yoa	F	5	P
21-3810(a)(2), (7)	Aggravated escape from custody; escaping while held in lawful custody upon a felony, etc.	F	5	N
21-3810(b)(2), (7)	Aggravated escape from custody; escape is facilitated by the use of violence or threat of violence	F	5	P
21-3826(c)(1)	Traffic in contraband in a correctional institution; firearms, ammunition, explosives, controlled substance	F	5	N
21-3826(c)(2)	Traffic in contraband in a correctional institution by an employee of a correctional institution	F	5	N
44-5,125(a)(1)(4)	Worker's compensation fund fraud	F	5	N
21-3731(b)(2)	Criminal use of explosives intended to be used to commit a crime, a public safety officer is placed at risk to diffuse the explosive or if another human being is in the building where the explosives are used	F	6	P
	KSA 21-3414(a)(1)(B) and 21-3414(a)(1)(C))	F	6	P
17-1253	Securities; intentional unlawful offers, sale or purchase	F	6	N
21-3419a(b)	Aggravated criminal threat; < $500 loss of productivity	F	6	P
21-3411	Aggravated assault on law enforcement officer	F	6	P
21-3415(b)(2)	Aggravated battery on an LEO; bodily harm or physical contact; deadly weapon	F	6	P
21-3437	Mistreatment of a dependant adult - physical	F	6	P
21-3511(a)	Aggravated indecent solicitation of a child; <14 yoa to commit or submit to unlawful sexual act	F	6	P
21-3511(b)	Aggravated indecent solicitation of a child; <14 yoa, inviting, etc. to enter secluded place	F	6	P
21-3742(d)	Throwing objects from bridge or overpass; resulting in injury to a passenger of vehicle	F	6	P
21-3810(b)(1),(3-5)	Aggravated escape from custody; escape is facilitated by the use of violence or threat of violence	F	6	P
21-3826(d)	Traffic in contraband in a correctional institution	F	6	N
21-3829	Aggravated interference with conduct of public business	F	6	P
21-3833	Aggravated intimidation of a witness or victim	F	6	P
21-4215	Obtaining a prescription only drug by fraudulent means for resale	F	6	N
40-2,118	Insurance; Fraudulent acts in an amount of more than $25,000	F	6	N
65-3441(c)	Hazardous Wastes; Knowingly violates unlawful acts included in paragraphs 1-11, subsection (a)	F	6	N
21-3513(b)(3)	Prostitution; Promoting prostitution when prostitute is <16 yoa	F	6	P
21-3718(b)(1)*	Arson; dwelling	F	6	P
21-3719(b)(2)	Aggravated arson; no substantial risk of bodily harm	F	6	P
44-5,125(a)(1)(iv)	Worker's compensation fund fraud ≥ $50,000 < $100,000	F	6	N
HB2596*	Counterfeiting; ≥$25,000; 1,000 or more items; or third or subsequent offense	F	7	N
21-4220(b)(2)	Unlawful endangerment; setup, build device, to protect controlled substance; physical injury	F	7	P
21-3846(b)(1)	Medicaid Fraud; false claim, statement or representation to madicaid progarm; ≥ $25,000	F	7	N
9-2012	Banking; Embezzlement; Intent to defraud	F	7	N
16-0305	Violation of prearranged funeral agreements act $25,000 or more	F	7	N
16-0633	Contract; Investment Certificates; Unlawful receipt of commission	F	7	N
16-0634	Contract; Investment Certificates; Unlawful receipt/possession of company property	F	7	N
16-0635	Contract; Investment Certificates; Unlawful acts pertaining to books/records	F	7	N
16-0640	Contract; Investment Certificates; Unlawful Acts or Omissions	F	7	N
16a-5-301(1)	Violation of the Uniform Consumer Credit Code; second or subsequent offense	F	7	N
17-1254	Securities; intentional unlawful sale by an unregistered dealer	F	7	N
17-1255	Securities; intentional unlawful sale of unregistered securities	F	7	N
17-1267	Securities; intentional violation of any rule and regulation adopted or order issued under the Securities Act	F	7	N
21-3410	Aggravated assault	F	7	P
21-3422a(b)	Aggravated interference with parental custody	F	7	P
21-3428	Blackmail	F	7	N
21-3435	Infection by communicable disease (HIV, etc.)	F	7	P
21-3445*	Unlawful administration of a substance	F	7	P
21-3715(a)	Burglary; building used as a dwelling	F	7	P
21-3715(b)	Burglary; building not used as a dwelling	F	7	N

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FELONY CRIMES
SORTED BY SEVERITY LEVEL AND THEN BY STATUTE NUMBER

REFERENCE	DESCRIPTION	F/M	LEVEL	P/N
21-3726	Aggravated tampering with a traffic signal	F	7	N
21-3742(c)	Throwing objects from bridge or overpass; resulting in injury to a pedestrian	F	7	P
21-3802	Sedition	F	7	N
21-3902(a)(6)(A)	Official Misconduct; Knowingly and willfully submitting to a governmental entity a claim for expenses which is false or duplicates expenses for which a claim is submitted to such governmental entity, another governmental or private entity; $25,000 or more	F	7	N
21-4018*	Identity Theft	F	7	P
21-4209a	Criminal possession of explosives	F	7	P
21-4219(b)	Criminal discharge of a firearm at occupied dwelling or vehicle	F	7	P
21-4401	Racketeering	F	7	N
25-2409	Elections; Election bribery	F	7	N
25-2417	Elections; Bribery of an election official	F	7	N
25-2418	Elections; Bribe acceptance by an election official	F	7	N
40-2,118	Insurance; Fraudulent acts in an amount of at least $5,000 but less than $25,000	F	7	N
50-1013	Willful violation of loan broker article	F	7	N
9-2004(b)(1)	Banking; Swear Falsely; Perjury in a felony trial	F	7	N
19-3519(b)(3)	Counties; Water Districts; fraudulent claims of $25,000 or more	F	7	N
21-3414(a)(1)(B)	Aggravated battery - intentional, bodily harm	F	7	P
21-3414(a)(1)(C)	Aggravated battery - intentional, physical contact	F	7	P
21-3510(a)(1)	Indecent solicitation of a child; $\geq$14 yoa & $<$16 yoa to commit or submit to unlawful sexual act	F	7	P
21-3510(a)(2)	Indecent solicitation of a child; $\geq$14 yoa & $<$16 yoa, inviting, etc. to enter secluded place	F	7	P
21-3513(b)(2)	Prostitution; Promoting prostitution when prostitute is $\geq$16 yoa, second or subsequent conviction	F	7	P
21-3603(a)(1)	Aggravated incest; Marriage to person $<$18 yoa, who is a known relative	F	7	P
21-3603(a)(2)(B)	Aggravated incest; Lewd fondling and touching described in 21-3503 with relative $\geq$16 yoa, but $<$18 yoa	F	7	P
21-3612(a)(5)	Contributing to a child's misconduct; causing, encouraging child $<$18 yoa to commit a felony	F	7	P
21-3701(b)(1)	Theft; loss of $\geq$ $25,000	F	7	N
21-3704(e)(1)	Theft of services; loss of $\geq$ $25,000	F	7	N
21-3707(d)(1)	Giving a worthless check; loss of $\geq$ $25,000	F	7	N
21-3718(b)(2)*	Arson; nondwelling	F	7	N
21-3720(b)(1)	Criminal damage to property; damage of property $\geq$ $25,000	F	7	N
21-3729(d)(1)	Criminal use of a financial card; money, services, etc. w/in 7 day period $\geq$ $25,000	F	7	N
21-3734(b)(1)	Impairing a security interest; value of $\geq$ $25,000	F	7	N
21-3755(c)(3)	Computer crime; loss of $\geq$ $25,000	F	7	N
21-3805(b)(1)	Perjury; false statement is made upon the trial of a felony charge	F	7	N
21-3904(b)(1)	Presenting a false claim; $\geq$ $25,000	F	7	N
21-3905(b)(1)	Permitting a false claim; $\geq$ $25,000	F	7	N
21-4111(b)(1)(A)	Criminal desecration; subsections (a)(2)(B), (a)(2)(C) or (a)(2)(D); loss of $\geq$ $25,000	F	7	N
39-0717(b)(3)	Welfare fraud; in the amount of $25,000 or more	F	7	N
40-0247(b)(1)(A)	Insurance agent/broker failure to pay premium to company; loss of $\geq$$25,000	F	7	N
44-5,125(a)(I)(iii)	Worker's compensation fund fraud; $\geq$ $25,000 $<$ $50,000	F	7	N
50-718*	Knowingly and willfully obtaining information on a consumer from a consumer reporting agency under false pretenses	F	7	P
50-719*	Knowingly and willfully providing information concerning an individual to a person not authorized to receive that information; officer or employee of a consumer reporting agency	F	7	P
9-2002	Banking; Making false reports of statements;	F	8	N
21-4220(b)(1)	Unlawful endangerment: setup, build device, to protect controlled substance	F	8	N
21-3522(a)(1)	Unlawful Voluntary Sexual Relations; sexual intercourse	F	8	P
21-3438(c)*	Stalking when the offender has a previous conviction within 7 years for stalking the same victim	F	8	P
21-3604	Abandonment of child; involves child $<$16 yoa	F	8	P
21-3711	Making a false writing	F	8	N
21-3807(b)	Compounding a felony crime	F	8	N
21-3810(a)(1),(3-6)	Aggravated escape from custody; escaping while held in lawful custody upon a felony, etc.	F	8	N
21-3811	Aiding an escape	F	8	N
21-3812(b)	Aiding a person charged as a felon	F	8	N
21-3812(a)	Aiding a felon	F	8	N
21-3840	Aircraft; Failure to register an aircraft	F	8	N
21-3841	Aircraft; Fraudulent aircraft registration	F	8	N
21-3842	Aircraft; Fraudulent acts relating to aircraft identification numbers	F	8	N
21-3910	Misuse of public funds	F	8	N
21-4105	Incitement to riot	F	8	P
21-4204(a)(2)	Criminal possession of firearm; poss. of any firearm by adult or juvenile offender convicted or adjudicated of a person felony or a violation of any provision of the uniform controlled substances act and was found to have been in possession of a firearm at the time of the commission of the offense	F	8	N
21-4204(a)(3)	Criminal possession of firearm; poss. of any firearm by a person convicted or juvenile offender adjudicated of a felony w/in 5 yrs and was found not to have been in possession of a firearm at the time of the commission of the offense	F	8	N
21-4204(a)(4)(A)	Criminal possession of firearm; poss. of any firearm by a person convicted or juvenile offender adjudicated of a listed felony w/in 10 yrs and was found not to have been in possession of a firearm at the time of			

