

HOUSE BILL No. 2334

By Committee on Corrections and Juvenile Justice

2-11

1 AN ACT concerning crimes, criminal procedure and punishment; relating
2 to competence of defendants to stand trial; repealing K.S.A. 22-3301
3 and 22-3306 and K.S.A. 2010 Supp. 22-3302, 22-3303, 22-3305 and
4 22-3305a.

5
6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. (a) No defendant shall be tried for the crime charged
8 while mentally incompetent to stand trial.

9 (b) A defendant is mentally incompetent to stand trial when such
10 defendant does not have:

11 (1) Sufficient present ability to consult with defendant's lawyer with a
12 reasonable degree of rational understanding and otherwise assist in the
13 defense; or

14 (2) a rational and factual understanding of the proceedings.

15 (c) A finding of mental incompetence to stand trial may arise from
16 mental illness, physical illness, disability, mental retardation or other
17 developmental disability, or any other etiology which results in
18 incompetence as described in of subsection (b).

19 Sec. 2. As used in sections 1 through 17, and amendments thereto:

20 (a) "Competent" means mentally competent to stand trial;

21 (b) "evaluator" means a person administering a competency
22 evaluation, such person who has satisfactorily completed appropriate
23 professional forensic training for competency evaluations with sufficient
24 training and experience to offer testimony to the court on matters
25 affecting competence. To the extent possible, an evaluator shall be a
26 licensed doctoral level psychologist who engages in a clinical practice
27 that includes therapy and assessments.

28 (c) "Incompetent" means mentally incompetent to stand trial as
29 defined in section 1, and amendments thereto.

30 (d) "Residential facility" means a facility where a person receives
31 inpatient treatment.

32 (e) "Treatment" means treatment or habilitation provided by a
33 treatment facility as defined in K.S.A. 59-2946, and amendments thereto.

34 Sec. 3. (a) If a good faith doubt as to the defendant's competence to
35 stand trial arises at any stage of the proceedings, the court shall order a
36 competency evaluation and conduct a hearing.

1 (b) The defendant may, and such defendant's counsel and the
2 prosecutor shall, move for a competency evaluation whenever any such
3 party has a good faith doubt as to the defendant's competence.

4 (c) The court shall, upon its own motion, order a competency
5 evaluation whenever the court has a good faith doubt as to such
6 defendant's competence. The court shall inform all parties of the reason
7 for its doubt, and give each party an opportunity to be heard before
8 ordering such evaluation.

9 (d) A defendant's motion for a competency evaluation shall be in
10 writing and shall certify that such motion is based on a good faith doubt
11 that such defendant is competent to stand trial. The motion shall set forth
12 the facts, with specificity, that form the basis of such good faith doubt.

13 (e) No party shall move for a competency evaluation in the absence
14 of good faith doubt that the defendant is competent. No party shall move
15 for such evaluation for any purpose unrelated to incompetence to stand
16 trial, including, but not limited to; obtaining information for mitigation of
17 sentence, obtaining favorable plea negotiations or delaying the
18 proceedings.

19 (f) Nothing in this section shall require defense counsel to divulge
20 confidential communications or communications protected by attorney-
21 client privilege.

22 Sec. 4. (a) A defendant entitled to pretrial release pursuant to K.S.A.
23 22-2802, and amendments thereto, shall not be involuntarily confined,
24 taken into custody, denied a pretrial release hearing or denied release on
25 an appearance bond solely because a competency evaluation has been
26 ordered, unless confinement is necessary for such evaluation or the court
27 determines that such defendant is unlikely to submit to outpatient
28 evaluation. Such confinement shall be in the least restrictive setting and
29 for the minimum length of time necessary to complete such evaluation.

30 (c) The court may order such defendant, as a condition of pretrial
31 release, to appear at a designated time and place for outpatient evaluation.

32 (d) The court shall have the authority to involuntarily confine, for
33 evaluation purposes, a defendant who refuses to cooperate or to provide
34 sufficient information to permit a determination of competence.

