

Approved by the Judicial Council December 4, 2009

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON 2009 SB 272**

In May, 2009, the Senate Judiciary Committee requested that the Judicial Council study and make a formal or informal recommendation on 2009 Senate Bill 272. SB 272 concerns persons incompetent to stand trial, involuntary commitment, and release procedures. The specific issue relates to the constitutionality of indefinite commitment of incompetent criminal defendants based solely on the basis of their continued incompetence. The study was assigned to the Criminal Law Advisory Committee.

COMMITTEE MEMBERS

1. **Stephen E. Robison, Chair**, Wichita; practicing attorney and member of the Judicial Council.
2. **James W. Clark**, Lawrence; attorney for the Health Care Stabilization Fund.
3. **Edward G. Collister**, Lawrence; practicing attorney.
4. **Representative Pat Colloton**, Leawood; Kansas State Legislator.
5. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
6. **Patrick M. Lewis**, Olathe; practicing attorney.
7. **Hon. Marla Luckert**, Topeka; Kansas Court of Appeals.
8. **Hon. Michael Malone**, Lawrence; District Judge in the 7th Judicial District.
9. **Joel Meinecke**, Topeka; practicing attorney.
10. **Steven L. Opat**, Junction City; Geary County Attorney.
11. **Senator Tim Owens**, Overland Park; Kansas State Legislator.
12. **John M. Settle**, Larned; Pawnee County Attorney.
13. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
14. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
15. **Debra J. Wilson**, Topeka; Appellate Defender's Office.

16. **Ron Wurtz**, Topeka; Federal Public Defender's Office.

DISCUSSION

The Criminal Law Advisory Committee met in July, 2009 and discussed 2009 Senate Bill 272. The committee also reviewed written testimony provided to the Senate Judiciary. 2009 SB 272 proposes to; lengthen the initial commitment of an incompetent criminal defendant, extend the time between the end of the initial commitment and the second competency review to 180 days, shift the burden of proving dangerousness to the incompetent defendant rather than the state, and allow indefinite commitment of some incompetent defendants who are not actually dangerous.

During review of the materials and discussion on the bill, the committee became particularly interested in the written testimony of Tom Bartee, Kansas Association of Criminal Defense Lawyers. Mr. Bartee point out several fairness issues with the bill, as well as several constitutional issues. The committee agreed that Mr. Bartee's testimony was on point with the constitutional concerns regarding the bill.

Although the committee agrees with the issues Mr. Bartee expressed, it also recognizes that management of incompetent defendants presents a problem that is difficult to solve within our current economic situation. In many instances, these individuals are caught up in a revolving door situation that is a direct result of budgetary restrictions and cuts that have had a significant effect on the mental health system over the years. Over the past 5-10 years, S.R.S. budgets have been cut repeatedly and therefore staffing in the mental health system has been trimmed as well. With fewer staff and fewer beds available, the policies and goals of the mental health system have had to change too.

Ten years ago, if an individual came into the system with the type of violence problems that this bill is based on, it would have been very difficult for that person to get out of a civil commitment. However, because of the budgetary cuts and subsequent policy changes, these individuals come into a system now where the goal is to get the patients in, get them treated and get them out as soon as possible. With the advent of new and improved medications the typical scenario is that an individual is deemed incompetent to stand trial, he is committed for treatment to obtain competency and with the administration of appropriate medications, the defendant is deemed competent to stand trial within a relatively short amount of time. As long as the defendant remains on the medication regime his behavior may continue to be controlled so that he is actually competent and not a danger to self or others. However, the problem is that this medication regime is not frequently maintained once the defendant is discharged. Whether it is because the defendant does not like the side effects, cannot afford the medication, or because the jail does not have the same type of medications, the result is the same. The defendant becomes incompetent again and the process begins once more.

Although the committee recognizes that this is a problem that needs to be addressed, it was unable to devise any recommendations that would work within the constraints of the budgetary restrictions that the State is faced with at this time. A thorough review of how other states handle this situation may provide some guidance.

CONCLUSION

The committee agrees with Mr. Bartee's written testimony regarding the constitutional issues involved in this bill and recommends against passing 2009 SB 272. However, the

committee intends to continue working with several local experts in the mental health system in order to develop some cost effective recommendations.