

Approved

Date: *March 12, 2001*

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson John Vratil at 9:37 a.m. on March 8, 2001 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Matt Treaster, Harvey County Attorney
Sara Wolff, Orphan Medical
Glenn Bitter, Narcolepsy victim
Representative Ward Loyd
Jim Kaup, Garden City, Kansas
Detective Randy Ralston, Garden City, Kansas
Laura Howard, SRS

Others attending: see attached list

Minutes of the March 7th meeting were approved on a motion by Senator Donovan, seconded by Senator Schmidt. Carried.

HB 2178—concerning controlled substances; re: gamma hydroxybutyric acid (GHB)

Conferee Treaster testified in support of **HB 2178**, a bill which amends the criminal code by adding various components of a date rape drug, GHB, to the law prohibiting illegal administration of a substance. The bill contains a provision to distinguish medical GHB from the illegally used drug. The Conferee presented personal testimony regarding the frustration he felt as a prosecutor of a rape case in Rice County and his inability to charge distribution or possession of GHB because the Kansas analog law was not broad enough. He also offered and discussed an amendment which would make the unlawful administration of GHB without the person's consent a level 3 drug felony. (attachment 1) Brief discussion followed.

Conferee Wolff testified in support of **HB 2178**, a bill she stated appropriately controls all forms of GHB. She discussed the different forms of the drug and their use. She stated that this bill reflects the model adopted by the federal government last year and she outlined provisions in the bill. (attachment 2)

At the request of the Chair, Barbara Tombs of the Sentencing Commission agreed to do a bed space study on **HB 2178** for Committee.

Conferee Bitter testified in support of **HB 2178** especially the provision for distinguishing medical GHB from the illegally used drug. He presented personal testimony as a victim of narcolepsy and cataplexy and discussed the positive effects he receives from taking GHB to relieve his symptoms. (attachment 3)

Written testimony supporting **HB 2178** was submitted by Susan Linn, Kansas State Board of Pharmacy. (attachment 4)

Kyle Smith, KBI, was present and responded to questions Committee members posed during discussion of **HB 2178**.

HB 2207—concerning criminal procedure; re: abatement of common nuisances

Conferee Representative Loyd testified in support of **HB 2207**, a bill which “expands the list of activities that constitute common nuisances to include felony activity by criminal street gangs.” (see supplemental note on bill) The conferee presented an historical background on the bill (**2000-HB 2775**) and discussed the “gang abatement through the use of civil injunctions” concept behind the bill. (attachment 5)

Conferee Kaup testified only briefly in support of **HB 2207 (2000-HB 2775)** deferring his time to the next conferee. He fielded questions during Committee discussion. (attachment 6)

Conferee Ralston testified that he supported **HB 2207** and stood for questions from Committee. (no written testimony) Discussion followed.

HB 2084—concerning criminal procedure; re: competency to stand trial

The Chair distributed and briefly reviewed a written response from Judge Marla Luckert commenting, as was requested by the Chair, on previous **HB 2084** testimony by other conferees. (attachment 7)

Conferee Howard, at the Chair’s request, detailed SRS’s recommended amendments to **HB 2084** which provide a short-term solution and a plan for a long-term focused process to address key issues in the bill. (attachment 8) Lengthy discussion followed with the Chair providing amendment clarification.

The meeting adjourned at 10:30 a.m. The next meeting is March 12, 2001.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 8, 2001

NAME	REPRESENTING
Andrea Faratta	Wy. Co. Farm Bureau
Nicolette Lyons	" " " " "
Mary Morales	" " " " "
Jennifer Thomas	" "
Kyle Smith	KBI
Bob Jones	KSC
Joe Herold	KSC
John House	SRS
Tracy Ragan	SRS
Laura Howard	SRS
Susan Linn	BOARD of Pharmacy
Jeremy Washburne	Elk Co Farm Bureau
Richard Berkling	Cowley Co. Farm Bureau
Jamin Anderson	" "
Guy Helms	" " " "
Semantha Steiner	" " " "
Crystal King	" " " "
Chris J. Roberts	Elk Co Farm Bureau
Amanda Klotz	"