35 (1) Such confinement may continue for such time as is necessary to
36 determine competence. The initial order of confinement shall be for no
37 longer than 14 days, subject to extensions for good cause shown.

38 (2) At the expiration of 60 days the court shall hold a hearing at
39 which the burden shall be on the prosecutor to show justification for
40 further confinement.

41 Sec. 5. (a) A competency evaluation shall be ordered by the court
42 upon such motion and for good cause shown. Such evaluation shall not
43 be ordered by the court prior to a determination of probable cause for

1 criminal prosecution by the court, unless such motion is made by defense
2 counsel. If the court finds that probable cause for criminal prosecution
3 does not exist, there shall be no further inquiry into the defendant's
4 competence.

5 (b) A defendant shall be granted the opportunity to consult with
6 counsel prior to such evaluation.

7 Sec. 6. (a) The order for evaluation shall specify the nature of the
8 evaluation to be conducted and the legal criteria of competency to be
9 addressed by the evaluator, as described in section 1, and amendments
10 thereto. Except as otherwise provided, unless a joint evaluation has been
11 requested by the defendant or for good cause shown, such evaluation
12 shall not include evaluation of the defendant's sanity at the time of the
13 offense, the defendant's need for civil commitment, or other matters
14 collateral to the issue of competence.

15 (b) If a defendant is in custody, such evaluation shall be concluded
16 and a report returned to the court within 14 days. If a defendant is on
17 pretrial release, such evaluation shall be concluded and a report returned
18 to the Court within 21 days. These time periods may be extended for
19 good cause shown but shall not exceed 45 days.

20 Sec. 7. (a) The primary matter addressed in the competency report
21 shall be the assessment of the defendant's competence. To the extent
22 possible, an evaluator shall be a licensed doctoral level psychologist who
23 engages in a clinical practice that includes therapy and assessments. In
24 considering this matter, the evaluator shall consider, substantiate and
25 specifically include in such report, the defendant's capacity, or lack of
26 capacity, to:

27 (1) Appreciate the charges or allegations against the defendant;
28 (2) appreciate the range and nature of possible penalties, if
29 applicable, that may be imposed;

30 (3) understand the adversarial nature of the legal proceedings;

31 (4) disclose to counsel facts pertinent to the proceedings;

32 (5) manifest appropriate courtroom behavior;

33 (6) testify relevantly; and

34 (7) maintain such capacity in a consistent manner over time.

35 (b) Such evaluator may also include comments in such report:

36 (1) On the effectiveness of the treatment;

37 (2) on whether the defendant has deteriorated mentally or physically
38 while awaiting trial;

39 (3) describing the indications of the defendant's deterioration
40 perceived by such expert;

41 (4) on whether the expert found the defendant to be malingering;
42 and

43 (5) on any other factor deemed relevant by the expert.

1 (c) Such comments shall be accompanied by assessment results,
2 supporting data and substantiation.

3 (d) The methodology used in considering and substantiating the
4 factors listed in subsection (a) shall be consistent with the professional
5 standards for the evaluator.

6 (e) If the defendant is determined to be competent, issues relating to
7 treatment shall not be addressed in the report.

8 (f) If it is determined that treatment is necessary for the defendant to
9 attain or maintain competence, the report shall address:

10 (1) The condition causing such incompetence;

11 (2) the treatment required for the defendant to attain or maintain
12 competence and an explanation of appropriate treatment alternatives in
13 order of preference;

14 (3) the likelihood of the defendant's attaining competence under the
15 treatment and the probable duration of such treatment; and

16 (4) the availability of various types of acceptable treatment in the
17 local geographical area. The evaluator shall indicate the agencies or
18 settings in which such treatment might be obtained. Whenever treatment
19 would be available in an outpatient setting, the evaluator shall state such
20 fact in the report.

21 (f) If the evaluator determines that the only appropriate treatment
22 would require the defendant to be taken into custody or involuntarily
23 committed, such report shall include an analysis of:

24 (1) Whether the defendant meets the criteria for involuntary civil
25 commitment as pursuant to article 29 of chapter 59 of the Kansas Statutes
26 Annotated, and amendments thereto;

27 (2) whether there is a substantial probability that the defendant will
28 attain competence to stand trial within the reasonably foreseeable future;

29 (3) the nature and probable duration of the treatment required for the
30 defendant to attain competence; and

31 (4) alternatives other than involuntary confinement considered by
32 the evaluator and the reasons for the rejection of such alternatives.

