

February 15, 2012

The Honorable Pat Colloton

House Committee on Corrections and Juvenile Justice

Kansas State Capitol

300 SW 10th Street, Room 144-S

Topeka, Kansas 66612

Re: Opposition to House Bill # 2707

Madam Chairwoman and Members of the Committee:

Thank you for this opportunity to testify in opposition to House Bill #2707. My name is Adam Hall, and I am a general practice attorney from Lawrence, Kansas. I have worked with legal and mental health professionals on the subject of legislative action in the area of forensic mental health issues, including incompetence to stand trial. As such, I am very interested in House Bill #2707.

House Bill # 2707 is designed to promote public safety in Kansas by requiring the evaluation and supervision of violent mentally ill persons after they are determined to be incompetent to stand trial; House Bill #2707 also attempts to ensure that these same people undergo therapeutic treatments designed to abate the dangerous manifestations of their peculiar illnesses. Kansas has suffered notable tragedies which could have been prevented by the passage of this, or a similar bill. There can be no debate that House Bill #2707 addresses a legitimate problem in the State.

However, House Bill #2707 is rife with flaws. While the concern for public safety is certainly supported by fact, House Bill #2707 includes policy choices that severely impair the civil rights of mentally ill persons in favor of furthering the bill's prophylactic purposes.

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Because many of the provisions of House Bill #2707 have apparently been drawn from the Kansas Care and Treatment Act for Mentally Ill Persons, K.S.A. 59-2945, *et seq.*, (the "Act"), a comparison to that Act demonstrates the point.

House Bill #2707 prescribes evaluative reports, findings, and recommendations from mental health professionals be directed to the Court at several stages of the commitment proceedings, presumably to aid the Court in making determinations required by the bill. See §§ 1(a), 1(d). However, House Bill #2707 does not require that the author of those reports, findings, and recommendations be a physician, psychologist, or "qualified mental health professional," as defined by K.S.A. 59-2946(j). The Act, however, does require those qualifications. See K.S.A. 59-2953 (requiring a physician or psychologist to conduct an evaluation); K.S.A. 59-2957(c)(1) (requiring certification from physician, psychologist, or "qualified mental health professional"). House Bill #2707 instead leaves the matter of who authors these evaluations to the *administrative* head of the treatment facility where the defendant is held (§§ 1(a), 1[d]), and to the Court, without criteria for selection of the author (§1[d]). The complete absence of objective criteria for the selection of the author invites a non-uniform application of evaluation standards in Kansas.

House Bill #2707 prescribes a judicial proceeding for the determination of whether an incompetent individual is "likely to cause harm to self or others," and is, thus, subject to involuntary commitment. In this proceeding, House Bill #2707 places the burden of proof on the incompetent individual to demonstrate by clear and convincing evidence, that he or she is not "likely to cause harm to self or others" (§1[d]). House Bill #2707's allocation of the burden of proof is at odds with the burden of proof prescribed in the Act. See K.S.A. 59-2966. But more than that, the placement of the burden of proof on the incompetent individual runs afoul of the U.S. Constitution. See *Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 1810, 60 L. Ed. 2d 323 (1979) ("We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires *the state* to justify confinement by proof more substantial than a mere preponderance of the evidence.") (emphasis added).

House Bill #2707's prescribed judicial proceeding is also designed in a manner that renders its results less reliable than comparable proceedings under the Act. House Bill #2707 grants the incompetent individual the rights to cross-examination and the presentation of evidence, but it withholds rights to a jury determination and personal appearance, which rights are guaranteed under the Act and are designed to afford more accurate, objective determinations. Compare §1[d]; with K.S.A. 59-2965. House Bill #2707 also fails to expressly grant the incompetent individual a right to compulsory

process to secure the witnesses in his or her behalf, and it does not grant a right to confrontation in this quasi-criminal setting.

This list of criticisms of House Bill #2707 is not meant to be exhaustive, but it sufficiently explains why I cannot write in support of this legislation. While I encourage you to not take favorable action on House Bill #2707, I do hope that in the future the objectives of this bill can be met by other legislation which does a better job of protecting the civil rights of the mentally ill. Thanks again for this opportunity to testify in opposition to House Bill #2707.

Adam M. Hall