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FELONY CRIMES
SORTED BY SEVERITY LEVEL AND THEN BY STATUTE NUMBER

REFERENCE	DESCRIPTION	F/M	LEVEL	P/N
	the commission of the offense	F	8	N
21-4204(a)(4)(B)	Criminal possession of firearm; poss. of any firearm by a person convicted or juvenile offender adjudicated of a nonperson felony w/in 10 yrs and was found not to hve been in possession of a firearm at the time of the commission of the offense	F	8	N
21-4219(a)	Criminal discharge of a firearm at unoccupied dwelling	F	8	P
21-4304	Commercial gambling	F	8	N
21-4306	Dealing in gambling devices	F	8	N
21-4308	Installing communications facilities for gamblers	F	8	N
21-4405	Commercial bribery	F	8	N
25-2412	Elections; Election forgery	F	8	N
25-2423	Elections: Election tampering	F	8	N
40-2,118	Insurance; Fraudulent acts in an amount of at least $1,000 but less than $5,000	F	8	N
65-2859	Healing Arts: Filing false documents	F	8	N
65-4141	Drugs; Arranging sale/purchase using communication facility	F	8	N
74-8717	Lottery; Forgery of lottery ticket	F	8	N
74-8810(j)	Parimutuel Racing; Prohibited Acts (i)(1) through (i)(15)	F	8	N
21-3414(a)(2)(B)	Aggravated battery - reckless, bodily harm	F	8	P
21-3612(a)(4)	Contributing to a child's misconduct; sheltering or concealing a runaway child	F	8	P
21-3731(b)(1)	Criminal use of explosives	F	8	P
21-3902(a)(5)	Official Misconduct; knowingly destroying, tampering with or concealing evidence of a crime	F	8	N
21-4202(b)(2)	Aggravated weapons violation; violation of 21-4201(a)(6), (a)(7), or (a)(8) criminal use of a firearm by a felon	F	8	N
21-4301a(c)(2)	Promoting obscenity to minors; second or subsequent offense	F	8	P
44-5,125(b)	Worker's Compensation Fund fraud, knowingly presenting false certificate of insurance	F	8	N
HB2596*	Counterfeiting; ≥ $500 to < $25,000; 100 to 1,000 items; or second offense	F	9	N
HB2805§1*	Theft detection shielding device or device remover; unlawful manufacture/sell	F	9	N
21-3522(a)(2)	Unlawful Voluntary Sexual Relations; sodomy	F	9	P
55-162(e)	Oil & Gas; removal of seal without approval of KCC	F	9	N
8-0262(a)	Driving while suspended-third or subsequent conviction	F	9	N
8-0287	Driving while a habitual violator	F	9	N
8-1568(c)(3)	Fleeing or eluding a police officer Third or subsequent conviction	F	9	P
8-1568(c)(4)	Fleeing or eluding a police officer	F	9	P
16-0305	Violation of prearranged funeral agreements act at least $500 but < $25,000	F	9	N
21-3406(a)(2)	Assisting suicide	F	9	P
21-3419	Criminal threat	F	9	P
21-3438(b)*	Stalking when the victim has a temporary restraining order or injunction against the offender	F	9	P
21-3508(b)(2)	Lewd and lascivious behavior (presence of person under 16)	F	9	P
21-3610b	Furnishing alcoholic beverages to a minor for illicit purposes; child < 18 yoa	F	9	P
21-3611(a)	Aggravated juvenile delinquency; adjudicated child ≥ 16 yoa running away, escaping from SRS facility	F	9	N
21-3707(d)(4)	Giving a worthless check; loss of < $500, if in previous five yrs. offender convicted two or more times of the same crime	F	9	N
21-3712	Destroying a written instrument	F	9	N
21-3713	Altering a legislative document	F	9	N
21-3715(c)	Burglary; motor vehicle, aircraft, or other means of conveyance	F	9	N
21-3748	Piracy of recordings	F	9	N
21-3756	Adding dockage or foreign material to grain	F	9	N
21-3757	Odometers; unlawful acts	F	9	N
21-3762	Pyramid promotional scheme; establishing, operating, advertising or promoting	F	9	N
21-3815	Attempting to influence a judicial officer	F	9	N
21-3817	Corrupt conduct of a juror	F	9	N
21-3825	Aggravated false impersonation	F	9	N
21-3846(b)(2)	Medicaid Fraud; false claim, statement or representation to medicaid program; ≥ $500 < $25,000	F	9	N
21-3846(b)(4)	Medicaid Fraud; offering wholly/partially false record, document, data or instrument in connection w/audit or investigation involving medicaid claim for payment	F	9	N
21-3849	Medicaid Fraud; destruction or concealment of records	F	9	N
21-3902(a)(6)(B)	Official Misconduct: knowingly and willfully submitting to a governmental entity a claim for expenses which is false or duplicates expenses for which a claim is submitted to such governmental entity, another governmental or private entity; at least $500 but less than $25,000	F	9	N
21-4202(b)(1)	Aggravated weapons violation; violation of 21-4201(a)(1) through (a)(5) or (a)(9) criminal use of a firearm by a felon	F	9	N
21-4406	Sports bribery	F	9	N
21-4408	Tampering with a sports contest	F	9	N
25-2411	Elections; Election perjury	F	9	N
25-2414	Elections; Possessing false or forged election supplies	F	9	N
25-2428	Elections; Destruction of election supplies	F	9	N
25-2429	Elections; Destruction of election papers	F	9	N
25-2431	Elections; False impersonation of a voter	F	9	N
40-2,118	Insurance; Fraudulent acts in an amount of at least $500 but less than $1,000	F	9	N
59-2121(a)	Adoption; knowingly/intentionally receiving/accepting excessive fees	F	9	N

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FELONY CRIMES
SORTED BY SEVERITY LEVEL AND THEN BY STATUTE NUMBER

REFERENCE	DESCRIPTION	F/M	LEVEL	P/N
65-2861	Healing Arts; False swearing	F	9	N
65-4153(c)	Drugs; Sim controlled substances/paraphernalia; Deliver, or cause to be delivered, to child < 18 yoa	F	9	N
65-4155(d)	Drugs; Representing noncontrolled substance as controlled; causing delivery to child < 18 yoa, etc.	F	9	N
8-1568(b)(3)	Fleeing or eluding a law enforcement officer - third or subsequent conviction	F	9	P
9-2004(b)(1)	Banking; Swear Falsely; Perjury other than in a felony trial	F	9	N
19-3519(b)(2)	Counties; Water Districts; fraudulent claims of at least $500, but less than $25,000	F	9	N
21-3701(b)(2)	Theft; loss of ≥ $500, but < $25,000	F	9	N
21-3701(b)(4)	Theft; loss of < $500, if in previous five yrs. offender has been convicted two or more times of the same crime	F	9	N
21-3704(c)(2)	Theft of services; loss of ≥ $500 but < $25,000	F	9	N
21-3707(d)(2)	Giving a worthless check; loss of ≥ $500 but < $25,000	F	9	N
21-3720(b)(2)	Criminal damage to property; damage of property ≥ $500 but < $25,000	F	9	N
21-3729(d)(2)	Criminal use of a financial card; money, services, etc. w/in 7 day period ≥ $500, but < $25,000	F	9	N
21-3734(b)(2)	Impairing a security interest; value of ≥ $500, but < $25,000	F	9	N
21-3749(b)(2)	Dealing in pirated recordings; ≥ 7 audio-visual recordings or ≥ 100 sound recordings w/in 180 days	F	9	N
21-3750(b)(2)	Nondisclosure of source of recordings; ≥ 7 audio-visual or ≥ 100 sound recordings w/in 180 days	F	9	N
21-3755(c)(2)	Computer crime; loss of ≥ $500, but < $25,000	F	9	N
21-3805(b)(2)	Perjury; false statement made in a cause, matter or proceeding other than the trial of a felony charge	F	9	N
21-3808(b)(1)	Obstructing legal process or official duty in the case of a felony, or resulting from parole, etc.	F	9	N
21-3904(b)(2)	Presenting a false claim; ≥ $500 but < $25,000	F	9	N
21-3905(b)(2)	Permitting a false claim; ≥ $500 but < $25,000	F	9	N
21-4111(b)(1)(B)	Criminal desecration; subsections (a)(2)(B), (a)(2)(C) or (a)(2)(D); loss of ≥ $500, but < $25,000	F	9	N
21-4201(a)(6)	Criminal use of weapons; possessing any device, etc., used to silence the report of any firearm	F	9	N
21-4201(a)(7)	Criminal use of weapons; possessing, etc., shotgun w/barrel less than 18"; automatic weapons	F	9	N
21-4201(a)(8)	Criminal use of weapons; possessing, etc., cartridge w/plastic coated bullet that has core of < 60% lead	F	9	N
21-4214(b)(2)	Obtaining a prescription only drug by fraudulent means; second or subsequent offense	F	9	N
21-4301(f)(2)	Promoting obscenity; second or subsequent offense	F	9	P
39-0717(b)(2)	Welfare fraud; in the amount of at least $500 but less than $25,000	F	9	N
40-0247(b)(1)(B)	Insurance agent/broker failure to pay premium to company; loss of ≥ $500, but < $25,000	F	9	N
40-0247(b)(2)	Insurance agent/broker failure to pay premium to company; loss of < $500, previous conv. w/in 5 yr	F	9	N
44-5.125(a)(1)(ii)	Worker's Compensation fund fraud > $500 < $25,000	F	9	N
44-5.125(c)	Worker's Compensation Fund fraud, health care provider knowingly submitting false bill for health care services	F	9	N
44-5,125(d)	Worker's Compensation Fund fraud, knowingly or inrentionally conspiring to defraud the Workers CompensationFund	F	9	N
74-8718(b)(2)	Lottery; Unlawful sale of lottery ticket; second or subsequent offense	F	9	N
74-8719(b)(2)	Lottery; Unlawful purchase of lottery ticket; second or subsequent offense	F	9	N
65-4153(a)(1)	Drugs; Sim controlled substances/paraphernalia	F	9	N
65-4153(a)(2)	Drugs; Sim controlled substances/paraphernalia; deliver to someone less than 18	F	9	N
65-4153(a)(3)	Drugs; Sim controlled substances/paraphernalia;	F	9	N
21-3522(a)(3)	Unlawful Voluntary Sexual Relations; lewd fondling or touching	F	10	P
55-156	Oil & Gas; Protection of water prior to abandoning well	F	10	N
55-157	Oil & Gas; Cementing in of surface casing	F	10	N
8-0116(c)	Vehicle identification numbers; destroying, altering, removing, etc. vehicle ID	F	10	N
8-0116(a)	Vehicle identification numbers; sale of vehicle w/ ID destroyed, removed, etc.	F	10	N
9-2010	Banking; Insolvent Bank Receiving Deposits	F	10	N
17-1264	Securities; intentional filing of false or misleading statements	F	10	N
17-1264	Securities; Filing false or misleading statements	F	10	N
17-5412	Savings & Loans; Declaration of Dividends	F	10	N
17-5811	Savings & Loans; Accepting Payment When Capital Impaired	F	10	N
17-5812	Savings & Loans; Fraudulent Acts	F	10	N
21-3438(a)*	Stalking in all other cases	F	10	P
21-3520	Unlawful sexual relations	F	10	P
21-3605	Nonsupport of a child or spouse	F	10	N
21-3736	Warehouse receipt fraud	F	10	N
21-3814	Aggravated failure to appear	F	10	N
21-3830	Dealing in false identification documents	F	10	N
21-3838	Unlawful disclosure of authorized interception of wire	F	10	N
21-4209	Criminal disposal of explosives	F	10	P
21-4315(b)	Unlawful conduct of dog fighting	F	10	N
22-4903	Failure to register under the Kansas Offender Registration Act	F	10	N
25-2420	Elections; Election fraud by an election officer	F	10	N
25-2421	Elections; Election suppression	F	10	N
25-2422	Elections; Unauthorized voting disclosure	F	10	N
25-2425	Elections; Voting machine fraud	F	10	N
25-2426	Elections; Printing and circulating imitation ballots	F	10	N
25-4414	Electronic/electromechanical voting system fraud	F	10	N
25-4612	Optical scanning equipment fraud	F	10	N
32-1005(b)	Fish & Game; Commercialization of wildlife having an aggregate value of at least $500	F	10	N
34-0293	Grain Storage; Unlawful issuance of receipt for warehouseman's grain	F	10	N

Legend
F = Felony
M = Misdemeanor

P = Scored as person
N = Scored as nonperson
$ = Scored as select
NS = Not scored

* This crime was created, amended or the severity level of this crime was changed during the 2000 legislative session.

