

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
2016 H.B. 2465**

JANUARY 18, 2017

In October 2016, Representative Tom Sloan asked the Judicial Council to study 2016 H.B. 2465, relating to a criminal defendant's competency to stand trial. The Judicial Council referred the study to the Criminal Law Committee.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Criminal Law Advisory Committee are:

Stephen E. Robison, Chair, Member of Fleeson, Goings, Coulson, & Kitch, LLC and Member of the Kansas Judicial Council; Wichita

Sen. Terry Bruce, Kansas State Senator and Practicing Attorney; Hutchinson

Natalie Chalmers, Assistant Attorney General; Topeka

Sal Intagliata, Member, Monnat & Spurrier, Chartered; Wichita

Ed Klumpp, Chief of Police-Retired, Topeka Police Department; Tecumseh

Patrick M. Lewis, Criminal Defense Attorney; Olathe

Prof. Joel Meinecke, Retired Attorney; Topeka

Steven L. Opat, Geary County Attorney; Junction City

Hon. Cheryl A. Rios, District Court Judge in the Third Judicial District; Topeka

John Settle, Pawnee County Attorney; Larned

Ann Swegle, Sedgwick County Deputy District Attorney; Wichita

Kirk Thompson, Director of Kansas Bureau of Investigation; Topeka

Ron Wurtz, Retired Public Defender (Federal and Kansas); Topeka

BACKGROUND

H.B. 2465 was introduced in the House on January 14, 2016, and referred to the House Committee on Judiciary. The bill revised the definition of when a defendant is competent to stand trial in K.S.A. 22-3301 by adding a list of decisions the defendant must have the ability to make. The bill never received a hearing and died in committee. In October 2016, Representative Tom Sloan asked the Judicial Council to study the bill. The Judicial Council referred the study to the Criminal Law Advisory Committee (“the Committee”).

METHOD OF STUDY

During its study of H.B. 2465, the Committee reviewed the bill and Standard 4-5.2 – Control and Direction of the Case, from the American Bar Association’s 4th Edition of the Criminal Justice Standards for the Defense Function. The Committee studied Kansas’ current statutory procedure for determining whether a defendant is competent to stand trial and the related case law. The Committee also considered the following materials:

- Grant H. Morris, Ansar M. Haroun, and David Naimark, “Competency to Stand Trial on Trial”, 4 Hous. J. Health L. & Pol’y 193 (2004);
- John T. Philipsborn, “Dealing with Experts on Competence to Stand Trial: Suggestions and Approaches - Part One”, Champion, January/February 2008;
- John T. Philipsborn, “Dealing with Experts on Competence to Stand Trial: Suggestions and Approaches - Part Two”, Champion, March 2008.

Additionally, the Committee invited Dr. David Mouille, Ph. D., and Dr. David Blakely, M.D., to submit written statements and attend a meeting to speak to the Committee. The Committee held two in-person meetings. Dr. Mouille and Dr. Blakely attended the second meeting. Also in attendance at the second meeting were Paul Oller, an attorney from Hays, and Dr. Tim Davis, the chair of the social work department at Fort Hays State University, who answered questions from the Committee members. The Committee met a third time via teleconference to finalize the Committee report.

COMMITTEE DISCUSSION

The criteria for determining whether a defendant is incompetent to stand trial is set forth 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.”

If the trial court determines that the defendant meets either of the standards in K.S.A. 22-3301, it should find the defendant incompetent.

H.B. 2465 proposed to explain the phrase “to make or assist in making his defense” by adding details about what types of decisions a defendant must have the ability to make in order to “make or assist in making his defense.” The amendment specified nine such decisions. This list was taken from Standard 4-5.2 – Control and Direction of the Case – of the American Bar Association’s 4th Edition of the Criminal Justice Standards for the Defense Function. Standard 4-5.2 discusses what types of decisions are to be made by the client or counsel during a criminal case. The standard listed nine decisions that are ultimately to be made by a competent client, after full consultation with defense counsel.

Dr. Mouille was involved in drafting H.B. 2465. He explained that the goal of adding the specific list of decisions to be made by the client would alert the mental health professionals conducting the competency evaluations to exactly what types of decisions a defendant must be able to think through and decide in order to be competent to stand trial. In his opinion, competency evaluators focus on subsection (1)(a) – whether the defendant understands the nature and purpose of the proceedings – and neglect evaluating the defendant’s ability to reason, process information, and make decisions as needed to satisfy subsection (1)(b) – whether the defendant can make or assist in making a defense. Dr. Mouille expressed concern about

defendants being “taught into competence” because someone teaches them about the court process and how to identify the role of the judge, prosecutor, defense attorney, witness, jury, etc. Such information may help the defendant understand the nature and purpose of the proceedings but does not address the defendant’s ability to make decisions.

The Committee believes that judges and attorneys already know what types of decisions and what level of reasoning is required by a defendant to make or assist in making a defense. The Committee identified Dr. Mouille’s concerns as an issue of mental health professionals training rather than an issue with the statutory definition of competency. A mental health professional conducts an evaluation and provides the court with a report containing an opinion regarding the defendant’s competency. However, it is the court’s responsibility to make the final determination of whether a defendant is competent to stand trial. The court is not bound by the evaluator’s opinion.

The Committee acknowledged that though the Committee members did not have personal experiences with inadequate competency evaluations, there may be issues across the state with how mental health professionals conduct their evaluations and understand K.S.A. 22-3301. The Committee unanimously agreed that absent demonstrable evidence of a state-wide problem, problems with inadequate competency evaluations would be better addressed through training rather than through a statutory amendment.

RECOMMENDATION

The Committee recognizes mental health professionals may not be aware of the types of reasoning and decisions required by a defendant to make or assist in making a defense but does not believe a statutory amendment to the legal definition of whether a defendant is incompetent to stand trial would help correct this problem. The Committee recommends against passage of H.B. 2465.

HOUSE BILL No. 2465

By Committee on Judiciary

1-14

1 AN ACT concerning criminal procedure; relating to competency;
2 amending K.S.A. 22-3301 and repealing the existing section.

3

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

5 Section 1. K.S.A. 22-3301 is hereby amended to read as follows: 22-
6 3301. ~~(1)~~(a) For the purpose of this article, a person is "incompetent to
7 stand trial" when ~~he~~ *such person* is charged with a crime and, because of
8 mental illness or defect is unable:

9 ~~(a)~~(1) To understand the nature and purpose of the proceedings
10 against him; or

11 ~~(b)~~(2) to make or assist in making ~~his~~ *a* defense. *To make or assist in*
12 *making a defense, the defendant must have the ability to make decisions*
13 *about:*

14 (A) *Whether to proceed without counsel;*

15 (B) *what pleas to enter;*

16 (C) *whether to accept a plea offer;*

17 (D) *whether to cooperate with or provide substantial assistance to*
18 *the government;*

19 (E) *whether to waive a jury trial;*

20 (F) *whether to testify;*

21 (G) *whether to speak at sentencing; and*

22 (H) *any other issue that requires a decision by the defendant to assist*
23 *in making a defense.*

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

28 Sec. 2. K.S.A. 22-3301 is hereby repealed.

29 Sec. 3. This act shall take effect and be in force from and after its
30 publication in the statute book.