Mary Bahr Elk Co. Farm Bureau
 Nancy Gronau " "
 Susan Bechard KCOAA

MATT TREASTOR HARVEY COUNTY ATTORNEY
 Danna Longworth Harvey County Att. Office

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3-8-01



**OFFICE OF THE
COUNTY ATTORNEY**

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HARVEY COUNTY ATTORNEY

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Prepared Statement of Matt Treaster to the Senate Judiciary Committee on HB 2178

My support for this bill stems from a case I prosecuted in Rice County in 1999. In that case two 30-year-old men gave two 14-year-old girls GHB. The girls were told that the GHB was an alcohol "shot". Once the GHB took effect on the girls, these men had sexual intercourse with the unwary victims. Eventually a search warrant was executed on the residence of one of the men and a liquid that was thought to be GHB was found. Once tested, the liquid turned out to be GBL, a derivative of GHB that has the same effect on a person. Through the course of the case it was frustrating to learn we could not charge the men with distribution or possession of the GBL because the Kansas analog law was not broad enough. Once it was learned that we could not charge distribution or possession of GBL, the GHB/GBL trade flourished in Rice County. In the span of 12 months we had four suspected overdoses of GHB/GBL. Each of those suspected overdoses was life threatening and required emergency room treatment.

I fully support HB 2178, but would ask that you also adopt the proposed amendment to the bill making the unlawful administration of GHB without the person's consent a level 3 drug felony. Under HB 2178, which was passed by the House, if someone is sold or given GHB with their consent, it is a level 3 drug felony; but if it is slipped into their drink unknowingly, it is a class A misdemeanor. To me it should be at least as serious to slip GHB into someone's drink as it is to give it to them knowingly.

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Amendment to Penalties for Unlawful Administration of a Substance

Sec. 1. K.S.A. 2000 Supp. 21-3445 is hereby amended to read as follows: 21-3445.

- (b) "Unlawful administration of a substance" means any method of causing the ingestion by another person of a controlled substance, including gamma hydroxybutyric acid, or any controlled substance analog, as defined in K.S.A. 65-4101, of gamma hydroxybutyric acid, including gamma butyrolactone; butyrolactone; butyrolactone gamma; 4-butyrolactone; 2(3H)-furanone dihydro; dihydro-2(3H)-furanone; tetrahydro-2-furanone; 1,2-butanolide; 1,4-butanolide; 4-butanolide; gamma-hydroxybutyric acid lactone; 3-hydroxybutyric acid lactone and 4-hydroxybutanoic acid lactone with CAS No. 96-48-0; 1,4 butanediol; butanediol; butane-1,4-diol; 1,4 butylene glycol; butylene glycol; 1,4 dihydroxybutane; 1,4-tetramethylene glycol; tetramethylene glycol; tetramethylene 1,4-diol, into any food, beverage or other consumable that the person knows, or should know, would be consumed by such other person.
- (c) This section shall not prohibit administration of any substance described in subsection (b) for lawful medical or therapeutic treatment.

Line 35 (d) Unlawful administration of a substance is a ~~class A person misdemeanor~~
drug severity level 3 felony.

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March 8, 2001

Good Morning Chairman Vratil and Members of the Judiciary Committee:

My name is Sara Wolff and I am a Policy Analyst to Orphan Medical, a small pharmaceutical company in Minneapolis dedicated to developing medicines for people who suffer from rare diseases. I am here to speak on behalf of HB 2178, a bill that appropriately controls all forms of a drug called gamma hydroxybutyrate, or GHB.

GHB is unlike any other drug because it comes in several forms.

- An easily made, home-brewed concoction used by body-builders as a muscle enhancer, by rave party-goers as a euphoric when mixed with alcohol and by sexual predators to facilitate sexual assault. Recipes and supply kits are available on the Internet, but their use appears to be declining.
- A promising, FDA-sanctioned investigative new drug for the treatment of cataplexy, a disabling symptom of narcolepsy. Cataplexy is the complete loss of muscle control. It affects about 65 percent of the estimated 1,314 Kansas residents with narcolepsy. The pharmaceutical formulation is being developed by Orphan Medical, a Minnesota-based developer of therapies to treat rare diseases. The company filed a New Drug Application (NDA) with FDA on October 2, 2000
- And commonly used industrial chemicals that when consumed are naturally converted into GHB in the body. The use of these GHB substitutes by partygoers, body builders and sexual predators is rising. The most common examples are gamma butyrolactone (GBL) and 1,4 butanediol (1,4 BD), which are produced in millions of pounds each year for legitimate industrial use.