FELONY CRIMES
SORTED BY SEVERITY LEVEL AND THEN BY STATUTE NUMBER

REFERENCE	DESCRIPTION	F/M	LEVEL	P/N
34-0295	Grain Storage; Negotiation of receipt for encumbered grain with intent to defraud	F	10	N
41-0405	Liquor; Warehouses; False Reports & Unlawful Removals	F	10	N
44-0619	Labor Act, Violations	F	10	N
47-0421	Animals; Unlawful Branding or Defacing of Brands	F	10	N
50-0122	Trade; Bucket Shops	F	10	N
50-0123	Trade; Transactions Declared to be Gambling & Criminal	F	10	N
50-0124	Trade; Transmitting Messages for Pretended Purchases or Sale	F	10	N
50-0125	Trade; Unlawful Acts	F	10	N
55-904(d)(2)	Oil & Gas; Disposal of salt water; second and subsequent	F	10	N
58-3304	Property; Sale of Unregistered Sub-Divided Land	F	10	N
58-3315	Property; Uniform Land Sales Practices Act	F	10	N
65-3026(b)	Knowingly violating subsections (a) through (f) of KSA 65-3025, the Air Quality Control Act	F	10	N
65-3441(b)	Hazardous Wastes; Violation of unlawful acts included in paragraph 11, subsection (a)	F	10	N
66-0137	Utilities; Falsifying or Destroying Accounts/Records	F	10	N
75-4228	State Departments; Liability of Treasurer & Director of A&R	F	10	N
79-3228e	Taxation; Income Tax, Penalties & Interest	F	10	N
79-3834b	Taxation; Cereal Malt Beverages; Penalties	F	10	N
79-5208	Taxation; Drugs; Dealer possession without tax stamps	F	10	N
21-3422(c)(2)	Interference with parental custody in all other cases	F	10	P

Legend
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* This crime was created, amended or the severity level of this crime was changed during the 2000 legislative session.

CARE AND TREATMENT ACT FOR MENTALLY ILL PERSONS

59-2946. Definitions. When used in the care and treatment act for mentally ill persons:

(e) "Mentally ill person" means any person who is suffering from a mental disorder which 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.

(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; mental retardation; organic personality syndrome; or an organic mental disorder.

(2) "Lacks capacity to make an informed decision concerning treatment" means that the person, by reason of the person's mental disorder, is unable, despite conscientious efforts at explanation, to understand basically the nature and effects of hospitalization or treatment or is unable to engage in a rational decision-making process regarding hospitalization or treatment, as evidenced by an inability to weigh the possible risks and benefits.

(3) "Likely to cause harm to self or others" means that the person, by reason of the person's mental disorder: (a) Is 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; except that if the harm threatened, attempted or caused is only harm to the property of another, the harm must be of such a value and extent that the state's interest in protecting the property from such harm outweighs the person's interest in personal liberty; or (b) is substantially unable, except for reason of indigency, to provide for any of the 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.

No person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone through prayer for healing shall be determined to be a mentally ill person subject to involuntary commitment for care and treatment under this act unless substantial evidence is produced upon which the district court finds that the proposed patient is 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; except that if the harm threatened, attempted or caused is only harm to the property of another, the harm must be of such a value and extent that the state's interest in protecting the property from such harm outweighs the person's interest in personal liberty.

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and

Chapter 208, Section 8

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59-2949. Voluntary admission to treatment facility; application; written information to be given voluntary patient. (a) A mentally ill person may be admitted to a treatment facility as a voluntary patient when there are available accommodations and the head of the treatment facility determines such person is in need of treatment therein, and that the person has the capacity to consent to treatment . . .

(c) No person shall be admitted as a voluntary patient under the provisions of this act to any treatment facility unless the head of the treatment facility has informed such person or such person's parent, legal guardian, or other person known to the head of the treatment facility to be interested in the care and welfare of a minor, in writing, of the following:

(1) The rules and procedures of the treatment facility relating to the discharge of voluntary patients;

(2) the legal rights of a voluntary patient receiving treatment from a treatment facility as provided for in K.S.A. 1998 Supp. 59-2978 and amendments thereto; and

(3) in general terms, the types of treatment which are available or would not be available to a voluntary patient from that treatment facility.

(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; mental retardation; organic personality syndrome; or an organic mental disorder.

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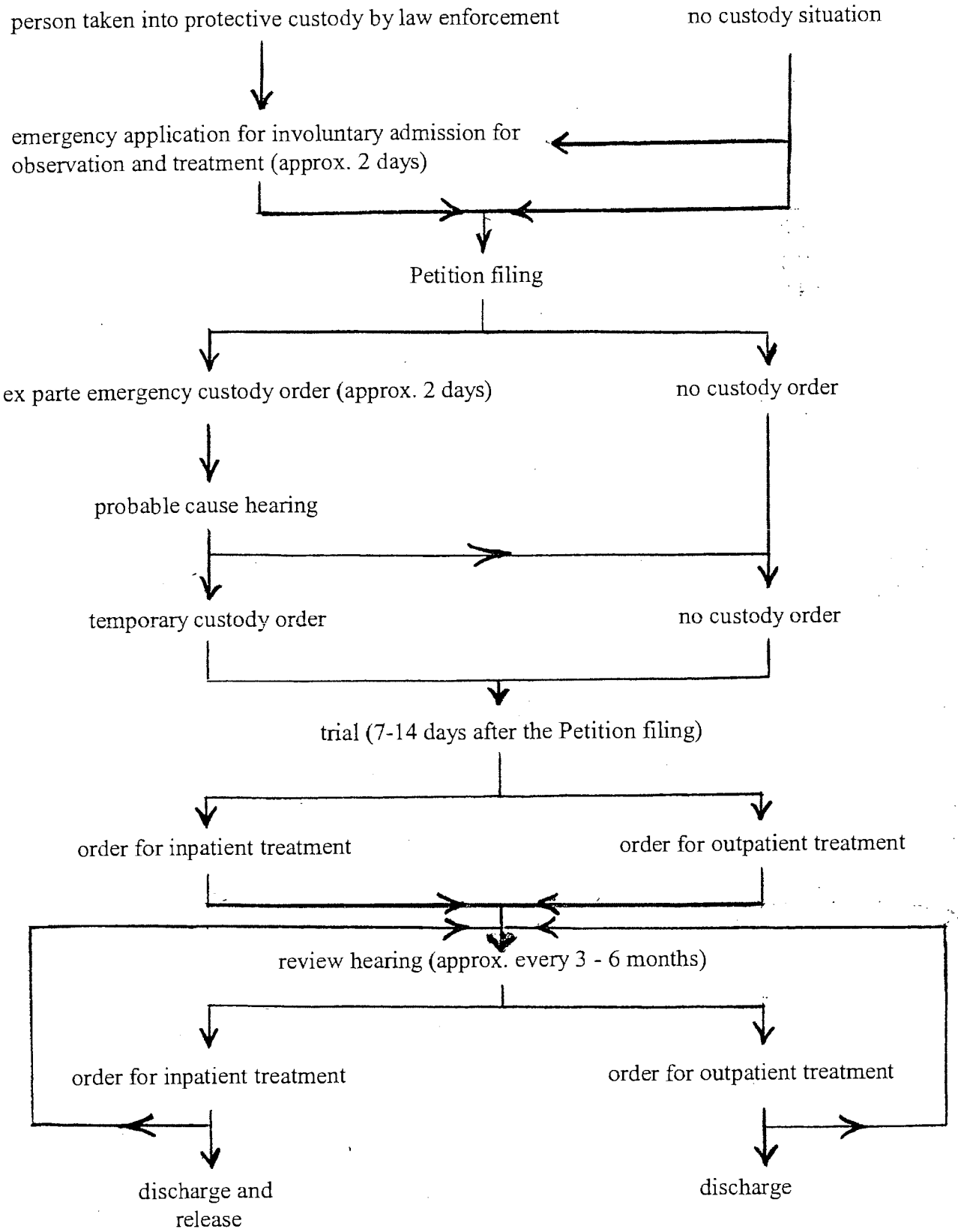
Involuntary Mental Illness Commitment Proceedings



The Shifting Sands Upon Which the Mental Health Services System Rests:

1. the criminalization of "mental illness":

*** the transfer of the mentally ill to prisons (as they slip thru the cracks)**

*** the calling of criminal behavior "mental illness" (of one form or another)**

2. differing expectations concerning the outcome of services:

*** among members of the community and public officials:**

- "error free" results

- services supportive of the community's social values

vs.

*** among consumers and their advocates:**

- "recovery model" results

- services supportive of personal values

3. diversification of the population served:

*** cultural context**

*** "criminalization"**

4. the erosion of resources:

*** actual Federal and State inflation adjusted appropriations have gone flat**

*** reduced insurance coverage (in spite of parity)**

*** reliance upon medicaid & public assistance programs as the primary funding system for mental health services (because of the state "match" feature)**

- IMD exclusion

- "supplemental" nature of public assistance

- lack of low cost housing

5. loss of prioritization within the State budget (due to deinstitutionalization):

*** percentage of SGF dollars, compared to the "big three," has gone way down, resulting in a loss of visibility**

6. life after 9-11-01:

*** security considerations**

*** trauma to the community**

No. 74,976

STATE OF KANSAS, *Appellee*, v. LANCE CHARLES CELLIER, *Appellant*.

(948 P.2d 616)

SYLLABUS BY THE COURT

1. TRIAL—*Erroneous Admission of Evidence—Contemporaneous Objection Rule.* A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection.
2. CRIMINAL LAW—*Motion to Suppress—Preservation of Issue on Appeal.* When a motion to suppress is denied, the moving party must object to the evidence at trial to preserve the issue on appeal.
3. APPEAL AND ERROR—*Statutes—Constitutionality—Appellate Review.* When a statute is challenged as unconstitutional, this court's standard of review is de novo.
4. CRIMINAL LAW—*Defendant's Competency to Stand Trial—Preponderance of Evidence Standard.* A party who raises the issue of competence to stand trial has the burden of going forward with the evidence, which will be measured by the preponderance of the evidence standard.
5. SAME—*Defendant's Competency to Stand Trial—Procedure When Court Raises Issue of Defendant's Competency.* When the court itself raises the issue of the competency of the accused, the court is not a party and cannot be responsible for coming forward with the evidence, but it can assign that burden to the State because both the court and the State have a duty to provide due process and to provide a fair trial to an accused.
6. SAME—*Defendant's Competency to Stand Trial—Presumption of Competency.* There is a presumption that a defendant is competent to stand trial.
7. SAME—*Sufficiency of Evidence—Appellate Review.* When the sufficiency of the evidence is challenged, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

Appeal from Lyon district court; JOHN O. SANDERSON, judge. Opinion filed October 31, 1997. Affirmed.