33 Sec. 8. (a) The following information shall be considered privileged
34 information and shall only be used in a proceeding to determine the
35 defendant's competence and related treatment issues:

36 (1) Such information elicited from the defendant at any hearing or
37 evaluation;

38 (2) such information contained in any motion filed by the defendant;

39 (3) such information furnished by the defendant to the court or to any
40 person evaluating or providing mental health or mental retardation
41 services, and any information derived therefrom; and

42 (4) any testimony of experts, evaluators or others based on
43 information elicited from the defendant.

1 The defendant shall waive such privilege if such defendant uses such
2 information, including but not limited to the report or any parts thereof,
3 for any other purpose. The defendant's use of the evaluation report for a
4 purpose other than the determination of competence shall be considered a
5 waiver of such privilege and the prosecutor shall be permitted to use the
6 report or any part of such report used by such defendant, subject only to
7 the applicable rules of evidence.

8 Sec. 9. (a) The court shall conduct a competency hearing as soon as
9 practicable after the receipt of the report, unless all parties stipulate that
10 no hearing is necessary and the court concurs. If the defendant has been
11 confined for examination, such hearing shall be held within seven days of
12 the receipt of such report. If the defendant is on pre-trial release, such
13 hearing shall be held within 30 days of receipt of such report.

14 (b) If the parties agree on the issue of competence or issues related
15 to treatment, a stipulation containing the factual basis for such agreement
16 may be accepted by the court. The court shall review the factual basis for
17 the stipulation and enter an appropriate order on the basis of the
18 stipulation. In the absence of stipulation by the parties and concurrence
19 by the court, a hearing on the issues shall be held.

20 Sec. 10. All hearings related to competence, treatment and
21 involuntary confinement shall be tried to the court unless the court elects
22 to empanel a jury of six persons to assist in making determinations of
23 fact.

24 Sec. 11. (a) (1) In all cases, the defendant shall have the right to
25 be present at the hearing, to confront and fully cross-examine witnesses,
26 to call independent expert witnesses, to have compulsory process for the
27 attendance of witnesses, and to have a transcript of the proceedings.

28 (2) Either party may call as a witness, any person, except the
29 defendant or defense attorney, designated by the evaluator as a source of
30 information for preparation of the report. The evaluator, whether called
31 by the court or either party, shall be considered a witness and subject to
32 examination as such by either party.

33 (b) The defendant shall have the right to adequate notice and time to
34 prepare for the hearing, including timely disclosure of the competency
35 report and, if necessary, opportunity to interview or depose the evaluator
36 before the hearing.

37 (c) Evidence presented at the hearing shall conform to rules of
38 evidence.

39 (1) Defense counsel may elect to relate to the court personal
40 observations of and conversations with the defendant to the extent that
41 counsel does not disclose confidential communications or violate the
42 attorney-client privilege. Such defense counsel shall be subject to cross-
43 examination.

1 (2) The court may inquire of defense counsel about the professional
2 attorney-client relationship and the client's ability to communicate
3 effectively with counsel. The defense counsel, however, shall not be
4 required to divulge the substance of confidential communications or those
5 that are protected by the attorney-client privilege. Defense counsel
6 responding to inquiry by the court on its own motion shall not be subject
7 to cross-examination by the prosecutor.

8 (c) The court shall first consider the issue of the defendant's
9 competence, and shall separately consider each other issue, if applicable.

10 (1) The party moving for the determination of incompetence shall
11 have the burden of proving such incompetence. If the court, upon its own
12 motion, has raised the issue, the prosecutor shall have the burden of
13 proving incompetence.

14 (2) If the court finds by a preponderance of the evidence that the
15 defendant is competent, the criminal matter shall proceed to trial.

