

SESSION OF 2022

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2697

As Amended by House Committee on Judiciary

Brief*

HB 2697, as amended, would amend provisions in the Kansas Code of Criminal Procedure regarding competency of defendants to stand trial, proceedings to determine competency, and commitment of incompetent defendants, persons found not guilty by reason of mental disease or defect, or convicted defendants.

Appropriate State, County, or Private Institution or Facility

The bill would define “appropriate state, county, or private institution or facility” (appropriate facility) to mean a facility with sufficient resources, staffing, and space to conduct the evaluation or restoration treatment of the defendant. The term would not include a jail or correctional facility as a location where evaluation and restoration treatment services are provided unless the administrative head or law enforcement official in charge of the jail or correctional facility agrees that the facility has the appropriate physical and care capabilities that such services may be provided by:

- The state security hospital or its agent or a state hospital or its agent;
- A qualified mental health professional, as defined in the Care and Treatment Act for Mentally Ill

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Persons, who is qualified by training and expertise to conduct competency restoration treatment;

- An individual who is qualified by training and experience to conduct competency evaluations and restoration treatment and is licensed by the Behavioral Sciences Regulatory Board; or
- A physician who is qualified by training and experience to conduct competency evaluations and restoration treatment and is licensed by the State Board of Healing Arts.

Proceedings to Determine Competency

The bill would replace language allowing a court to commit a defendant to the state security hospital or an appropriate facility for competency examination and report to the court with language allowing the court to order an evaluation to be completed by an appropriate facility to be conducted in person or by use of available electronic means while the defendant is in jail, at any secure location, or on pretrial release.

The bill would replace language allowing the court to designate certain appropriate clinics, centers, or facilities to conduct the examination with language allowing the court to designate an appropriate facility to conduct the examination and add “any secure location” as a place where the defendant may be located.

The bill would reduce the minimum number of physicians or psychologists the court could appoint to examine the defendant from two to one and would clarify the qualifications of such physicians or psychologists.

The bill would clarify the procedure and time limitation for commitment of the defendant to an institution or facility for the examination, and would require, before the expiration of

the 60-day evaluation period, the professional approved by the court to examine the defendant or, if the defendant is committed for inpatient examination, the chief medical officer or head of the appropriate institution or facility to certify to the court whether the defendant is competent to stand trial.

Evaluation and Treatment of Incompetent Defendant

The bill would amend provisions requiring a defendant found incompetent to stand trial to be committed for evaluation and treatment to instead require such defendant to be ordered for evaluation and treatment, conducted on an outpatient or inpatient basis, by an appropriate facility. The bill would state that evaluation or restorative treatment of a defendant shall not be conducted in a jail unless the administrative head or law enforcement official in charge of the jail agrees to such evaluation or restorative treatment being conducted in such jail.

The bill would allow an evaluation and treatment to be ordered to be conducted on an outpatient basis in person or by use of available electronic means while the defendant is in jail, at any secure location, on pretrial release, or in any other appropriate setting.

The bill would allow outpatient evaluation and treatment at an appropriate facility to be ordered to be conducted for a defendant charged with a misdemeanor offense. For a defendant charged with a felony offense, the bill would allow an inpatient commitment to the state security hospital or its agent or a state hospital or its agent, or an outpatient commitment to such facilities or agents if the defendant meets screening criteria established by the state security hospital. In ordering an inpatient commitment, the court would be required to consider the defendant's mental condition, behaviors, and the availability of outpatient evaluation and treatment options.

A provision requiring notification of the county or district attorney in the county where the criminal proceeding is pending, at the time of commitment, for the purpose of providing victim notification would be moved and amended to standardize terms and reflect the new procedures provided by the bill.

A provision requiring the chief medical officer of the institution to certify to the court within 90 days of commitment whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future would be amended to reflect the new evaluation and treatment options provided by the bill. The bill would require the court to set a hearing within 21 days after such certification, unless exceptional circumstances warrant delay, for the purpose of determining competency.