Jean K. Gilles Phillips, special appellate defender, argued the cause, and *Jessica R. Kunen*, chief appellate defender, was with her on the brief for appellant.

Joe E. Lee, county attorney, argued the cause, and *Carla J. Stovall*, attorney general, was with him on the brief for appellee.

alleged improper waiver of *Miranda* rights, this issue has not been properly preserved for appeal.

III. COMPETENCY TO STAND TRIAL

On June 3, 1994, Cellier filed a motion challenging his competency to stand trial, in accordance with K.S.A. 22-3302. Pursuant to this motion, Cellier was committed to Larned State Security Hospital. On October 12, 1994, the trial court held a hearing on the issue of Cellier's competency. At that hearing, two employees of Larned State Security Hospital testified. Harold Dixon is a registered master's level psychologist employed at Larned State Security Hospital since 1981. Dixon was the ward psychologist and treatment team leader for Cellier. Dixon gave Cellier numerous tests and utilized this information to help form his opinion regarding Cellier's competency to stand trial, *i.e.*, whether Cellier understood the courtroom proceedings against him and whether Cellier could help his attorney in preparing a legal defense. According to Dixon, Cellier suffered from schizophrenia, although it was in remission during Cellier's stay at the hospital. Dixon opined that as long as Cellier remained on medication and in a structured environment, his psychosis could be controlled. Dixon also stated that Cellier was impulsive, unreliable, irresponsible, exercised poor judgment, and could not concentrate. However, Dixon explained that he did not think that Cellier's impulsiveness, irresponsibility, or unreliability was relevant to his ability to help with his defense. Dixon concluded that Cellier was competent to stand trial.

Dr. Arsenio Imperial, a Larned psychiatrist, testified that he interviewed Cellier in order to evaluate his competency to stand trial. Imperial found that Cellier's memory for immediate recall, comprehension, and attention were impaired. Cellier told Imperial that he had spoken with his attorney about the defense of insanity. However, Cellier told Imperial that he did not feel he was criminally insane, but it was his attorney's idea to suggest it.

Imperial testified that a person who is delusional could still assist his or her counsel in creating a defense to a criminal prosecution if the individual was properly medicated and the delusions were well encapsulated. Imperial opined that Cellier's delusions were

encapsulated and controlled by medication to a point where he could appropriately assist his counsel with mounting a defense. Imperial gave his professional opinion that Cellier was competent to stand trial. Imperial stated that he had not observed anything during the court proceedings regarding Cellier's competency to suggest that Cellier was incompetent. Further, Imperial stated that if Cellier continued to take his medication as prescribed, there was no reason to believe he would not remain competent to stand trial.

Based on the testimony of Dixon and Imperial, the trial court ruled that Cellier was competent to stand trial. Cellier appeals this ruling.

The procedure and statutory requirements for determining competency to stand trial, etc., are contained in K.S.A. 22-3301 and K.S.A. 22-3302.

A. Evidentiary Standard and Burden of Proof

Cellier's complaint is that these statutes do not include an evidentiary standard of proof which the trial court should use to determine whether the definition of incompetency has been met. As such, Cellier contends that there is no standard of proof by which to judge when the evidence is sufficient to find a person incompetent and no method to review a trial court's determination on appeal. Thus, Cellier challenges the competency statute as unconstitutional for failing to set out a standard of proof by which competency must be measured.

When a statute is challenged as unconstitutional, this court's standard of review is de novo. See *State v. Fierro*, 257 Kan. 639, 643, 895 P.2d 186 (1995).

In support of its position that K.S.A. 22-3302 is unconstitutional for failing to provide an evidentiary standard and burden of proof, Cellier points to two United States Supreme Court cases which addressed the constitutionality of competency statutes based on their evidentiary standards. *Cooper v. Oklahoma*, 517 U.S. 348, 134 L. Ed. 2d 498, 116 S. Ct. 1373 (1996); *Medina v. California*, 505 U.S. 437, 120 L. Ed. 2d 353, 112 S. Ct. 2572, *reh. denied* 505 U.S. 1244 (1992).

In *Cooper*, the United States Supreme Court addressed an Oklahoma statute which presumed an accused was competant to stand trial unless the accused could prove his or her incompetency by clear and convincing evidence. The Supreme Court noted the well-accepted rule that " 'the criminal trial of an incompetent defendant violates due process.' " 517 U.S. at 354 (quoting *Medina*, 505 U.S. at 453). The Supreme Court then pointed out that with the Oklahoma statute, a criminal defendant could prove he or she was more likely than not incompetent (preponderance of the evidence standard), but if the defendant could not prove he or she was incompetent by clear and convincing evidence, then the defendant would still have to stand trial. Thus, the Court held that requiring the accused to meet such a high evidentiary standard of clear and convincing evidence, as opposed to a preponderance of the evidence standard, violated the accused's right to due process under the 14th Amendment. The Court struck down the Oklahoma competency statute as unconstitutional. 517 U.S. at 356, 369.

In *Medina*, the United States Supreme Court addressed a California statute which presumed an accused was competent to stand trial unless the accused could prove his or her incompetence by a preponderance of the evidence. The Court found that this statute, with its presumption of competence and preponderance of the evidence standard, did not violate due process. The Court upheld the statute as constitutional. 505 U.S. at 451-52.

Since an existing evidentiary standard in a competency statute can be too high and make the statute unconstitutional, Cellier asserts that the complete absence of an evidentiary standard in a competency statute should also make the statute unconstitutional. However, Cellier concedes that a court may salvage a statute when possible by interpreting ambiguous language in a constitutional manner.

Many states explicitly place the burden to prove incompetency on the defendant by a preponderance of the evidence. Several states place no burden on the defendant at all, but require the State to prove the defendant's competency once the issue has been credibly raised by the defendant. In a number of states, the burden

imposed on the defendant and/or the State to prove incompetency is unclear, as in Kansas. However, as the United States Supreme Court points out, "[n]othing in the competency statutes or case law of these States suggests . . . that the defendant bears the burden of proving incompetence by clear and convincing evidence." 134 L. Ed. 2d at 510 n. 17. Finally, the American Bar Association places the burden of proving incompetency on the party raising the issue, and the trial court must find the defendant is competent to stand trial "by the greater weight of the evidence." 2 ABA Standards for Criminal Justice § 7-4.8, p. 7-208 (2d ed. 1980).

The trial court obviously used an evidentiary standard to determine if Cellier could understand the proceedings or could assist in his defense. Neither K.S.A. 22-3301 nor 22-3302 explicitly provides such a standard. Thus, the trial court must have inferred an implicit evidentiary standard within the statutes from their language and the legislative intent. This has been done before and is not improper. For instance, K.S.A. 22-3215(4) provides the procedure for suppressing a confession. This statute specifically provides that the burden of proof for proving a confession is admissible is on the prosecution. However, the statute does not enunciate which evidentiary standard the prosecution must utilize to prove that a confession is admissible. This court did not find the statute was unconstitutional simply because it failed to enunciate a specific evidentiary standard for the State to use. Instead, this court inferred an evidentiary standard implicit within the statute—preponderance of the evidence. See *State v. Miles*, 233 Kan. 286, 295, 662 P.2d 1227 (1983). Thus, the trial court in this case can infer an evidentiary standard within the competency statute.

There are three different evidentiary standards which could be applied to K.S.A. 22-3301 and 22-3302—preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. The latter two of these three standards have been found to violate due process when included in a competency statute. See *Cooper*, 517 U.S. 348. The legislature would not intend to promulgate an unconstitutional statute. If at all possible, statutes are to be interpreted in a constitutional manner. The only way to constitutionally interpret 22-3301 and 22-3302 is to find that their implicit evidentiary standard is a preponderance of the evidence standard.

The issue of competency to stand trial is more complicated than it appears, the reason being that the issue is frequently raised by the court itself as opposed to being raised by or on behalf of the accused or by the State. The obvious rule is that a party who raises the issue of competence to stand trial has the burden of going forward with the evidence, which will be measured by the preponderance of the evidence standard. When the court itself raises the competency issue, the court is not a party and cannot be responsible for coming forward with the evidence, but it can assign that burden to the State because both the court and the State have a duty to provide due process and to provide a fair trial to an accused. Determining the competency of an accused to stand trial is a duty that falls on both the State and the trial court. The trial court measures the evidence presented by the standard of preponderance of evidence. With a statutory presumption that an accused is sane, *State v. Gilder*, 223 Kan. 220, 227-28, 574 P.2d 196 (1977), it follows that there is a presumption a defendant is competent to stand trial. Using this implicit burden of proof and evidentiary standard within the competency statutes, we hold that K.S.A. 22-3201 and K.S.A. 22-3202 are not unconstitutional.

B. Cellier's Competency to Stand Trial

Using the proper burden of proof and evidentiary standard, the trial court held a competency hearing and found that Cellier was competent to stand trial. Cellier appeals this finding.

A defendant is incompetent if the defendant cannot understand the court proceedings or assist counsel with a defense. K.S.A. 22-3301. According to Cellier, to be able to assist counsel, a defendant should have the ability to communicate rationally, to recall and relate facts concerning his actions, to comprehend advice, and to make decisions based on a well-explained alternative. See 2 ABA Standards for Criminal Justice § 7-4.1, Commentary, p. 7-173 (2d ed. 1980). Since Cellier does not have these abilities, he claims that he was incompetent to stand trial.

No. 79,424

In the Matter of ADA VANDERBLOMEN.

(956 P.2d 1320)

SYLLABUS BY THE COURT

MENTAL ILLNESS—*Care and Treatment Act for Mentally Ill Persons—Organic Mental Disorder—Involuntary Commitment Proceeding.* A provision in the Care and Treatment Act for Mentally Ill Persons, K.S.A. 1997 Supp. 59-2946(f)(1), which excludes persons suffering from certain disorders, including "organic mental disorder," from being subject to involuntary commitment is not unconstitutionally vague. Despite the American Psychiatric Association's abandonment of the term organic mental disorder in its Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994), the Kansas Legislature clearly intended to use the term as it has been previously and commonly used throughout the psychiatric community. In the context of an involuntary commitment proceeding, disorders that have traditionally been labelled organic in nature should continue to be regarded as falling within the definition of "organic mental disorder."

Appeal from Shawnee district court; FRANK J. YEOMAN, JR., judge. Opinion filed April 17, 1998. Affirmed.

Kenneth M. Carpenter, of Carpenter, Chartered, of Topeka, argued the cause and was on the brief for appellant Ada Vanderblomen.

No appearance by appellee.

The opinion of the court was delivered by

LARSON, J.: This appeal involves the constitutionality of a provision of the Care and Treatment Act for Mentally Ill Persons, K.S.A. 1997 Supp. 59-2945 *et seq.*, which prevents those persons suffering from certain disorders from being subject to involuntary commitment. The court-appointed guardian for Ada Vanderblomen appeals the trial court's determination that K.S.A. 1997 Supp. 59-2946(f)(1) is constitutional and Vanderblomen's ordered discharge from a mental hospital.

In 1977, Vanderblomen was involved in a motor vehicle accident and suffered a traumatic closed head injury. Partially paralyzed and unable to care for her basic needs, she had been placed in various nursing homes.