No state has been immune from the illicit use of GHB analogues. They are being used by athletes to build muscles. They are being used by teens at dance clubs. There should be no comfort to parents that the dance club attended by their kids does not sell alcohol.

HB 2178 reflects the model adopted by the federal government last year that recognizes the various forms of GHB and appropriately controls them.

This bill:

- Places all illicit forms of GHB and its analogues in Schedule I.
- Places medical-GHB in Schedule III, allowing narcolepsy patients access to life-changing medication.
- Closes a loop-hole in the current "controlled substance analogue" definition to give law enforcement tools to prosecute the latest GHB substitute, 1,4 butanediol (1,4 BD) as well as future analogues.
- Adds gamma butyrolactone (GBL) and 1,4 BD to the Regulated Chemicals list, thus allowing law enforcement to possible diversion.

We think this bill is a win-win for everybody (prosecutors, drug investigators, rape crisis advocates and people with narcolepsy), everybody except drug dealers and sexual predators.

I am happy to answer any questions you may have regarding the controlled distribution of medical GHB, the GHB analogue trends, or anything else. I urge you to pass HB 2178. Thank you for your consideration.

Sara Wolff

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Combating Illicit Use of Various Forms of GHB without Hurting the Treatment of People with Narcolepsy

- Like the federal “Date Rape Drug Prohibition Act of 2000,” HB 2178 recognizes that gamma hydroxybutyrate (GHB) comes in several forms:
 - An easily-made, home-brewed concoction used by body-builders as a muscle-enhancer, by rave party-goers as a euphoric when mixed with alcohol, and by sexual predators to facilitate sexual assault.
 - Commonly used industrial chemicals that when ingested are naturally converted into GHB in the body. According to law enforcement authorities around the country, illicit use of these industrial chemicals by body-builders rave party-goers and sexual predators has surpassed illicit use of homemade GHB.
 - A promising, FDA-sanctioned investigational new drug for the treatment of cataplexy, a disabling symptom of the rare disease, narcolepsy.
- The federal law lists illicit GHB as a Schedule I substance. The chemicals that metabolize into GHB are treated as Schedule I substances under the federal “controlled substance analogue” statute. And FDA-approved medical GHB is listed in Schedule III. However, illicit use of medical GHB is penalized by Schedule I penalties.
- HB 2178 mirrors federal law in the scheduling of GHB. Kansas law conveys similar penalties on the illicit use of depressant drugs in Schedules I, II and III.
- HB 2178 also reflects federal law in its proposal to amend the Kansas “controlled substance analog” provision. Such an amendment would provide tools for state and local law enforcement authorities to combat the sale and use of industrial chemicals for their GHB effect. The legal and appropriate use of these chemicals by Kansas manufacturers would be protected.
- However, HB 2178 would require reporting of sales by chemical suppliers of those industrial solvents that have the potential to be diverted as GHB substitutes. Last year, more than 100 million gallons of gamma butyrolactone (GBL) and 1,4 butanediol (1,4 BD) were produced in the US for legitimate manufacturing use in making plastics, synthetic clothing and cosmetics. GBL and 1,4 BD are the primary industrial chemicals that are diverted and used for their GHB effect.
- Authorities in Florida, Alabama, California North Carolina and Texas report a dramatic increase in the use of common industrial solvents that produce a GHB effect. Additionally, the primary age of abusers has dropped to young people in their teens and early 20s.
- No other currently available drug therapy provides the therapeutic benefits that medical GHB has demonstrated in people with narcolepsy. According to clinical studies being reviewed by FDA, doctor-prescribed GHB restores natural sleep, allowing patients to live a normal life. Absent GHB therapy, they suffer daily attacks of cataplexy. FDA approval of doctor-prescribed, medical GHB is expected this year.
- Cataplexy is the sudden loss of muscle control. A total cataplectic attack results in a total body collapse. A cataplexy attack is triggered by emotional highs and lows — stress, fatigue, laughter, fear, surprise, sadness.
- Cataplexy affects about 65 percent of the estimated 180,000 Americans with narcolepsy. In Kansas, about 1,300 residents have narcolepsy, of which an estimated 850 suffer from cataplexy — about the population of a small city, such as Alma or Benton, Kansas.