16 Sec. 12. (a) If the court finds that the defendant is incompetent or
17 that competence depends on continuation of treatment, the court shall
18 consider issues relating to treatment to effect competence, including but
19 not limited to, appropriateness, availability in the geographic area,
20 probable duration and the likelihood of restoration to competence in the
21 reasonably foreseeable future and the availability of the least restrictive
22 treatment alternative.

23 (1) A defendant may be ordered to undergo treatment if the court
24 finds that the defendant is in need of such services and that such services
25 are available. When the defendant is in custody the court may order:

26 (A) Treatment services be administered at the custodial facility;

27 (B) the defendant's transfer to another facility for treatment; or

28 (C) the defendant to comply outpatient treatment services.

29 (b) At the conclusion of the hearing the court shall enter its written
30 order for treatment to effect competence. The order shall contain:

31 (1) Written findings of fact setting forth separately and distinctly the
32 findings of the court on the issues of competence, treatment and
33 involuntary confinement;

34 (2) copies of supporting evaluative information sufficient for a
35 professional involved in providing treatment to ascertain the charge
36 against the defendant and the nature of the condition causing the
37 incompetence;

38 (3) a finding that the institution to which the defendant is to be
39 committed appears to be sufficiently staffed and equipped to meet that
40 defendant's treatment needs; and

41 (4) the time at which reports will be required from the professionals
42 providing treatment.

43 (e) An order adjudicating the defendant incompetent to stand trial

1 shall be appealable.

2 Sec. 13. (a) A defendant determined to be incompetent to stand trial
3 shall have prompt and adequate treatment to effect competence and a
4 right to have such services administered by competent and qualified
5 professionals.

6 (b) A defendant shall have treatment in the least restrictive setting
7 appropriate to effect competence to stand trial.

8 (1) A defendant may be treated in a facility established for the
9 purpose of treatment or in sections of general treatment facilities which
10 are specifically set apart and designated for treatment of persons under
11 criminal charges.

12 (2) A defendant may be detained in jail only if adequate treatment to
13 effect competence can be provided in that setting.

14 (3) A defendant on pretrial release shall not be involuntarily confined
15 in a residential facility to restore competence unless the court determines
16 by clear and convincing evidence that:

17 (A) There is substantial probability that defendant's incompetence
18 will respond to treatment and defendant will attain or maintain
19 competence in the reasonably foreseeable future;

20 (B) treatment appropriate for the defendant to attain or maintain
21 competence is available in a residential facility; and

22 (C) no appropriate treatment alternative is available less restrictive
23 than that requiring involuntary hospitalization.

24 (c) Within 14 days of entry of an order detaining or committing a
25 defendant for treatment, or ordering treatment or on an outpatient basis,
26 the evaluator shall develop and file with the court an individualized plan
27 of treatment.

28 (d) Each treatment plan shall contain a statement of:

29 (1) The specific causes of the defendant's incompetence including,
30 where appropriate, diagnosis and description of any physical or mental
31 illness, mental retardation or physical disability and reference to any
32 other factors causing the incompetence;

33 (2) the methods of treatment, whether medical, psychological,
34 educational or social, appropriate to effect competence;

35 (3) any restrictions to be placed on the defendant and the reasons for
36 imposing such restrictions; and

37 (4) the expected duration of treatment required to effect the
38 defendant's competence.

39 (e) A person determined to be incompetent and detained or
40 committed for treatment or ordered to appear for outpatient treatment
41 shall have no right to refuse ordinary and reasonable treatment designed
42 to effect competence, but may refuse any treatment which:

43 (1) May significantly impair such defendant's ability to prepare a

1 defense;

2 (2) is experimental; or

3 (3) has an unreasonable risk of serious, hazardous or irreversible
4 side effects.

5 Sec. 14. (a) A defendant's continuing incompetence shall be
6 periodically redetermined by the court. The facility or person responsible
7 for treatment shall periodically file a continuing incompetency report on
8 the defendant's current status with the court, provide copies of such report
9 to the prosecutor and defense counsel, and provide notice of such report
10 to the defendant.