On March 8, 1995, Vanderblomen's guardian applied to the Shawnee County District Court for a determination that Vanderblomen was mentally ill. The application alleged that Vanderblo-

men had become unmanageable at her nursing home and had injured staff, destroyed property, and become a danger to herself and other residents.

Attached to the petition was the affidavit of Dr. Benintendi, who had examined Vanderblomen and reviewed her records. The affidavit noted a history of aggression and stated Vanderblomen did not respond to questioning and was aphasic. Dr. Benintendi's diagnosis stated: "Mental Dis. NOS due to head injury or other possible organic Dis." Under treatment expectations, Dr. Benintendi wrote: "Please check for organic basis to behavior disruptions. Also evaluate medications." Dr. Benintendi concluded: "I believe client to be a danger to herself and others, and incompetent to make her own treatment decisions due to her mental illness."

The court granted a petition for temporary protective custody and appointed an attorney to represent Vanderblomen in the proceedings. On March 10, 1995, after a hearing, the court ruled there were reasonable grounds to believe Vanderblomen was mentally ill and likely to injure herself or others if not detained. The court ordered her placed in protective custody at the Topeka State Hospital.

Shortly after her commitment, Dr. Jose Bulatao at Topeka State Hospital evaluated Vanderblomen and reported to the court that Vanderblomen had not shown any aggression since her transfer, but stated she had a severe mental illness diagnosed as organic mental disorder and had no capacity to make a rational decision regarding her needs for treatment.

After receiving the report, the court concluded Vanderblomen was a mentally ill person as defined by statute and ordered her continued hospitalization. Subsequent reports from staff psychiatrists at the hospital indicated that Vanderblomen's diagnosis was organic mental disorder, characterized by impaired cognitive functioning, poor impulse control, impaired memory, impaired judgment, and unpredictable and aggressive behaviors. The reports indicated she required continued nursing care and supervision on a daily basis and she had no capacity to make rational decisions regarding treatment. Continued hospitalization was recommended.

Upon each scheduled review, the court continued to order Vanderblomen's confinement at the hospital. The next review was scheduled for June 14, 1996. The summary of Vanderblomen's medical status submitted to the court on May 24, 1996, stated she met the diagnostic criteria of dementia due to multiple etiologies and also carried the additional diagnosis of encephalopathy with aphasia. Although noting that she had shown some improvement, the report emphasized that Vanderblomen continued to be a danger to herself and others and was unable to meet her basic needs.

On June 10, 1996, the court terminated Vanderblomen's commitment, finding she was "not a 'mentally ill person subject to involuntary commitment for care and treatment.'" The court noted that she suffered from conditions described as dementia and encephalopathy, which are both descriptive of an organic mental disorder. The court stated that the new law, as provided in K.S.A. 1997 Supp. 59-2946(f)(1) excludes those suffering from an organic mental disorder from being subject to involuntary commitment.

The guardian petitioned the court to vacate the order and requested an evidentiary hearing. He pointed out that organic mental disorder had been eliminated as a separate and distinct mental disorder in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV) and argued that the new law was unconstitutionally vague.

The court denied the petition to vacate. The guardian appealed, and the Court of Appeals remanded the case to the district court to allow the guardian to present evidence in an evidentiary hearing.

At the hearing, the guardian presented the testimony of psychiatrist Dr. Samuel Bradshaw regarding diagnoses in the DSM-IV. Dr. Bradshaw stated that many prior diagnoses have been recently found to have a brain-based etiology and the wording of the DSM-IV indicates it is "illusory to say one kind of disorder is brain based and not another since the major mental disorders are all brain based." Quoting from the DSM-IV, he said: "The term organic mental disorder is no longer used in DSM-IV because it incorrectly implies [that] nonorganic mental disorders do not have a biological basis." Dr. Bradshaw agreed that usage of the term organic mental

disorder is no longer a medically acceptable diagnosis. The court took judicial notice of the entire DSM-IV.

The guardian argued that the Kansas Legislature had placed guardians in the untenable position where they have no authority to hospitalize wards needing hospitalization if those wards happen to suffer from an organic mental disorder. Vanderblomen's appointed attorney stated he had been unable to consult with his client due to her condition and he did not object to any of the guardian's remarks.

The court held the legislature clearly intended to exclude persons suffering from an organic mental disorder from involuntary commitment and decided the commitment statute was constitutional. The court found that the legislature defines legal terminology and was not persuaded that a change in the American Psychiatric Association's definitions in the DSM-IV caused the statute to become vague.

The guardian timely appeals. The Court of Appeals granted a stay of the trial court's order, and we granted the guardian's request for transfer to this court pursuant to K.S.A. 20-3017.

The issue in this case involves statutory interpretation, which is a question of law over which we have unlimited review. *In re Tax Appeal of Boeing Co.*, 261 Kan. 508, Syl. ¶ 1, 930 P.2d 1366 (1997). We are duty bound to avoid a vague construction of a statute if reasonably possible, *In re Care & Treatment of Hay*, 263 Kan. 822, 833, 953 P.2d 666 (1998). We have also stated:

"A statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so. A statute must clearly violate the constitution before it may be struck down. This court not only has the authority, but also has the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute." *Peden v. Kansas Dept. of Revenue*, 261 Kan. 239, Syl. ¶ 2, 930 P.2d 1 (1996), *cert. denied* 520 U.S. 1229 (1997).

The guardian challenges the constitutionality of K.S.A. 1997 Supp. 59-2946(f)(1), which reads, in relevant part, as follows:

"(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; mental retardation; organic personality syndrome; or an organic mental disorder."

K.S.A. 1997 Supp. 59-2946(e) states:

" 'Mentally ill person' means any person who is suffering from a mental disorder which 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."

The Care and Treatment Act for Mentally Ill Persons was enacted in 1996, repealing the Treatment Act for Mentally Ill Persons, K.S.A. 59-2901 *et seq.*

The new statutes distinguish between a "mentally ill person" and a "mentally ill person subject to involuntary commitment for care and treatment." K.S.A. 1997 Supp. 59-2946(e) and (f). The predecessor statute to K.S.A. 1997 Supp. 59-2946(f), K.S.A. 59-2902(h), made no such distinction and defined a mentally ill person as follows:

"(h) 'Mentally ill person' means any person who:

(1) Is suffering from a severe mental disorder to the extent that such person is in need of treatment;

(2) lacks capacity to make an informed decision concerning treatment; and

(3) is likely to cause harm to self or others."

When construing a statute, courts should give words in common usage their natural and ordinary meaning. "Technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings." *Galindo v. City of Coffeyville,* 256 Kan. 455, Syl. ¶ 5, 885 P.2d 1246 (1994) (citing K.S.A. 1993 Supp. 77-201 *Second*). In *Reed v. Kansas Racing Comm'n,* 253 Kan. 602, Syl. ¶ 5, 860 P.2d 684 (1993), we also stated: "A statute is not invalid for vagueness or uncertainty where it uses words with commonly understood meanings. The test for vagueness is a common-sense determination of fundamental fairness."

The guardian argues that K.S.A. 1997 Supp. 59-2946(f)(1) uses a specific psychiatric term of art, implicating the use of DSM-IV definitions, and that this terminology cannot be considered a word in common usage. As the DSM-IV has abandoned the use of the term "organic mental disorder," the guardian claims that the term no longer has any meaning, particularly as there was testimony that the major mental disorders are all brain based.

The DSM-IV itself, however, recognizes its own diagnostic limitations in stating:

"Moreover, although this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations. . . . [D]ifferent situations call for different definitions." DSM-IV, p. xxi.

We do not believe there is any reason to link the constitutionality of a statute to the changing tides of psychiatric thought as reflected in the most recent version of the DSM. Due to the purpose of the manual and the frequent revisions it undergoes, it would be foolhardy to allow its altered provisions to render otherwise valid and comprehensible legislation unconstitutional. This point was emphasized by the United States Supreme Court in *Jones v. United States*, 463 U.S. 354, 364-65 n. 13, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983):

"We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the 'uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . .' [Citations omitted.] The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments."

Furthermore, it is not at all clear that the legislature failed to consider the DSM-IV when it enacted the wording of 59-2946 in 1996. The general comment to the revised act submitted to the legislature by the Care and Treatment Advisory Committee of the

Judicial Council explained the rationale for the changes suggested in 59-2946(f) as follows:

"(2) 'Mentally ill person,' found currently at 59-2902(h) is rewritten and is separate from the new term 'mentally ill person subject to involuntary commitment for care and treatment.' The changes require that there are certain mentally ill persons who should not be subject to involuntary proceedings to restrict their liberty.

"(3) 'Mentally ill person subject to involuntary commitment for care and treatment' has been added. The intent is to separate the criteria that must be met before a person who is suffering from a mental illness may be involuntarily forced to accept treatment. In the current definition of 'severe mental disorder,' found at 59-2902(o), conditions caused by the use of chemical substances and antisocial personality are excluded from the legal definition. The committee expanded upon that list by naming disorders defined in the *Diagnostic and Statistical Manual of Mental Disorders* (Fourth Edition) American Psychiatric Association (1994) ('DSM-IV') which are generally professionally recognized as unresponsive to psychiatric treatment."

Although the distinction between organic and nonorganic mental disorders may no longer be clinically supported because all mental disorders may have a brain-based component, the legislature has the right to make distinctions based upon the treatability of a condition. The trial court recognized such a distinction when it stated:

"The Legislature's action is entirely consistent with this Court's prior rulings concerning the difference between 'illness' and 'organic deterioration,' *i.e.*, absence of brain cells or death of part of the brain. The legislative action in question has done no more than codify the existing law. It has been plain that the purpose for confining people involuntarily for treatment was to apply 'treatment' (whatever that might be) to change the person's mental condition. It has been stated over and over again in testimony before this Court that an 'organic' condition is not one that can be changed. It is 'organic' because part of the 'organ' is missing—destroyed, etc. It is not repairable, replaceable, or subject to change for the better. This is in contrast to changes that can be effected in a person through counseling, medication, etc. in such things as depression, schizophrenia, and the like."