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Members of the Judiciary Committee,

My name is Glenn Ray Bitter, 2414 S.E. Alexander Dr., Topeka, Kansas. I was diagnosed with Narcolepsy in 1971. I'm an ordained minister by profession but had to leave the full-time ministry because of the effect of narcolepsy and cataplexy on my life.

I have been on various drugs during the course of the last thirty years. All of the drugs were effective to some degree but with undesirable side effects. From July, 1996-December, 1999, I was fortunate enough to participate in a study program for GHB with Dr. Lawrence Scrima, Sleep Alertness Disorder Center, Inc., Aurora, Co. The program had to be concluded because the supplier for the GHB, a firm in Canada, decided that they would no longer produce the GHB formulation that was used by the pharmacy to mix the individual prescriptions for the participants.

I cannot begin to express or convey to you the change that I experienced in my life during the time that I was taking GHB. I was able to hold my granddaughter without the fear of dropping her. I could get down on the floor and play with her and not be afraid of collapsing and falling on her. I was able to receive an unexpected phone call and not drop the phone because of a cataplectic attack. I was able to laugh at a joke or even tell one myself without collapsing. I could watch a movie or a TV program that contained emotional material and enjoy it instead of losing total muscle-tone, unable to keep my eyes open, my head dropping, and thus failing to enjoy the moment. Any sort of emotional trigger could bring about a cataplectic attack. If I had one and there was no one around to hold me up or help me sit down I would literally fall to the floor. It would take several minutes for me to recover. Needless to say, this kind of situation was very unnerving and frightening to anyone observing it if they didn't know what was happening and also very dangerous for myself.

While I was taking the GHB I was able to take a deep breath and shrug off a situation that otherwise would have caused me to collapse. I didn't experience any undesirable side effects while taking the GHB. Through the use of the GHB I was able to sleep more soundly. A narcoleptic generally doesn't get into stage 3 or 4 of sleep during a night. GHB enabled me to enter into that deeper sleep and that in turn helped to lessen the sleep attacks that I might experience the next day. Through the use of GHB I was able to express and experience a healthy emotional life.

Unfortunately, the program had to be concluded because the supplier for the GHB, a firm in Canada, decided that they would no longer produce the GHB formulation that was used by the pharmacy to mix the individual prescriptions for the participants. Now that I no longer have GHB available to me I have more problems again with the cataplexy. Fortunately, the drug that I now use does control it better than any that I had taken before the GHB. However, now I am also experiencing undesirable side effects again.

As members of this committee I urge you to do all within your power to bring about passage of the legislation that you are investigating. It is indeed unfortunate that there are those who are abusing this drug and using it in the vile manner that some see fit. However, at the same time please don't forget individuals such as myself who have or could benefit from a proper clinical use of the drug GHB. Allowance needs to be made for narcoleptics, sleep disorder clinics, physicians, and others who have a legitimate reason to possess and use GHB. I'm looking forward to the day that the FDA approves GHB and I will be able to obtain it once again.

Thank you,

Glenn Ray Bitter

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Kansas State Board of Pharmacy

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SUSAN LINN
EXECUTIVE SECRETARY/DIRECTOR

STATE OF KANSAS



BILL GRAVES
GOVERNOR

March 7, 2001

Senator John Vrail, Chairperson
Members of the Senate Judiciary Committee

Subject: House Bill 2178

I serve as the executive secretary of the Kansas State Board of Pharmacy. Pursuant to K.S.A. 65-4102, the Board annually submits its proposal to the Speaker of the House and the President of the Senate with a listing of medications for scheduling/rescheduling as controlled substances.

HB 2178, introduced by the House Committee on Judiciary, includes the following change supported by the Board:

- GHB (gamma hydroxybutyric acid), currently listed as a Schedule IV in Kansas changed to Schedule I. GHB has been added federally to the listing of Schedule I controlled substances.

The Board of Pharmacy respectfully requests favorable passage of HB 2178. There is no financial impact on the operation of the Board of Pharmacy

Please accept this letter as notice of the report for compliance of K.S.A. 65-4102. If I may answer any questions, or be of further help, please contact me at 296-8419.