If such probability does exist, the bill would expand the places the court could order the defendant to remain to include jail, a secure location, on pretrial release, or at an appropriate setting. If such probability does not exist, the bill would require the prosecuting attorney where the charges are filed (if the evaluation and treatment was not provided by the state security hospital or its agent or a state hospital or its agent), or the prosecuting attorney or the Secretary for Aging and Disability Services (if the evaluation and treatment was provided by the state security hospital or its agent or a state hospital or its agent), to commence involuntary commitment proceedings, and would require such proceedings to commence within 21 days of receipt of the certification, unless exceptional circumstances warrant delay. The bill would implement similar requirements if a defendant, who was found to have had a substantial probability of attaining competency, has not attained competency within six months from the date of the original commitment.

[*Note:* The certification and involuntary commitment procedures are repeated throughout the bill for each of the new evaluation and treatment options. Although the language appears to be entirely new each time, it actually reflects the

procedures outlined above, modified slightly for each evaluation and treatment option.]

The bill would require, rather than allow, a defendant committed to a public institution or facility under these provisions who is thereafter sentenced for the crime charged at the time of commitment to be credited with all of the time during which the defendant was committed and confined.

If the defendant is ordered or met criteria to receive an outpatient evaluation and treatment, and the chief medical officer of the appropriate institution or facility determines that the defendant's mental health condition or behaviors warrant terminating outpatient treatment services and commencing inpatient evaluation and treatment, the chief medical officer or head of the facility or institution would be required to provide a report to the court within 10 days after outpatient treatment is terminated. The bill would provide content and procedural requirements for such report, including procedures for the court to order the sheriff of the county where the charges are filed to transport the defendant to the state security hospital or its agent or a state hospital or its agent for inpatient services.

The bill would require the court, prosecuting attorney, defense counsel, and chief medical officer of any institution or the head of any facility where the defendant is receiving outpatient services to provide requested documentation to the state security hospital or its agent or the state hospital or its agent for the purpose of managing inpatient admission.

Psychotropic Medications

The bill would allow, notwithstanding a statute providing certain rights to persons in the custody of the Secretary for Aging and Disability Services, psychotropic medications to be prescribed for any defendant who is ordered or has met the criteria to receive evaluation and treatment on an inpatient or outpatient basis at an appropriate facility. The bill would

outline requirements for the prescription, ordering, administration, and review of such medications.

The bill would prohibit such medications from being administered to a defendant for two days prior to and during any hearing, if such medications alter the defendant's mental state to adversely affect the defendant's judgment or hamper the defendant in preparing for or participating in the hearing. Prior to the hearing, the bill would require a report of all such medications or other treatment that has been administered to the defendant, and a copy of any written consent signed by the defendant, to be submitted to the court.

The bill would allow the defendant's counsel to preliminarily examine the attending physician regarding the administration of any medication to the defendant within two days of the hearing and the effect that medication may have had on the defendant's judgment or ability to prepare for or participate in the hearing. If the court determines that medication or other treatment has been administered that adversely affects the defendant's judgment or ability to prepare for or participate in the hearing, the court could grant the defendant a reasonable continuance to allow the defendant to be better able to prepare for or participate in the hearing. The bill would require the court to order that such medication or other treatment be discontinued until the conclusion of the hearing, unless the court finds that such medication or other treatment is necessary to sustain the defendant's life or to protect the defendant or others, in which case the court would be required to order the hearing to proceed.

The bill would require, if a defendant who is charged with a felony is receiving treatment under this section and is not deemed a present danger to themselves or others objects to taking any medication prescribed for the purpose of restoring the defendant to competency, the defendant's objection to be recorded in the defendant's medical record and written notice of such objection to be forwarded to the medical director of the treatment institution or facility or the director's designee

and to the court where the criminal charges are pending. The bill would permit the medication to be administered over the defendant's objection only if the court finds that:

- The medication is substantially unlikely to have side effects that may undermine the fairness of the trial;
- The medication is medically appropriate;
- Less intrusive alternatives have been considered;
- The medication is necessary to advance significantly important governmental trial interests; and
- The administrative head or law enforcement official in charge of the jail has agreed to having the medication administered over the defendant's objection in the jail.

The bill would prohibit the administration of any experimental medication without the consent of the defendant or defendant's legal guardian.

