

## MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35a.m. on Tuesday, February 10, 2004, in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Mike Heim, Kansas Legislative Research Department  
Jill Wolters, Office of the Revisor Statutes  
Helen Pedigo, Office of the Revisor Statutes  
Dee Woodson, Committee Secretary

Conferees appearing before the committee:

Senator John Vratil  
Matt Bretz, Kansas Trial Lawyers Association  
Ron Wurtz, Kansas Judicial Council  
Rocky Nichols, Kansas Advocacy & Protective Services  
Jane Rhys, Kansas Council on Developmental Disabilities  
Patrick Poull, The Brain Injury Association of Kansas & Greater Kansas City  
Paige Nichols, Kansas Association of Criminal Defense Lawyers  
Jim Clark, Kansas Bar Association

Others attending: See attached list.

### **SB 337 - Repealing the crime of hypnotic exhibition**

Chairman Vratil called for discussion and final action on **SB 337**.

Senator Haley made a motion to amend the bill by making it effective upon publication in the Registrar and report the amended bill favorably for passage. Senator O'Connor seconded the motion, and the motion carried.

### **SB 420 - Costs of a civil action; offer of judgment**

Chairman Vratil opened the hearing on **SB 420**. He said that he was the sponsor of the proposed bill. He explained that there was a current statute on the books entitled "Offer of Judgement" which is designed to facilitate settlement of cases by allowing parties to make an offer of judgment at least 15 days before trial. If an offer is made and accepted, then the case is resolved and it goes away, but if the offer is not accepted and the case goes to trial, and the judgment is less favorable than the offer of settlement hence the party who made the offer gets court costs. If the judgment is more favorable, court costs can be awarded to the party making the offer settlement. Chairman Vratil said that **SB 420** ups the ante a bit, because court costs in most cases are a \$100 or \$200, a fairly nominal sum. He stated what **SB 420** does is allow for attorney's fees to be awarded to one party or another depending upon whether the ultimate judgment is more or less favorable than the offer of settlement.

Chairman Vratil gave an example of a case if **SB 420** becomes law. The plaintiff makes an offer of settlement of \$100,000, it is rejected by the defendant, and then ultimately there is a \$200,000 judgment rendered by the court or a jury. The plaintiff, in this situation, would be entitled to recover attorney's fees in addition to the \$200,000. He explained the purpose of the bill is to encourage parties to evaluate the merit of their case or defense at an early stage in the proceedings, and to encourage those parties to settle without requiring the court to conduct a trial. It does that through the award of attorney's fees.

Committee discussion followed the Chair's explanation of the bill. Concern was expressed that the bill possibly favored "big guys" with lots of money. This bill is an attempt to level the playing field and encourage the plaintiff to make a reasonable settlement proposal. If the defendant rejects that proposal and the verdict is ultimately in favor of the plaintiff then the plaintiff can get attorney's fees. Senator Goodwin stated that she agreed with the proposed legislation, and some of these cases needed to be mediated outside the courtroom. She added that if Kansas does not provide an incentive to do that, then she sees lots of lawyer fees escalating, and the "little guy" runs up many hours that it is not even worth it to him to pursue his case because of the escalating costs that may be incurred. Senator Donovan

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commented that currently the court sets a limit on reasonable attorney fees, and every case that can be mediated fairly before it goes to court is a step forward.

Matthew Bretz, representing the Kansas Trial Lawyers Association (KTLA), testified in opposition to **SB 420**. He said that KTLA has no objection to the substantive provisions of KSA 60-2002 in its present state, but there were concerns that the amendments proposed in **SB 420** would require the courts to assess the prevailing party's attorneys fees against the losing party, violating longstanding principles of American law. The bill would effect the right of individuals to access the judicial system. Mr. Bretz stated that **SB 420** is one sided. It provides a person with insurance a bigger hammer against the person who does not have insurance. He concluded by saying the American Rule, in which both parties are responsible for their own attorney's fees, was a longstanding principle of American law, and KTLA respectfully requested that the provision assessing attorney's fees be stricken. (Attachment 1)

Following brief Committee discussion, the Chair closed the hearing on **SB 420**.

### **SB 355 - Changes requirements for determining mental retardation for purposes of applying the death penalty**

Chairman Vratil opened the hearing on **SB 355**, and asked Randy Hearrell, Kansas Judicial Council (KJC), to explain the proposed bill and introduce Ron Wurtz who testified on behalf of KJC and as a member of its Criminal Law Advisory Committee. Mr. Hearrell said the bill sets out how the state determines mental retardation, and that the issue was studied by the Criminal Law Advisory Committee upon the request of the Legislature. Mr. Wurtz testified in favor of **SB 355**.