Sincerely,

Susan A. Linn
Executive Secretary

*Su Linn
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WARD LOYD
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TOPEKA
HOUSE OF
REPRESENTATIVES

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TRANSPORTATION
UTILITIES
JOINT COMMITTEE ON
SPECIAL CLAIMS AGAINST
THE STATE

**TESTIMONY OF WARD LOYD
IN SUPPORT OF HB 2207**

March 8, 2001

Chairman Vratil and Committee Members:

I appear today on behalf of the City of Garden City, Kansas, and its residents, in support of favorable consideration of House Bill 2207. House Bill 2207 is identical to a measure (House Bill 2775) that was recommended for passage without amendment by the House Judiciary Committee last year, and then favorably acted upon and passed out of the House of Representatives. We believe that timing did not permit the issue to be scheduled for hearing in the Senate. Thus, the matter is again submitted for consideration.

I provide you with testimony submitted last year on HB 2775 by a representative of the City of Garden City, including a memorandum from the Investigations Division Commander of the Garden City Police Department. There is further submitted an issue paper, "Civil Approaches to Gang Abatement."

House Bill 2775 is modeled after a section of the California Penal Code (Section 186.20-186.28) known popularly as the "California Street Terrorism Enforcement and Prevention Act." The California code provision has been tested in court action, and upheld.

A review by Garden City officials of various intervention strategies designed to abate

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Chairman John Vratil, et al.
Senate Judiciary Committee
Testimony in Support of HB 2207
by Rep. Ward Loyd
March 8, 2001

gang problems indicate two approaches that have been successful in other areas of the country. These primarily involve an anti-nuisance injunctive strategy against gangs or landlords or both, initiated by either the government or citizens. A secondary strategy involves educational efforts involving landlords, citizens, and students. HB 2775 addresses the former, and will be used as a part of the educational efforts.

The concept behind HB 2207 is "gang abatement" through the use of civil injunctions. Injunctions are easier to use, more efficient, and less costly than criminal prosecutions. Injunctions can be tailor-made to attack the specific gang conduct causing a public nuisance, and can target an area or a single locale. Injunctions serve as a vehicle to empower and mobilize neighborhoods, and provide a shelter to those who wish to take their neighborhood's back.

Neighbors must be contacted, and their support and declarations (affidavits) obtained. It is difficult to refute the declarations of residents or business owners who describe how their lives have been disrupted by gun shots, loud and vulgar language, fights or assaults, threats of violence, drinking alcohol in public, drug sales or abuse, and similar items. These declarations can be sealed by the Court and protect the residents from retaliation. All of this engenders cooperation between citizen and police, and build trust through establishment of partnerships.

To assist you in your consideration of this measure, I provide you with copies of the statutory procedures regarding civil abatements, K.S.A. 22-3901, *et seq.* If you are like me there seems to be little time to review underlying statutory procedures in hearing or acting on the various measures submitted to us.

Civil abatements do not replace criminal prosecutions, they complement them. This bill, if passed, will provide a tool by which to involve neighbors and neighborhoods in the process of community policing.

Thank you.

City of Garden City

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LEGISLATIVE TESTIMONY

TO: Chairman O'Neal and Members, House Judiciary Committee
FROM: Jim Kaup, on behalf of the City of Garden City
RE: **HB 2775; Common Nuisances-Felony Activity by Gang Members**
DATE: February 8, 2000

The 2000 State Legislative Policy Statement adopted by the City Commission of Garden City on December 28, 1999 provides:

“The City supports legislation to amend the common nuisance statute, K.S.A. 22-3901, to add to the list of property declared to be common nuisances property that is used to maintain and carry on gang-related activities.”

Like many communities in Kansas and across the nation, Garden City continues to face the problem of youth gangs. In order to deal effectively with this problem, we have engaged in a number of approaches, both proactive and reactive. The City has expanded the scope of its DARE program in the schools to focus even more attention on anti-gang education. In a cooperative program that involves the business community, private citizens, local law enforcement, and other municipal departments, we have significantly reduced the gang graffiti problem in Garden City through an aggressive approach to cleanup and by restricting the sale of spray paint to minors. The special “street gang unit” formed a few years ago in the Garden City Police Department continues to be highly active in identifying and investigating gang members, notifying parents, conducting surveillance, working closely with the schools through their administration and through the school resource officers assigned to them by the department, and arresting gang members on various criminal charges.

As a consequence of all of our efforts, the community has achieved notable success in the reduction of gang activity and the decline in the number of our youth being recruited into local gangs.