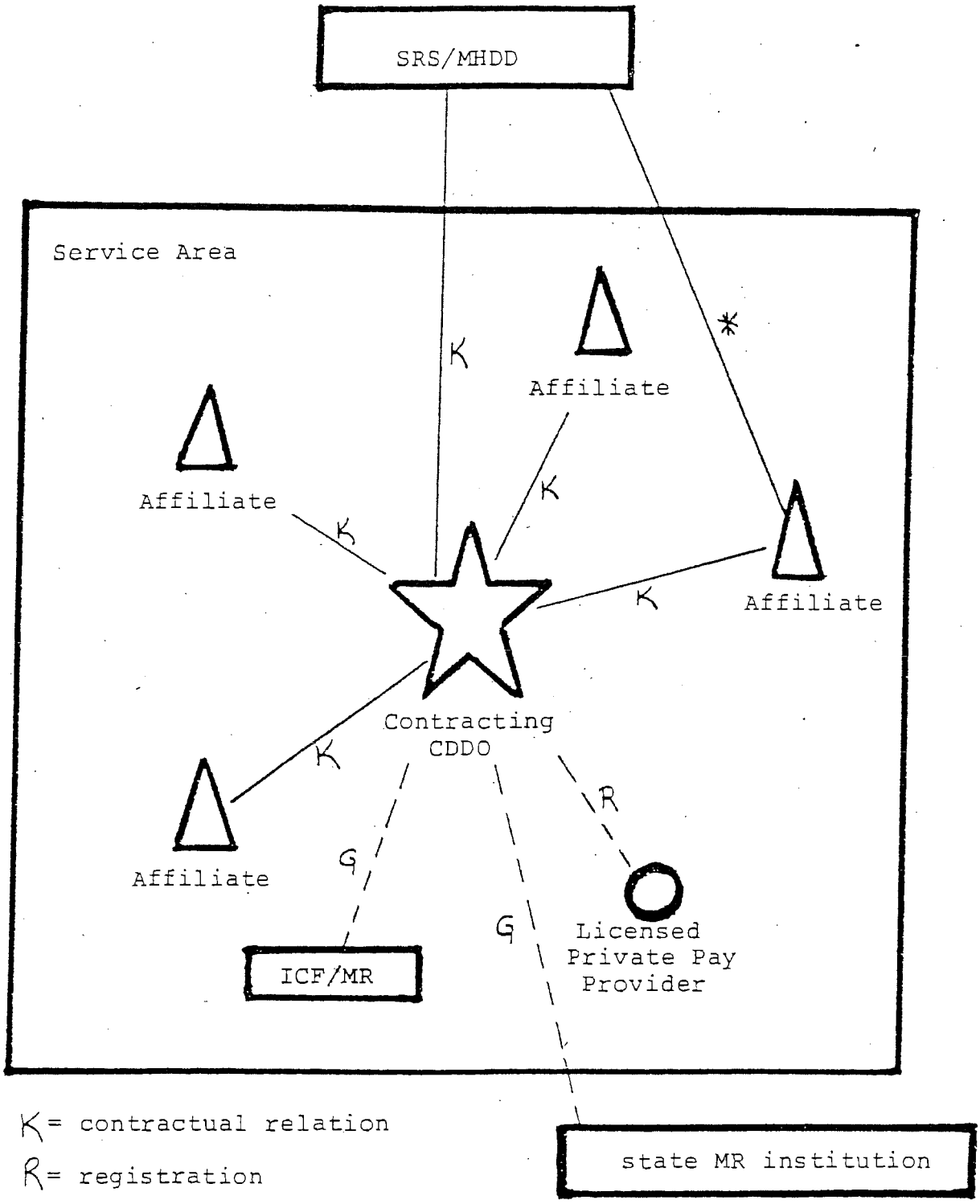
Based on the legislative history, the trial court's analysis appears to be correct. In his testimony before the Senate Judiciary Committee on January 18, 1996, Judge Sam Bruner, Chair of the Care and Treatment Advisory Committee of the Judicial Council, explained the bill would amend the existing definition of "mental

illness" by making a distinction between a "mentally ill person" and a "mentally ill person subject to involuntary commitment for care and treatment." Judge Bruner stated that certain mental conditions had been added that cannot be used for involuntary commitments. The minutes of the Committee specifically state:

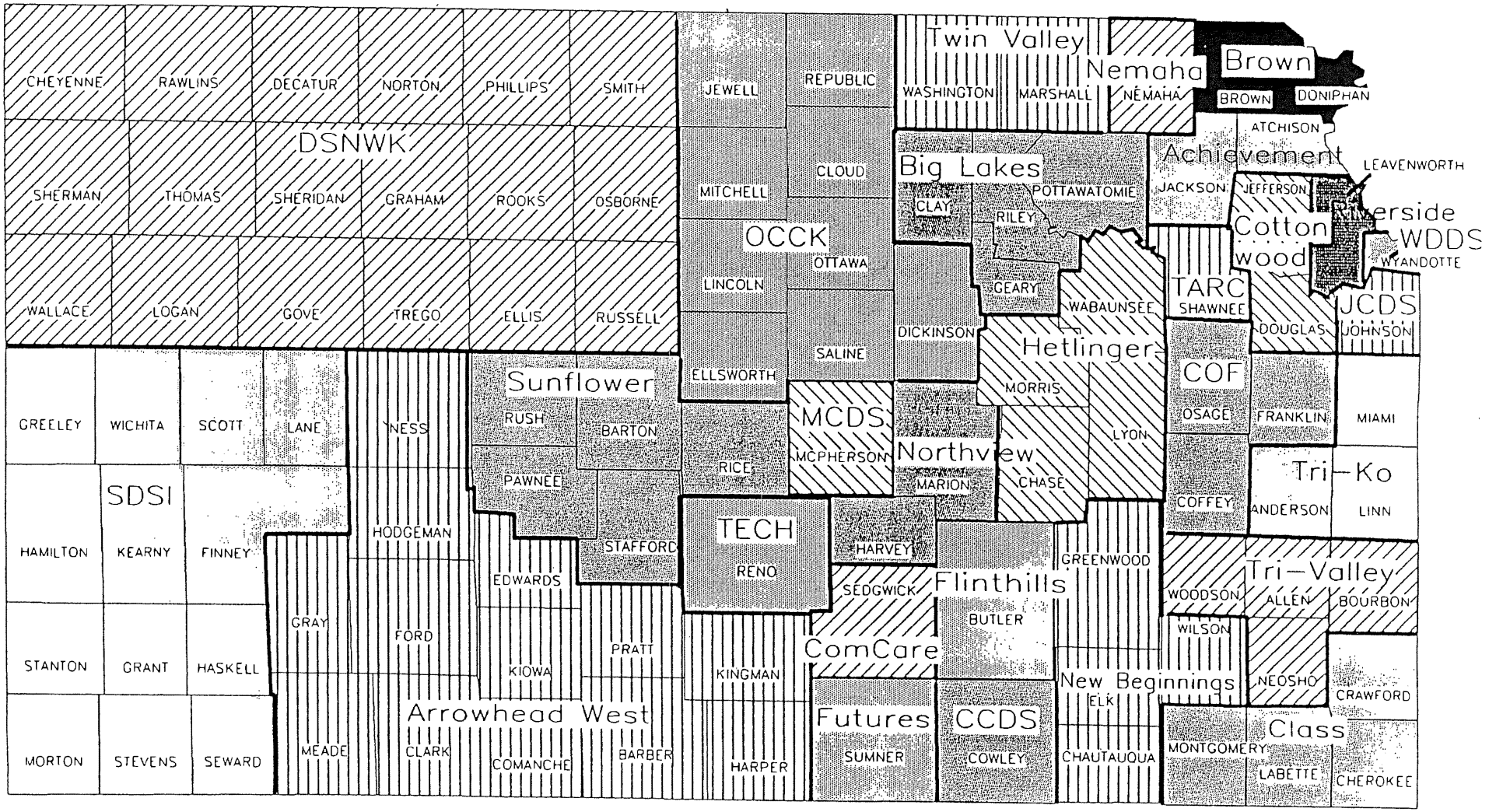
"The conferee stated that certain mental conditions have been added that can not be used for involuntary commitments. The conferee continued by stating that **SB 469** is an expansion over current Kansas law to prohibit involuntary commitment for the treatment of mental illness, for instances with regard to mentally retarded individuals, or with regard to alzheimer victims, etc. The conferee noted that the language immediately preceding that change in the statute, line 29 states, 'whose diagnoses is not solely one of the following.' " Minutes of Senate Committee on Judiciary, January 19, 1996.

The diagnosis in issue here is "organic mental disorder," which the testimony of Judge Bruner clearly shows was to be one of those diagnoses which will not justify an involuntary commitment. Despite the DSM-IV's abandonment of the term "organic mental disorder," the legislature clearly intended to use the term as it has been previously and commonly used throughout the psychiatric community. In the context of an involuntary commitment proceeding, disorders that have traditionally been labelled organic in nature should continue to be regarded as falling within the definition of "organic mental disorder."

We hold K.S.A. 1997 Supp. 59-2946(f)(1) is not unconstitutionally void for vagueness. We affirm the trial court.


SRS/MHDD
Service Area
Affiliate
Affiliate
Affiliate
Affiliate
Contracting CDDO
ICF/MR
Licensed Private Pay Provider
state MR institution
K = contractual relation
R = registration
G = gatekeeper function
* = 20 or more employees direct payment option

KANSAS CDDOs



Date of Map: November 25, 1997

Rev. 12/03/01

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FAX: (785) 242-2118
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FAX: (316) 383-7866
Colin McKenney, Exec. Director

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FAX: (785) 842-6102
Sharon Spratt, Director

Cowley Co. Developmental Services, Inc.
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Arkansas City, KS 67005-0618
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FAX: (620) 442-5623
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Neodesha, KS 66757
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FAX: (316) 283-5196
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FAX: (913) 755-4981
Dennis Norton, Director

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Maury Thompson, Director

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Gordon Criswell, Director

30-64-23. Single point of application, determination, and referral. (a) Each contracting CDDO shall develop and implement a means by which the CDDO shall become the single point of application, eligibility determination, and referral for persons desiring to receive community services within the service area of that CDDO. Procedures shall be established for the following:

(1) Distributing, completing, accepting, and processing the uniform statewide application for community services, as published by the commission;

(2) determining if the applicant meets the definitional criteria to be considered a person with a developmental disability as defined in K.S.A. 39-1803, and amendments thereto;

(3) informing a person of the types and availability of community services provided within the service area and of the licensed providers and community service providers who have requested that their names be provided, existing within the service area and how the licensed providers may be contacted;

(4) assisting a person in deciding which community services the person may wish to obtain or would accept within the next year from the date of the person's application;

(5) assisting a person in accessing the community services of the person's choice; and

(6) maintaining a list of persons who have made application to the CDDO for community services and have been determined eligible, and allowing access to the names of those persons who have not requested that their names be kept confidential by the community service providers in the service area who have entered into affiliation agreements

with the CDDO.

(b) Each contracting CDDO shall require any employees or agents of the CDDO who perform the functions of eligibility determination to be trained as prescribed by the commissioner.

(c) Each contracting CDDO shall require any employees or agents of the CDDO who perform the functions of processing applications for service or referral of persons for service to complete a training program that meets these criteria:

(1) Is developed by the CDDO and approved by the CDDO council of community members;

(2) includes topics regarding the following:

(A) Types of community services available in the service area and information concerning the providers of those services; and

(B) potential referral contacts for persons who are determined not to be eligible for services; and

(3) is offered in a manner and frequency to ensure that employees or agents of the CDDO who perform the duties required by subsection (a) are competent.

(d) This regulation shall take effect on and after October 1, 1998. (Authorized by and implementing K.S.A. 1997 Supp. 39-1801, et seq.)

