

## **MINUTES**

### **SPECIAL COMMITTEE ON JUDICIARY**

November 29-30, 2004  
Room 313-S—Statehouse

#### **Members Present**

Representative Michael O'Neal, Chairman  
Senator John Vratil, Vice Chairman  
Representative Jan Pauls, Ranking Minority Member  
Senator Phillip Journey  
Senator Derek Schmidt  
Representative Sydney Carlin  
Representative Paul Davis  
Representative Jeff Jack  
Representative Judy Morrison  
Representative Thomas Owens

#### **Staff Present**

Jerry Ann Donaldson, Legislative Research Department  
Mike Heim, Legislative Research Department  
Jill Wolters, Revisor of Statutes Office  
Diana Lee, Revisor of Statutes Office  
Helen Pedigo, Revisor of Statutes Office  
Cindy O'Neal, Committee Secretary

#### **Conferees Present**

Rocky Nichols, Kansas Advocacy and Protective Services  
Jim Ellis, University of New Mexico School of Law  
Sean O'Brien, University of Missouri, Kansas City Law Professor  
Jane Rhys, Council on Developmental Disabilities  
Kevin O'Connor, Sedgwick County Deputy District Attorney  
Representative Kathe Decker, Sponsor of HB 2649  
John Eichkorn, Kansas Highway Patrol  
Kyle Smith, Kansas Bureau of Investigation  
Jeff Bottenberg, Kansas Sheriffs Association

**November 29, 2004  
Morning Session**

**Topic Number 3—Death Penalty and the Definition of Mentally Retarded**

Rocky Nichols, Kansas Advocacy and Protective Services, reported that every state is required to have legislation, which protects the legal and civil rights for persons with disabilities. Their mandate is a federal requirement.

The issue today deals with cognitive disabilities and the death penalty. The Kansas Judicial Council proposed SB 355 last session, which prohibits a sentence of death for persons that have both significantly impaired intellectual functioning, defined as two or more standard deviations below the norm (which is less than 70 on the I.Q. test) and significant limitations in adaptive behavior, as defined as conceptual, social, and practical adaptive skills.

The proposed bill would not protect every person with cognitive disability from the death penalty, but only those individuals who have met the two-pronged test. SB 355 also would not tie protection from the death penalty to any particular age of onset of the disability. Those who fit the two-pronged test would have been sentenced allowing any other punishment, including life without parole.

The Kansas Judicial Council decided to look into the issue as the result of a 2002 U.S. Supreme Court case, *Atkins v. Virginia*, in which it ruled that, executing a person with mental retardation, *i.e.* cognitive disability, was cruel and unusual punishment in violation of the Eighth Amendment to the *U.S. Constitution*. Since the *Atkins* ruling, the U.S. Supreme Court has taken up two more cases on the issue of cognitive disability, *Tennard v. Dretke* and *Smith v. Texas*, which clarify and expand the constitutional threshold of relevant mitigating evidence involving persons with cognitive disabilities and the death penalty (Attachment 1).

Written testimony was provided by William Stiers, PhD., Clinical Associate Professor, University of Kansas Medical Center, which states that probably less than 2 percent of Kansas population can be expected to have severe cognitive disability. Most of these individuals would have been placed in a care facility by their family; they rarely live independently in the community (Attachment 2).

Written testimony also was provided by Daniel Martell of Park, Dietz and Associates, which addressed the issue of drug abuse causing a person to be cognitively disabled. In his profession, he has not found any cases where drugs can cause this phenomenon. Sometimes a solvent toluene, such as paint thinner can show some impact on I. Q., but not enough that the person would be able to meet the two-pronged test (Attachment 3).

Jim Ellis, University of New Mexico School of Law, stated the proposed legislation has three issues:

- How to comply with *Atkins*' definition of cognitive disability;
- Procedure and timing by which claims would be heard; and
- Mental disabilities distinguished from mental retardation, only because of when it occurs.

When the Legislature recreated the death penalty in Kansas, it included a provision that people with mental disabilities would not be sentenced to death due to their disability. The concern has been the definition of mental disabilities, and that the mental disability had to have some impact with regard to the crime, *i.e.*, the person could not determine right from wrong. *Atkins* ruling was concerned with tying the "act" to the mental disability.

Kansas legislation allows for this issue to be addressed after the trial is done. Many states have similar legislation, but have found through experience that the most efficient way to address the issue of mental disability is to do it in the pre-trial stage. Such a procedure saves both time and money, since many of these cases get resolved by plea bargaining. The issue of mental disability does not necessarily have to be done at pre-trial, but it should, at least, be raised during the jury trial, not afterwards.