However, there is still much that needs to be done in Garden City. Of particular concern to us is what happens to the quality of life in a neighborhood when a particular residence becomes a focal point for gang activity. Such locations become the neighborhood headquarters for vandalism, burglary, drug trafficking, and just plain intimidation. The hard-working, law-abiding residents of the neighborhood are afraid for their safety, even while on their own property, and those residents fear for the influence this activity may have on small children in the neighborhood. The police respond as aggressively as possible when violations occur, but are often limited in what they can do. The community needs another option to address situations like this.

That is precisely what the City is asking for in House Bill 2775. We seek to expand the range of options available to us to combat gangs in our community, specifically by amending K.S.A. 22-3901 to enable the use of common nuisance statutes against gang activity. This legislation would add specified gang activity to the list of common nuisances. This would give local authorities the ability to file for injunctive and other relief currently provided for under K.S.A. 22-3901 *et seq.* Although new to Kansas, this method has been employed with some success by communities in other states, most notably in Arizona and California where similar laws have survived legal challenges.

It has been our experience in Garden City that complex community problems such as criminal gangs, substance abuse, and other related problems are best addressed on multiple fronts. We view this legislation as assisting us in this regard, by giving us another tool that we can utilize in our efforts to eliminate gang activity and keep the streets safe for our citizens. As such, the City of Garden City would like to convey its strong support for House Bill 2775.

We appreciate the sponsorship of this bill by our Representative, Ward Loyd. The City respectfully requests favorable action on HB 2775 by this Committee.

JMK:ag

**KANSAS DISTRICT COURT**

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CHAMBERLAIN OF
MARLA J. LUCKERT
CHIEF JUDGE OF THE DISTRICT COURT

OFFICER:
CHERYL J. KARNS
ADMINISTRATIVE ASSISTANT
RICHARD R. CUEVAS, CSR-RPR
OFFICIAL COURT REPORTER

March 7, 2001

VIA FAX & U.S. MAIL

Senator John Vratil
Chair of Senate Judiciary Committee
State House - Room 120-S
Topeka, KS 66612

RE: House Bill 2084

Dear Senator Vratil:

This letter is in response to your request that I respond to the written testimony of Stephen Feinstein, Ph.D., and the verbal and written testimony of others. First, let me emphasize, as I did previously, that the programmatic issues, which are primarily the issues addressed by Dr. Feinstein and SRS, are beyond the scope of our study or expertise. The legislation before you provides a procedural mechanism for the State of Kansas to maintain jurisdiction over and provide supervision for those individuals who are a danger to society but can not be committed because they do not meet the current definition of mental illness. The purpose of the legislation is to allow for continuing jurisdiction through the involuntary commitment procedure, not to dictate the environment or program into which SRS places the individual. If SRS believes it needs more flexibility, including some or all of the options proposed by Dr. Feinstein, then amendments could be made to K.S.A. 59-2966 or other statutes. As I indicated in answering questions at the end of the hearing, you have a difficult policy decision as to whether funds will be committed to this issue and if so how many dollars will be committed. I certainly agree with Dr. Feinstein and others that this issue should not detract from the level of services offered to the mentally ill. However, again the purpose of the legislation is to provide a mechanism so that SRS can provide an appropriate environment as that environment is determined by mental health and disability professionals.

Questions were posed regarding the constitutionality of the proposal. Two things need to be remembered. First, the amendment reverts for this limited purpose to the definition of mental illness in place in 1996 and before. Second, the procedure is the same procedure as for any other involuntary commitment. The same procedural and due process guarantees are in place. There is a right to demand a jury and an attorney must be appointed. The court will be required to review the status of the individual and conduct hearings when demanded by the patient. The person could not be confined if a court is unable to determine that the individual is

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likely to cause harm to self or others. Thus, the procedure would meet the same due process considerations of all involuntary commitment procedures. Also, with the exception of utilizing a lower burden of proof and requiring more frequent reviews, these procedures parallel those in the act for commitment of sexually violent predators which the United States Supreme Court found to be constitutional. It is important to note that in this holding the United States Supreme Court recognized that the state's interest in protecting the safety of others is a legitimate government objective. In other words, progression towards competency is not the only objective that will justify confinement. However, exercise of the state's power must be reasonably related to the objective. Hence, cases will require a professional judgment that the commitment is necessary to assure reasonable safety of the public. Since the state's interest conflicts with fundamental personal liberties, the state must take steps to assure the infringement be as minimal as is consistent with the safety threat.