Commitment of Persons Found Not Guilty By Reason of Mental Disease or Defect

The bill would amend the statute governing commitment of persons found not guilty by reason of mental disease or defect to allow commitment to an appropriate secure facility in addition to the state security hospital as permitted under continuing law. Accordingly, the bill would amend various procedural provisions to incorporate the licensed psychologist at or head of such appropriate secure facility. The bill would amend hearing timing requirements in this statute to allow delay if the court finds that such delay is warranted by exceptional circumstances.

Commitment of Convicted Defendants

The bill would amend a statute allowing commitment for mental examination, evaluation, and report of a convicted defendant as part of the presentence investigation, to provide that all such commitments shall be to the state security hospital. Under current law, such commitment may also be to a suitable local mental health facility or to a private hospital.

Other Amendments

Throughout the bill, references to “county or district attorney” would be changed to “prosecuting attorney,” and technical changes would be made to ensure consistency in statutory style, references, and phrasing.

Background

The bill was introduced by the House Committee on Judiciary at the request of a representative of the Kansas Department for Aging and Disability Services (KDADS).

House Committee on Judiciary

In the House Committee hearing on February 17, 2022, representatives of KDADS, ACLU of Kansas, and Wyandot Behavioral Health Network; the Wyandotte County District Attorney; and the Douglas County Sheriff testified as **proponents** of the bill, stating the bill would make important changes in the process and availability of services to conduct competency evaluations for criminal defendants, including expanding the locations and providers for such evaluations and permitting mobile competency evaluation and treatment. A representative of the Kansas Mental Health Coalition submitted written-only proponent testimony.

Representatives of the Association of Community Mental Health Centers of Kansas and the Kansas Sheriffs

Association testified as neutral conferees. Representatives of the League of Kansas Municipalities and the Office of the Attorney General provided written-only neutral testimony.

Some proponent conferees and the neutral conferees requested amendments regarding several provisions.

A representative of the Disability Rights Center of Kansas provided **opponent** testimony, stating concerns regarding unintended consequences and constitutionality of various provisions.

On March 16, 2022, the House Committee adopted an amendment developed by KDADS, in consultation with other stakeholders, to address concerns raised by proponent, neutral, and opponent conferees. The amendment included:

- Defining “appropriate state, county, or private institution or facility”;
- Prohibiting evaluation or restorative treatment in a jail without the agreement of the person in charge of the jail;
- Requiring time committed to be credited to a defendant who is later sentenced for the crime charged;
- Providing additional procedures and required findings prior to administering psychotropic medication over a defendant’s objection; and
- Standardizing terms and phrases used throughout the bill.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Judicial Branch indicates enactment of the bill could have a fiscal effect on

expenditures of the Judicial Branch and could lead to fewer delays in trials being held in the district courts. Nevertheless, until the courts have had an opportunity to operate under the bill's provisions, an accurate estimate of the fiscal effect on expenditures by the Judicial Branch cannot be given. Any fiscal effect on the Judicial Branch associated with the bill is not reflected in *The FY 2023 Governor's Budget Report*.

KDADS requested \$2.8 million from the State General Fund in its FY 2023 budget submission to fund HB 2697 and the full amount is included in the Governor's Budget Recommendation for FY 2023. During October 2021, there were a total of 50 defendants waiting for forensic competency evaluation for an average of 140 days to be admitted to Larned State Hospital (LSH). There were 124 defendants waiting 179 days for competency restoration treatment. Using the current per evaluation costs under the mobile evaluation contract, the cost to conduct all the evaluations would cost \$90,450. For this grant program, KDADS assumes the Community Mental Health Centers (CMHCs) would have slightly higher costs in some areas of the state due to the volume of cases and the need to recruit additional staff. Research in the Journal of the American Academy Psychiatry and Law in 2019 indicates cost for forensic competency restoration in jails was between \$42 and \$222 per day. For this estimate, KDADS assumes a \$200 daily cost for 90 days to complete the restoration. That would make the unit cost \$20,250 per restoration ordered. The mobile competency contract also allows \$100 per hour for travel and court time which is added to the estimate for a total cost of \$2.8 million. Any fiscal effect on KDADS associated with enactment of the bill is reflected in *The FY 2023 Governor's Budget Report*.

Criminal procedure; competency to stand trial; evaluation; location; treatment; medications