The labeling of the disability has three components: the measured I.Q., the real world disability which it causes, and when it happened. Most have acquired their mental disability early in their life. The age limitation does not have significance and should not govern the definition. Nebraska and New Mexico do not have an age of onset requirement, and Kansas should not either. He suggested that if the disability is the same at eight years old or 28 years of age, then when the disability happened does not matter.

Sean O'Brien, Law Professor, University of Missouri in Kansas City, stated the proposed bill causes two new classes of defendants:

- Those with an onset of cognitive disability during adulthood, probably due to some type of accident; and
- Someone who is clearly operating under the cognitive disability, but cannot prove that the onset was during childhood. These individuals would probably be those who grew up in a low-economic neighborhood.

The *Atkins* case touches on how complicated our judicial system has become and the rules which must be followed. Individuals with cognitive disabilities, whether it happened early on or in adulthood, have trouble giving accurate information.

### **Afternoon Session**

Jane Rhys, Council on Developmental Disabilities, appeared in support of SB 355, more specifically, the use of, and definition of the term cognitive disability. Most individuals who have a cognitive disability do everything they can do to hide it.

Ms. Rhys addressed the issue of Alzheimer's disease increasing with the elderly. It is estimated that 50,000 Kansans have Alzheimer's. This disease progresses through seven stages, with stages 1-5 not experiencing significant limitations in both intellectual functioning and deficits in adaptive behavior (Attachment 4).

Kevin O'Connor, Sedgwick County Deputy District Attorney, appeared on behalf of the Kansas County and District Attorneys Association. They believe that no changes are needed in Kansas' death penalty law, because Kansas already forbids execution of the mentally retarded. In *Atkins*, the Supreme Court did not define what mental retardation is. It left that up to the states. The

conferee believes that the cognitive disability standard is too low of a threshold, because it omits one of the traditional three prongs of the definition of mental illness. He also was concerned with deleting the "age of onset" provision which helps determine who could be faking their mental illness ([Attachment 5](#)).

**November 30, 2004  
Morning Session**

**Topic Number 5—Use of a Controlled Substance**

Representative Kathe Decker, who is the sponsor of proposed HB 2649, which provides for stiffer penalties when any person uses a controlled substance appeared in support of the measure. The first offense would be a class A non-person misdemeanor and a second offense, with a prior conviction, would be sentenced under the drug grid as a severity level IV felony. Her main concern is that over 80 percent of domestic violence incidents happen when one or both individuals are under the influence of a controlled substance ([Attachment 6](#)). The bill is commonly referred to as internal possession.

John Eichkorn, Kansas Highway Patrol, supports this concept, and appreciates the role it would play in the war on drugs. The bill would allow an officer to request a drug test from an individual arrested for child abuse, aggravated assault, battery, or drug possession if the officer had probable cause to believe the person used a controlled substance ([Attachment 7](#)).

Kyle Smith, Kansas Bureau of Investigation, appeared in support of the concept of the proposed bill, but proposed some changes:

- □ Section 2 is based on language found in KSA 8-1001, which is the implied consent law for suspected drunk drivers. The bill may need to be changed to make it address any controlled substance.
- □ The bill should probably make a specific quantity of the controlled substance found in a person's system be admissible, not just the fact that they had a controlled substance in their body.
- □ There would be an added cost to determine the quantity of a drug in an individual's system, and thereby more costly for the state to run tests ([Attachment 8](#)).

Jan Satterfield, Butler County Attorney, provided testimony supporting HB 2649 in its present form, and supports amending amended it by including KSA 8-1567 which changes the drug Driving Under the Influence (DUI) provisions to further define intoxication ([Attachment 9](#)).

Ms. Satterfield provided the Committee with a recent unpublished Kansas Court of Appeals opinion, *State v. Foiles*, in which Foiles claimed that there was insufficient evidence for the jury to have found him guilty of driving while under the influence of drugs based on the inert metabolites found in his urine. The Court agreed and the case was reversed ([Attachment 10](#)). Therefore, she suggested that it would be beneficial to establish a minimum standard in blood and urine, which

would either create presumptive impairment or a *per se* violation of the particular violation in terms of quantitative levels.

Ms. Satterfield also provided the Committee with a summary of state laws dealing with driving while under the influence of drugs (Attachment 11).

Jeff Bottenberg, Kansas Sheriffs' Association, did not appear before the Committee but provided written testimony in support of the proposed bill (Attachment 12).

### **Topics Number 1 and 2—Use of Eminent Domain for Purposes of Economic Development**

Additional information was provided by Christy Caldwell with regard to the issue (Attachment 13).