Finally, it appears that some alternatives being proposed by opponents to HB 2084 sidestep the procedural guarantees of the involuntary commitment process. This does create significant constitutional issues. The process must be in place for due process in the initial proceedings and for continued review to assure that the individual is likely to cause harm to others. Other proposals suggest a different treatment of those who are likely to cause harm to others and incompetent because of mental illness than those who are likely to cause harm to others and incompetent because of mental retardation, alcohol or chemical abuse, antisocial personality disorder, organic personality syndrome or organic mental disorder. Such differentiation of treatment raises equal protection issues. Such differences resulted in a holding that the Indiana statute was unconstitutional. *Jackson v. Indiana*, 406 U.S. 715, 730 (1972).

In essence, the objections that are being voiced are as to the treatment options currently available to SRS. HB 2084 does not intend to limit SRS or local mental health centers in the development of programs deemed appropriate. Even the opponents admit there is a public safety gap under the current statutes. HB 2084 provides a procedural mechanism to close that gap. The programs that are implemented are left to the judgment of SRS and the Legislature.

If I can be of further assistance to the committee or answer other questions, please let me know.

Very truly yours,



Marla J. Luckert

MJL:ck

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**Kansas Department of Social and Rehabilitation
Services**
Janet Schalansky, Secretary



Docking State Office Building
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for additional information, contact:

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Senate Judiciary Committee
March 7, 2001

Recommended Amendments to H.B. 2084

Health Care Policy
Laura Howard, Assistant Secretary
785.296.3773

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Kansas Department of Social and Rehabilitation Services
Janet Schalansky, Secretary

Senate Judiciary Committee
March 7, 2001

Recommended Amendments to H.B. 2084

The issue which H.B. 2084 seeks to address is an important one. It is an issue that states around the country have grappled with in seeking solutions that promote public safety while safeguarding due process and equal protection rights. The Department proposes amendments to this bill that provide a short-term solution and a plan for a long-term focused process to address these key issues.

States across the country have begun to look at how to adequately protect public safety when alleged offenders who are not mentally ill are found not competent to stand trial. States have taken a number of different approaches, all of which merit further review and study in Kansas. Two alternatives states have specifically enacted include public guardianships and civil commitment proceedings.

- Under a public guardianship alternative, a quasi-governmental organization is created to provide public guardianship to persons who have been alleged to have committed serious criminal offenses, but who, due to disabilities other than mental illness or substance abuse, have been found incompetent to stand trial for the alleged offense. These public guardianship organizations are typically not-for-profit organizations that meet the requirements of corporate guardians. The charge to such an organization is secure supports and supervision for persons placed in its custody that allows persons to be served in the least restrictive setting consistent with public safety.
- Other states have enacted civil commitment laws with appropriate safeguards for persons with disabilities that render them incompetent to stand trial, and who pose a threat to public safety. In most circumstances of civil commitment, the agency in whose custody the individual is placed is charged to provide for services and placement in the least restrictive environment consistent with public safety.
- A key focus in states addressing these issues has been the development of secure supports and services in the community, when appropriate, coupled with adequate risk assessment and staff training.

To effectively consider the above or other options, it is critical that key stakeholders be engaged in the process including the judicial system, law enforcement, disability service providers, disability advocates, and consumers and families. Thus, SRS recommends the creation of a taskforce appointed by the Secretary of SRS to study current programs and laws for alleged

offenders with disabilities that render them incompetent to stand trial, but who do not meet the criteria for involuntary commitment. Our amendment proposes that this task force report to the SRS Transition Oversight Committee during the 2000 interim, and complete a final report with recommendations for programmatic and statutory change by the 2001 Session.

In the meantime, the Department concurs that additional safeguards are desirable to assure public safety concerns are addressed. The Department's amendment proposes the following procedures be applied:

When a person is found incompetent to stand trial, and the probability does not exist that the person will attain competency:

- The court shall order the Secretary of SRS to conduct an investigation concerning the defendant to determine what services or placement involving the least restrictive setting are appropriate to meet the needs of the defendant consistent with public safety;
- The Secretary is directed to commence involuntary commitment (under current law) or guardianship proceedings, whenever appropriate.
- The Secretary is directed to provide or assure provision of services and shall report to the court on the services provided.
- The court may set a hearing on whether the secretary's actions are sufficient to meet the defendant's needs or to protect the public interests.
- Charges are dismissed against the defendant if such a request is not made within 10 days from receipt of the Secretary's report, but the statute of limitations is stayed until competency is attained.