Definition of Mental Retardation

Background: Consistent with K.S.A. 39-1803(f) & (h), persons who are mentally retarded are those whose condition *presents an extreme variation in capabilities from the general population,* which manifests itself in the developmental years and results in a need for life long interdisciplinary services. The following identifies those who, among all persons with disabilities, *are the most disabled,* as defined below:

Mental Retardation means:

I. **substantial limitations in present functioning**

that

II. is manifested during the period from birth to age 18 years

and

III. is characterized by **significant sub-average intellectual functioning**

existing concurrently with

IV. deficits in adaptive behavior, including related limitations, in **two or more** of the following applicable adaptive skill areas:

1. Communication
2. Self-care
3. Home living
4. Social skills
5. Community use
6. Self-direction
7. Health and safety
8. Functional academics
9. Leisure
10. Work

Definition of Other Developmental Disability

Background: Consistent with K.S.A. 39-1803 (f), persons who are otherwise dvelopmentally disabled are those whose condition *presents an extreme variation from the general population,* which manifests itself in the developmental years and results in a need for life long interdisciplinary services. The following identifies those who, among all persons with disabilities, *are the most disabled,* as defined below:

Other Developmental Disability means:

I. a condition, such as autism, cerebral palsy, epilepsy, or other similar physical or mental impairment (or a condition which has received a dual diagnosis of mental retardation and mental illness), evidenced as a **severe, chronic disability** which is attributable to a mental or physical impairment or a combination of mental and physical impairments,

and

II. is manifested before the age of 22,

and

III. is likely to continue indefinitely,

and

IV. results in **substantial functional limitations** in any **three or more** of the following areas of life functioning:

1. Self-care
2. Understanding and the use of language
3. Learning and adapting
4. Mobility
5. Self-direction in setting goals and undertaking activities to accomplish those goals
6. Living independently
7. Economic self-sufficiency

and

V. reflects a need for a combination and sequence of special, interdisciplinary or generic care, treatment or other services, which are lifelong or extended in duration, and are individually planned and coordinated

and

VI. does not include individuals who are solely severely emotionally disturbed or seriously and persistently mentally ill, or have disabilities solely as a result of infirmities of aging.

home and community based services for individuals with head injury

WHAT IS HCBS/HI

The HCBS/HI program serves individuals 16 to 55 years of age who meet the criteria for head injury rehabilitation hospital placement. The services available to these individuals are: 1) personal services; 2) assistive services; 3) transitional living skills; 4) rehabilitation therapies; and, 5) head injury (HI) targeted case management. The goal of the HCBS/HI program is to help individuals stay in their homes and live as independently as they can.

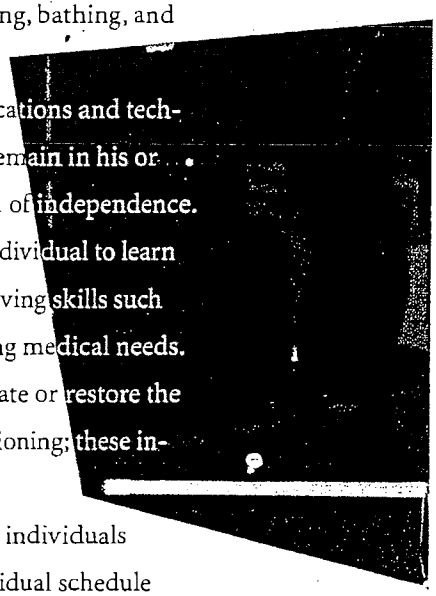
1. *Personal services:* Assistance in completing tasks of daily living which the individual would do themselves if they did not have a disability. These could include dressing, shopping, cooking, bathing, and other everyday tasks.

2. *Assistive services:* Medical equipment, home modifications and technology assistance devices which help the individual to remain in his or her home and increase his or her quality of life and level of independence.

3. *Transitional living services:* Services which help the individual to learn the skills necessary to be independent. Training in daily living skills such as cooking, bathing, grooming, social skills and managing medical needs.

4. *Rehabilitation therapies:* Services designed to rehabilitate or restore the individual to an optimal level of physical and mental functioning; these include physical, occupational, and speech therapies.

5. *HI targeted case management:* A case manager will help individuals determine their needs. The case manager will help the individual schedule the services and treatments necessary to meet their goals and needs.



PAGE 2

who is eligible for hcbs/hi and how can they access the program

HOW DOES AN INDIVIDUAL QUALIFY FOR THE HCBS/HI PROGRAM

In order to qualify for the HCBS/HI program, you must meet the following eligibility guidelines:

1. Be 16 to 55 years of age;
2. Meet the criteria for head injury rehabilitation hospital placement (determined by screening);
3. Meet the financial guidelines to qualify for Title 19.

Contact your local Social and Rehabilitation Services (SRS) office, a head injury waiver provider (HIWP), or a Center for Independent Living (CIL), to find out about the HCBS/HI program. Ask how you can determine if you qualify for HCBS/HI services. A list of SRS offices, HIWP's, and CIL's are in the back of this booklet.

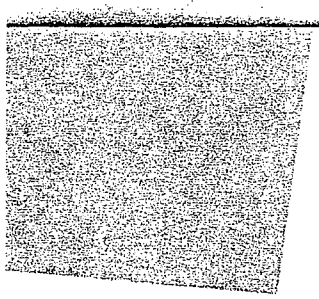
HOW CAN AN INDIVIDUAL WITH A HEAD INJURY APPLY FOR THIS PROGRAM

You can apply for these services through the local SRS office, a nearby CIL or the other HIWP agencies listed on the back of this booklet. You should call the number of the agency you choose to ask them for assistance in applying for HCBS/HI services.

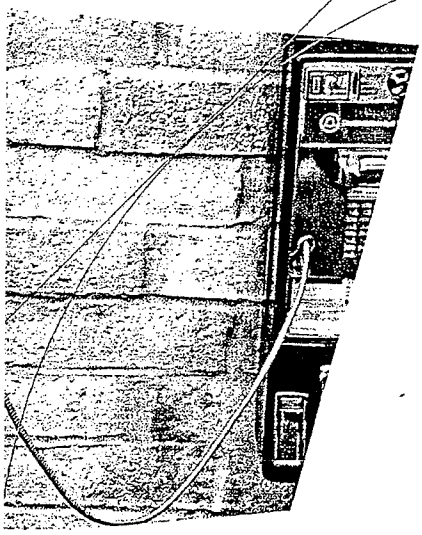
the rights, responsibilities, and duties of individuals with a head injury who take part in the hcbs/hi program

WHAT ARE THE RIGHTS AND RESPONSIBILITIES OF THE HCBS/HI CONSUMER

You have the right to appeal decisions. If you have any questions about an action taken by SRS, an HIWP, or a CIL, or if you want more information considered before a planned action is taken, discuss these matters with an SRS representative. If you are still not satisfied, you have the right to a hearing before a State Hearings Officer. Your request for a hearing must be received in writing within 30 days of the date on the notice of action to be taken. SRS will explain the hearing process and supply any forms you need if you request them. You may have legal counsel or other representation at the hearing. If your request for a fair hearing is received before the effective date of action, assistance may continue at the current level until a decision is made; however, any overpayment from a continuation may be recovered if the decision is not in your favor. If you are not satisfied with a fair hearing decision, you may request a review of the decision by the state appeals committee.



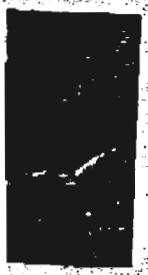
WHAT ARE THE CIVIL RIGHTS OF THE CONSUMER



No person shall, on grounds of race, color, national origin, age, disability, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity of the Kansas Department of Social and Rehabilitation Services. If a consumer feels that he or she has been discriminated against on the above grounds, a complaint may be made in writing to the Kansas Department of Social and Rehabilitation Services or to the federal Department of Health and Human Services. One may also make a complaint by calling the Customer Assistance Unit (CAU) at *1.800.766.9012* or *785.291.4144*. The hours are from 7:30 am to 7:00 pm. Or you may write to: Medicaid Customer Service Center, Cost Center 779, PO BOX 3571, Topeka, Kansas 66601-3571.

Under the HCBS/HI program individuals have a right to:

1. Have eligibility for services determined within 30 days.
2. Receive services as provided to persons in the same category of eligibility in accordance with the state plan, dependent on availability of service and fiscal limits.
3. Request a fair hearing if dissatisfied with the decision made on the application or if there has been undue delay in acting on the application.
4. Equal treatment with other applicants/recipients who are in similar situations.
5. Be treated with respect and have privacy.



An applicant has the responsibility to:

1. Report to their case manager if he or she plans to move. The local SRS office should also be informed.

2. Report any change in income, family size, or Supplemental Security Income (SSI) status to your worker at the local SRS office.

A consumer has the responsibility to:

1. Report fully all circumstances affecting their application;

2. Agree to a full investigation of eligibility including inquiries of employers, bankers, doctors, other business and professional persons, and a review of any agency records. Also, if the agency needs further information from employers, the consumer will be asked to sign a release. If consent is given to the release of any information from SSI and Social Security records to SRS, a Social Security number will be used only in the administration of the SRS program;

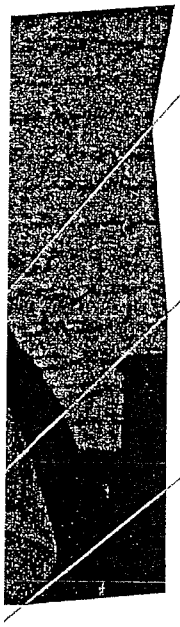
3. Report any changes in circumstances which affect eligibility;

4. Cooperate in current and subsequent agency efforts to establish eligibility;

5. Pay their share of service costs, if applicable, in accordance with the client obligation schedule.

For consumer assistance, telephone *1.800.766.9012*.

Other helpful telephone numbers begin on the facing page.



CENTERS FOR INDEPENDENT LIVING (CIL's) IN KANSAS

Access to Living Coalition for Independence, Inc.
4631 Orville, Suite 102
Kansas City, Kansas 66102
913.287.0999 v/tdd

Center for Independent Living of Southwest Kansas
111 Grant Avenue
Garden City, Kansas 67846
316.276.1900 v/tdd
1.800.736.9443¢

Independence, Inc.
2001 Haskell
Lawrence, Kansas 66046
785.841.0333
785.841.1046 tdd
1.888.824.7277

Independent Connection
1710 W Schilling Rd
Salina, Kansas 67401
785.827.9383 v/tdd
1.800.526.9731

Independent Living Center of Northeast Kansas
414 Commercial
Atchison, Kansas 66002
913.367.1830 v/tdd
1.888.845.2879

Independent Living Resource Center, Inc.
3330 W Douglas, Suite 101
Wichita, Kansas 67203
316.942.6300 v/tdd
1.800.479.6861

LINK, Inc.
2401 E 13th
Hays, Kansas 67601
785.625.6942 v/tdd
1.800.569.5926

Prairie Independent Living Resource Center
915 S Main
Hutchinson, Kansas 67501
316.663.3989
316.663.9920 tdd
1.888.715.6818

Resource Center for Independent Living
1137 Laing Street
p o box 257
Osage City, Kansas 66523
785.528.3105
785.528.3106 tdd
1.800.580.7245

Southeast Kansas Independent Living, Inc.
1801 Parsons Plaza
Parsons, Kansas 67357
316.421.5502
316.421.6551 tdd
1.800.688.5616

Three Rivers, Inc.
408 Lincoln Avenue
Wamego, Kansas 66547
785.456.9915 v/tdd
1.800.555.3994

Topeka Independent Living Resource Center
501 SW Jackson, Suite 100
Topeka, Kansas 66603
785.233.4572 v/tdd
1.800.443.2207

The Whole Person, Inc.
3100 Main, Suite 206
Kansas City, Missouri 64111
816.561.0304 v/tdd

Statewide Independent Living Council of Kansas, Inc.
700 SW Jackson, Suite 212
Topeka, Kansas 66603
785.234.6990 v/tdd
1.800.217.4525