Mr. Wurtz explained the U. S. Supreme Court's ruling on the case of *Atkins v. Virginia*, in which the Supreme Court held that capital punishment of persons with mental retardation is cruel and unusual punishment under the Eighth Amendment, thus being unconstitutional. Prof. James Ellis of the University of New Mexico School of Law, argued the *Atkins* case before the U.S. Supreme Court. Prof. Ellis came to Topeka in October of 2003, and spoke to the Criminal Law Advisory Committee. He outlined for the Committee his concerns with Kansas' current statute, including his recommended changes. His primary concern with the current statute was the definition of "mentally retarded" as set forth in KSA 21-4623(e). Prof. Ellis said the U.S. Supreme Court did not define "mentally retarded" in the *Atkins* opinion, but it did reference the clinical definitions of both the American Association of Mental Retardation (AAMR) and the American Psychiatric Association. (Attachment 2)

Prof. Ellis described two potential problems with Kansas' definition. First, it is so different from the other states, one could argue that the definition does not conform to the "national consensus" and its constitutionality could be called into question. Second, Prof. Ellis believed the current definition could be challenged as unconstitutional on its face or as applied. He recommended that removing the causation clause would be sufficient to cure the constitutional matter, and updating the clinical definition with AAMR's most recent (2002) definition. Mr. Wurtz said the Committee was in agreement that the second half of the current definition, which seemed to come from the insanity defense, should be deleted. However, the Committee had many concerns about whether and how the clinical portion of the definition should be changed.

Mr. Wurtz explained that in an effort to understand the clinical terms and the differences between the evolving AAMR definitions, the Committee invited Prof. Rud Turnbull to meeting in November, 2003. Prof. Turnbull is the Chairman of the Special Education Department, University of Kansas, and current President of AAMR. Prof. Turnbull talked about various updates to the AAMR definition which all meet a three prong test: (1) substantial intellectual impairment; (2) impact of that impairment on everyday life; and (3) appearance of the disability at birth or during the person's childhood. He said that a person must meet all three requirements in order to fall within the definition of mental retardation. He stated that the second component, i.e. the impact on the individual's life was the one that wasn't worded exactly the same in the different versions, but he emphasized that the various formulations describe the same group of individuals.

Mr. Wurtz said that the Criminal Law Advisory Committee struggled with the "age of onset" issue. Prof. Ellis had informed the Advisory Committee that a few states that had changed their laws "post-*Atkins*"

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had chosen not to include an age of onset provision in their definition of mentally retarded. The Advisory Committee was not satisfied with that option. The Advisory Committee was unanimous in its desire to amend the definition of KSA 21-4623 so that it would apply to all persons having a cognitive impairment such that they met the first two prongs of the three prong AAMR definition of mentally retarded. Mr. Wurtz stated that the Advisory Committee chose to substitute the words "cognitive disability" for mentally retarded to clarify that the class of people protected from capital punishment in Kansas is larger than the class of mentally retarded people. Mr. Wurtz talked about other recommended amendments Prof. Ellis suggested and issues brought to the Committee's attention by Prof. Ellis as outlined in the written testimony submitted.

Rocky Nichols, Executive Director for Kansas Advocacy and Protective Services (KAPS), testified in support of **SB 355**. He said that the proposed bill only involved whether the death penalty can be imposed on persons with significant cognitive disabilities, and does not involve determinations of mental illness, capacity to stand trial, or guilt or innocence. He explained that the high court found it unconstitutional to execute a person with significant cognitive disabilities because they have "diminished capacities to undertake and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Mr. Nichols added that the two reasons to execute criminals are retribution and deterrence, and that those reasons were absent when persons with significant cognitive disabilities were sentenced. (Attachment 3)

Mr. Nichols briefly spoke about **SB 355**. He said it was the result of an interim study and serious deliberations by the Kansas Judicial Council. He outlined several significant improvements in the Kansas death penalty statutes as a result of the research and information gathering done by the KJC's Advisory Committee. He expressed his appreciation to the KJC for its extensive work and for the effective job it did in crafting the public policy. He asked that the Judiciary Committee adopt KJC's new version of the bill.

Jane Rhys, Kansas Council on Developmental Disabilities, spoke in support of **SB 355**. She stated that people with cognitive disabilities should be punished when they break the law and they should be held responsible for their actions; however, the death penalty would not be considered an appropriate punishment based on the facts of their disability. She said the Council firmly believes that people who have cognitive disabilities, regardless of how and when that disability occurred, should not be executed. (Attachment 4)

Patrick Poull, The Brain Injury Association of Kansas and Greater Kansas City, testified in support of **SB 355**. Mr. Poull's written testimony included a handout, "The Consequences of Brain Injury", which noted the vast range of impacts that a survivor and family may face. Mr. Poull explained that egocentricity, impulsivity, low frustration tolerance, anxiety, depression, and mood swings are the everyday challenges that some families and individuals confront. He said that while not mental retardation by definition, these sometimes overwhelming impacts have similar effects on a person's ability to control their behavior. Mr. Poul stated that holding a person with a cognitive disability to a different standard than a person with a developmental disability is plainly discriminatory. He concluded by saying this bill would provide an objective standard upon which prosecution and defense could depend. (Attachment 5)

Paige Nichols, Kansas Association of Criminal Defense Lawyers (KACDL), spoke in favor of **SB 355**, and strongly supported the Judicial Counsel Criminal Law Advisory Committee's Report. (Attachment 6)

Jim Clark, Kansas Bar Association, submitted written testimony in support of **SB 355**. (Attachment 7)

There being no opponents appearing to testify in opposition to **SB 355**, the Chair closed the hearing.

### **Final Action:**

#### **SB 299 - Concerning Kansas surety agents**

Chairman Vratil called for discussion and final action on **SB 299**.

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Senator Oleen made a motion to report **SB 299** favorably for passage as amended, seconded by Senator Betts, and the motion carried.

The meeting was adjourned at 10:30 a.m. The next scheduled meeting is February 11, 2004.