The Committee was reminded that the Kansas Supreme Court has upheld the current eminent domain statutes to take private property for economic development purposes, in two recent cases. Also, that the U.S. Supreme Court has scheduled the case, *Kelo v City of New London*, for argument and should render its decision next year.

*Representative Jack made the motion that a bill be drafted which would require cities and counties to hold a public hearing and to allow property owners whose land is scheduled to be condemned to be heard. The hearing requirement will apply only when the power of eminent domain is used to take private property for economic development purposes or where the ownership or control of the condemned property will be in private hands. Senator Vratil seconded the motion. The motion carried.*

*Representative Vratil made the motion that any further action on this topic should be deferred until after the U.S. Supreme Court renders its decision on this topic. Representative Morrison seconded the motion. The motion carried 5-4.*

### **Afternoon Session**

#### **Topic Number 3—Death Penalty and the Definition of Mentally Retarded**

The Committee was provided copies by staff of the following information:

- Atkins v. Virginia;
- LaRoyce Lathair Smith v. Texas;
- Ring v. Arizona; and
- Tennard v. Dretke.

After Committee discussion, the Committee recommends that a new bill be drafted and pre-filed, which would include the following:

- Retain the definition of mentally retarded and mental retardation as in the current statutes;
- Remove the age of onset language as contained in SB 355;
- Delete the nexus language regarding the criminality provision that is contained in SB 355;
- Include the pre-trial component of SB 355 for a finding of mental retardation;
- Include the post-trial component of SB 355 regarding a special verdict on the question of a finding of mental retardation; and
- Include the provisions of new section 4 of SB 355 that allowed for the Kansas Board of Indigent's Defenses Services to provide counsel for a person who is unrepresented in order to determine whether to file a petition for relief from the sentence of death on the grounds that the defendant was an individual who was mentally retarded at the time of the commission of the capital offense.

#### **Topic Number 4—Adult Care Homes and Prohibiting the Use of State Inspection Reports as Evidence in Civil Litigation**

Senator Vratil provided the Committee with a memorandum that contained proposed language which could be considered a compromise of all interested parties. It is hoped that it reflects current law concerning the admissibility of relevant evidence, and will require a judge to make a specific finding on the record as to why proposed evidence is or is not admissible (Attachment 14).

Staff suggested that "survey or" should be stricken, and on the third line a comma should come before "and substantially." *Senator Vratil made the motion to have the language in the handout be changed to incorporate the revisor's suggestion to replace the language in Subsection 7. The motion was seconded. The motion failed.*

Representative Pauls stated that Topic Number 4 is changing the criteria that is used in ratings for nursing homes for general liability insurance. *Therefore, Representative Pauls made the motion that the Committee make no recommendation. The motion was seconded. The motion carried.*

#### **Topic Number 5—Use of Controlled Substance and if the Defendant's Refusal to Take a Drug Test is Admissible Evidence at Any Trial on a Charge of Using a Controlled Substance**

While the Committee indicated that there was support for the concept of HB 2649, it recommended that Representative Decker and the Kansas Bureau of Investigation should confer and devise a draft bill that would better deal with the concept of HB 2649 and introduce it in the 2005 Legislative Session.

**Topic Number 6—Allowable Time for a  
Investor to Pursue Civil Litigation Under  
the Kansas Uniform Securities Act**

Additional written testimony was provided by Diane Nygaard, who agrees with Commissioner Biggs' recommendation that section 38j(1) be amended so that an action for failure to register is to be instituted within the "earlier of one year after actual discovery of facts constituting the violation or three years after the violation." However, she reminded the Committee that this would still be a reduction in time that currently can be sought (Attachment 15).

After Committee discussion, the Committee recommended the introduction without recommendations, a bill which would provide an expanded statute of limitations for private individuals bringing an action for securities registration violations under Section 38j(1) of 2004 HB 2347. The bill would provide for a statute of limitations of one year from the date of discovery of the registration violation with an overall two year statute of limitation from the actual registration violation.

The members of the Committee also authorized the Chairman and Vice-Chairman to urge the National Conference of Commissioners on Uniform State Laws, to approve the change to the act.

The Chairman directed staff to mail the Committee reports to each member who would have until December 13 to make changes, otherwise the reports would stand approved.

*A motion was made and seconded to approve the Committee minutes from October 20, 2004. The motion passed.*

The Committee meeting was adjourned.

Prepared by Cindy O'Neal  
Edited by Jerry Donaldson

Approved by Committee on:

March 11, 2005  
(date)