11 (b) Such report shall be filed at intervals not to exceed 90 days and
12 at any time the facility or person responsible for treatment believes:

13 (1) such defendant has attained competence to stand trial; or

14 (2) that there is not a substantial probability that the defendant will
15 attain competence within the foreseeable future.

16 (c) Such report shall contain:

17 (1) A reevaluation of issues contained in the initial competency
18 report as described in section 7, and amendments thereto;

19 (2) a description of the treatment administered; and

20 (3) an assessment of the defendant's continued progress toward
21 attaining competence within the reasonably foreseeable future, if such
22 report concludes that the defendant remains incompetent to stand trial.

23 (c) Either party may move to contest such report, or any issues
24 addressed in such report, within 14 days of service on such party. Upon
25 motion, the court shall order a hearing.

26 (1) Before the hearing, upon motion of either party and for good
27 cause shown, the court shall order such the defendant evaluated by
28 independent evaluators who shall create reports.

29 (2) Each party shall have the right to present evidence at the hearing.
30 At the conclusion of such hearing the court shall enter a written order
31 setting forth separately and distinctly the findings of the court on the
32 issues of competence, treatment and involuntary confinement.

33 (d) If neither party contests, the court shall independently review
34 such report. If the court concurs in the recommendations, the court shall
35 enter an order accepting the report either continuing the defendant's
36 treatment or, if the defendant is determined to be competent, setting the
37 criminal case for trial. If the court does not concur in such report's
38 conclusions, the court shall order an independent reevaluation of the
39 defendant and shall hold a hearing on the issues addressed in such report.

40 (1) The prosecutor or defense counsel, upon a showing of good
41 cause, may move for reevaluation of a defendant by independent
42 evaluators or for rehearing by the court on the issue of the defendant's
43 continuing incompetence. For good cause shown, the court may order

1 such reevaluation or rehearing at any time.

2 (2) Defense counsel may have the defendant reevaluated at defense
3 expense at any time. If the defendant has been committed or detained, the
4 detaining facility shall make such defendant available for reevaluation.
5 All records necessary for independent evaluation shall be made available
6 to the prosecutor and defense counsel.

7 (3) The report of any independent evaluator shall contain all
8 information required in the initial competency report as described in
9 section 7, and amendments thereto. Such report shall be made available to
10 all parties.

11 Sec. 15. The fact that the defendant has been determined
12 incompetent shall not preclude further judicial action, motions, or
13 discovery proceedings which may fairly be conducted without the
14 personal participation of the defendant.

15 Sec. 16. (a) A defendant may be adjudged permanently incompetent
16 to stand trial if the defendant has previously been adjudged incompetent
17 and there is no substantial probability that the defendant will become
18 mentally competent to stand trial within the foreseeable future.

19 (b) The court shall hold a hearing to determine permanent
20 incompetence whenever the issue has been raised in the continuing
21 incompetency report, at the expiration of the maximum sentence, if
22 convicted, such defendant would serve or 12 months from the date of
23 adjudication of incompetence to stand trial, whichever occurs first.

24 (c) If the defendant has been adjudged permanently incompetent to
25 stand trial, the court shall order the secretary of social and rehabilitation
26 services to commence involuntary commitment proceedings pursuant to
27 article 29 of chapter 59 of the Kansas Statutes Annotated, and
28 amendments thereto.

29 Sec. 17. (a) A defendant shall not be considered incompetent solely
30 because such defendant's competence is dependent upon continuation of
31 treatment, including, but not limited to, medication.

32 (b) A defendant shall not be prohibited from standing trial or entering
33 a plea solely because such defendant is undergoing such treatment.

34 (c) If the defendant proceeds to trial with the aid of treatment which
35 may affect demeanor, either party may introduce evidence regarding the
36 treatment and its effects and may request jury instruction on the issue of
37 competency and treatment.

38 Sec. 18. K.S.A. 22-3301 and 22-3306 and K.S.A. 2010 Supp. 22-
39 3302, 22-3303 and 22-3305 are hereby repealed.

40 Sec. 19. This act shall take effect and be in force from and after its
41 publication in the statute book.

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