HEAD INJURY WAIVER PROVIDERS (HIWP)

communityworks, inc.
5808 Nall
Mission, Kansas 66202
913.789.9900 v/fax

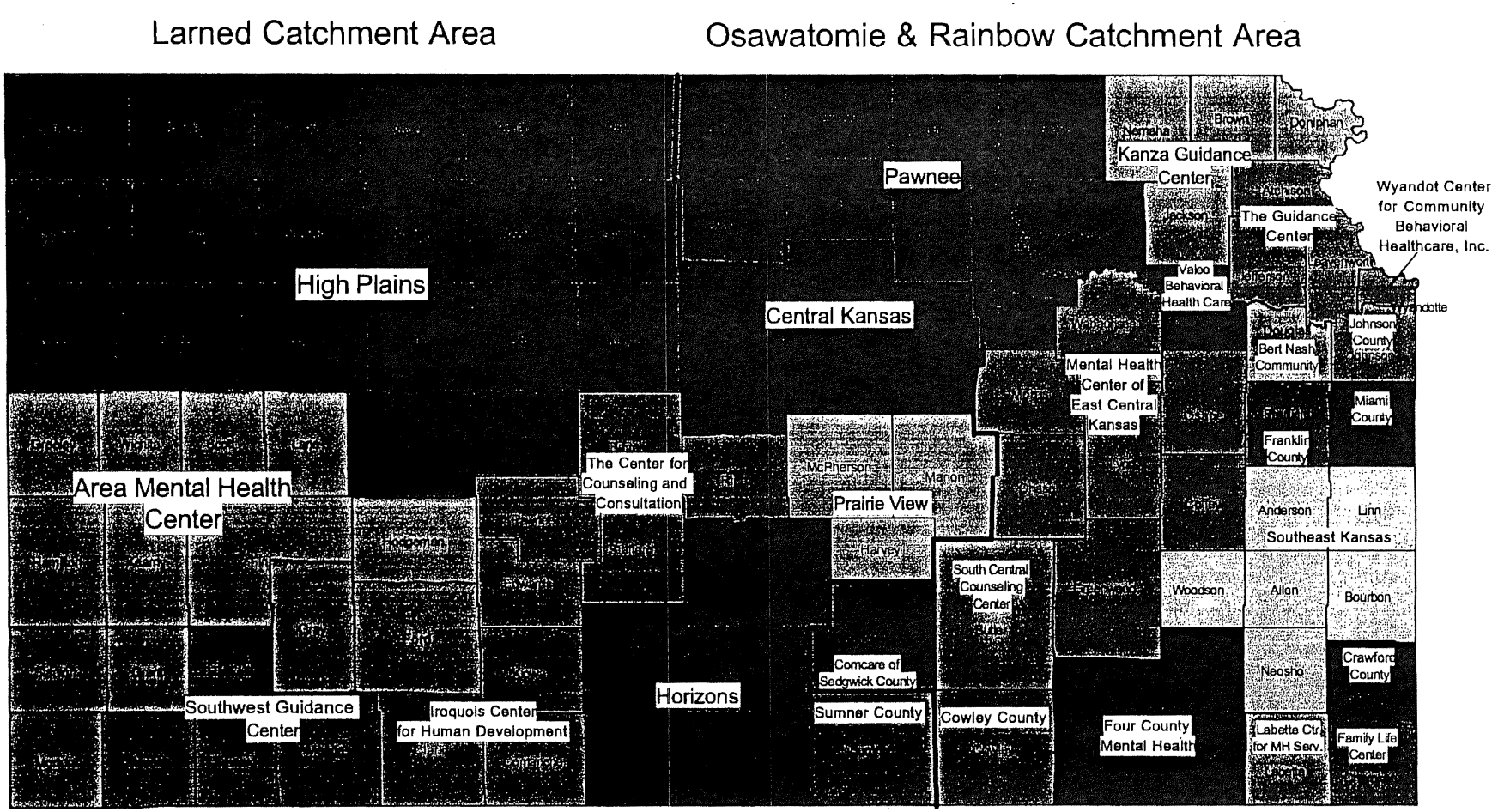
Cerebral Palsy Foundation Kansas Inc.
5111 E 21st Street
Wichita, Kansas 67208-0217
316.688.1888 v/tdd
316.688.5687 fax

Dreamworks
636 Minnesota, Suite D
Kansas City, Kansas 66101
913.371.6070 v/tdd
913.371.6307 fax

and

10000 W 75th Street, No. 200
Shawnee Mission, Kansas 66204
913.432.9939 v/fax

State of Kansas
Community Mental Health Centers



CMHC EXECUTIVE DIRECTORS

(BY CENTER)

(Updated 12/14/01)

MENTAL HEALTH CENTER ADDRESS	EXECUTIVE DIRECTOR EMAIL ADDRESS	TELEPHONE # FAX #
AREA MENTAL HEALTH CENTER 1111 EAST SPRUCE STREET GARDEN CITY KS 67846-5999	RICK H. GRAY, Ph.D. rgray@pld.com	(620) 275-0625 (620) 275-7908
BERT NASH COMMUNITY MENTAL HEALTH CENTER 200 MAINE STREET, SUITE A LAWRENCE KS 66044	DAVID E. JOHNSON djohnson@bertnash.org	(785) 843-9192 (785) 843-0264
CENTER FOR COUNSELING & CONSULTATION SERVICES 5815 BROADWAY GREAT BEND KS 67530	DWIGHT YOUNG dyoung@thecentergb.com	(620) 792-2544 (620) 792-7052
CENTRAL KANSAS MENTAL HEALTH CENTER 809 ELMHURST SALINA KS 67401	PATRICIA MURRAY murray@ckmhc.org	(785) 823-6322 (785) 823-3109
COMCARE OF SEDGWICK COUNTY 635 NORTH MAIN WICHITA KS 67203	DEBORAH DONALDSON ddonalds@sedgwick.gov	(316) 383-8251 (316) 383-7925
COMMUNITY MENTAL HEALTH CENTER OF CRAWFORD COUNTY 3101 N MICHIGAN SUITE B PITTSBURG KS 66762	RICK PFEIFFER rpfeiffer@kscable.com	(620) 231-5141 (620) 231-1152
COWLEY COUNTY MENTAL HEALTH & COUNSELING CENTER 22214 D STREET WINFIELD KS 67156	LINDA YOUNG youngl@onemain.com	(316) 442-4540 (620) 442-4559
FAMILY CONSULTATION SERVICES (1) 560 NORTH EXPOSITION WICHITA KS 67203	RANDALL CLASS rclass@fcswichita.org	(316) 264-8317 (316) 264-0347
FAMILY LIFE CENTER INC 201 WEST WALNUT COLUMBUS KS 66725	SCOTT JACKSON sjackson@columbus-ks.com	(620) 429-1860 (620) 429-1041

FAMILY SERVICE & GUIDANCE CENTER (2) 325 SW FRAZIER TOPEKA KS 66606-1963	DUB RAKESTRAW (retires 12/14/01) drakestraw@fsgctopeka.com	(785) 232-5005 (785) 232-0160
FOUR COUNTY MENTAL HEALTH CENTER 3751 WEST MAIN INDEPENDENCE KS 67301	RONALD DENNEY rdenney@fourcounty.com	(620) 331-1748 (620) 332-8540
FRANKLIN COUNTY MENTAL HEALTH CENTER 204 EAST 15TH STREET OTTAWA KS 66067	DIANE ZADRA DRAKE fcmhc@mail.ott.net	(785) 242-3780 (785) 242-6397
GUIDANCE CENTER 818 N 7TH STREET LEAVENWORTH KS 66048-1422	KEITH RICKARD krickard@nekmhgc.org	(913) 682-5118 (913) 682-4664
HIGH PLAINS MENTAL HEALTH CENTER 208 EAST 7TH STREET HAYS KS 67601-4199	KERMIT GEORGE kgeorge@media-net.net	(785) 628-2871 (785) 628-1438
HORIZONS MENTAL HEALTH CENTER 1715 EAST 23RD ST HUTCHINSON KS 67502-1188	JIM SUNDERLAND sunderlandj@hmhc.com	(620) 665-2240 (620) 665-2276
IROQUOIS CENTER FOR HUMAN DEVELOPMENT 103 SOUTH GROVE GREENSBURG KS 67054	C. SHELDON CARPENTER irqcenter@midway.net	(620) 723-2272 (620) 723-3450
JOHNSON COUNTY MENTAL HEALTH CENTER 6000 LAMAR, SUITE 130 MISSION KS 66202	DAVID WIEBE wiebe@jocoks.com	(913) 831-2550 (913) 826-1608
KANZA MENTAL HEALTH AND GUIDANCE CENTER 909 SOUTH SECOND STREET, P.O. BOX 319 HIAWATHA KS 66434	BILL PERSINGER bpersinger@ksmhc.org	(785) 742-7113 (785) 742-3085
LABETTE CENTER FOR MENTAL HEALTH SERVICES 1730 BELMONT, P.O. BOX 258 PARSONS KS 67357	JACK W. MARTIN, Ph.D. jackwm@par1.net	(620) 421-3770 (620) 421-0665

MENTAL HEALTH CENTER OF EAST CENTRAL KANSAS 1000 LINCOLN EMPORIA KS 66801	JOHN RANDOLPH Ph.D. randolph@cadvantage.com	(620) 343-2211 (620) 342-1021
MIAMI COUNTY MENTAL HEALTH CENTER 401 NORTH EAST STREET PAOLA KS 66071	BOB CURTIS bcurtis@mcmhc.net	(913) 557-9096 (913) 294-9247
PAWNEE MENTAL HEALTH SERVICES P.O. BOX 747 MANHATTAN KS 66505-0747	EVERETT "JAKE" JACOBS jakej@pawnee.org	(785) 587-4361 (785) 587-4377
PRAIRIE VIEW INC 1901 E 1ST STREET BOX 467 NEWTON KS 67114	MELVIN GOERING goeringmm@pvi.org	(316) 284-6400 (316) 284-6491
SOUTH CENTRAL MENTAL HEALTH & COUNSELING CENTER 2365 WEST CENTRAL EL DORADO KS 67042	BILL JOHNSTON, Acting _____	(316) 321-6036 (316) 321-6336
SOUTHEAST KANSAS MENTAL HEALTH CENTER 304 NORTH JEFFERSON, PO BOX 807 IOLA KS 66749	ROBERT F. CHASE rchase@sekmhc.org	(620) 365-8641 (620) 365-8642
SOUTHWEST GUIDANCE CENTER P.O. BOX 2945 LIBERAL KS 67905-2945	JIM KARLAN jkarlan@yahoo.com	(620) 624-8171 (620) 624-0114
SUMNER MENTAL HEALTH CENTER 1601 WEST 16TH STREET, P.O. BOX 607 WELLINGTON KS 67152-0607	GREGORY G. OLSON golsonsmhc@hotmail.com	(316) 326-7448 (316) 326-6662
VALEO BEHAVIORAL HEALTH CARE 5401 WEST 7TH STREET TOPEKA KS 66606	TOM ZABROWSKI tomz@cjnetworks.com	(785) 273-2252 (785) 273-2736
WYANDOT CENTER FOR COMMUNITY BEHAVIORAL HEALTHCARE, INC. 3615 EATON ST BOX 3228 KANSAS CITY KS 66103	PETER W. ZEVENBERGEN, JR. zevenbergen_p@wmhci.org	(913) 831-0024 (913) 831-1300

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(1) Affiliate of COMCARE of Sedgwick County
(2) Affiliate of Valeo Behavioral Health Care