We believe this approach is a reasoned one which allows continued court involvement through the proceedings outlined above, and through the guardianship proceeding. This approach places clear expectations on the Secretary to both meet service needs and assure public safety. In carrying out these provisions, the Department would work closely with guardians of the individual involved, including assisting the guardian in gaining the authority to admit the alleged offender to an appropriate inpatient treatment program when a risk assessment suggests that type of setting is necessary to protect public safety or appropriate to the treatment needs of the individual. In instances where the guardian is not responsive, SRS would seek a new guardian.

We would anticipate that the number of instances where parties would not agree on the plan would be small. However, in those circumstances, the court could retain jurisdiction and hold

additional hearings until a plan is developed that adequately addresses concerns regarding public safety and service needs. In any event, criminal charges are not dismissed until all parties are in agreement.

This approach has a number of advantages to that originally proposed in H.B. 2084 for the short-term. Specifically, these proposed amendments:

- averts an immediate constitutional challenge,
- place specific mandates on SRS to provide appropriate services,
- are fiscally more cost-effective, since Medicaid matching funds would not be available for services rendered under involuntary commitment proceedings, and
- affords the opportunity to craft focused statutory and programmatic recommendations that provide key safeguards for persons with disabilities while addressing public safety concerns.

Thank you for your consideration of the Department's recommended amendments to H.B. 2084.

HOUSE BILL No. 2084

By Committee on Judiciary

1-19

9 AN ACT concerning criminal procedure; relating to competency to stand
10 trial; amending K.S.A. 22-3303 and repealing the existing section.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 22-3303 is hereby amended to read as follows: 22-
14 3303. (1) A defendant who is charged with a felony and is found to be
15 incompetent to stand trial shall be committed for evaluation and treat-
16 ment to the state security hospital or any appropriate county or private
17 institution. A defendant who is charged with a misdemeanor and is found
18 to be incompetent to stand trial shall be committed for evaluation and
19 treatment to any appropriate state, county or private institution. Any such
20 commitment shall be for a period of not to exceed 90 days. Within 90
21 days after the defendant's commitment to such institution, the chief med-
22 ical officer of such institution shall certify to the court whether the de-
23 fendant has a substantial probability of attaining competency to stand trial
24 in the foreseeable future. If such probability does exist, the court shall
25 order the defendant to remain in an appropriate state, county or private
26 institution until the defendant attains competency to stand trial or for a
27 period of six months from the date of the original commitment, whichever
28 occurs first. If such probability does not exist, the court shall order the
29 secretary of social and rehabilitation services to ~~commence involuntary~~
30 ~~commitment proceedings pursuant to article 20 of chapter 59 of the Kan-~~
31 ~~sas Statutes Annotated, and any amendments thereto. For such proceed-~~
32 ~~ing, "mentally ill person subject to involuntary commitment for care and~~
33 ~~treatment" means a mentally ill person, as defined in subsection (e) of~~
34 ~~K.S.A. 2000 Supp. 59-2046, and amendments thereto, who is likely to~~
35 ~~cause harm to self and others, as defined in subsection (f)(3) of K.S.A.~~
36 ~~2000 Supp. 59-2046, and amendments thereto. The other provisions of~~
37 ~~subsection (f) of K.S.A. 2000 Supp. 59-2046, and amendments thereto,~~
38 ~~shall not apply.~~

39 (2) If a defendant who was found to have had a substantial probability
40 of attaining competency to stand trial, as provided in subsection (1), has
41 t attained competency to stand trial within six months from the date
42 the original commitment, the court shall ~~order the secretary of social~~
43 and rehabilitation services to ~~commence involuntary commitment pro-~~

95
conduct an investigation concerning the de-
fendant and determine what services or place-
ment involving the least restrictive setting
appropriate to meet the needs of the defen-
dant consistent with public safety are appro-
priate. The secretary shall commence an in-
voluntary commitment proceeding pursuant to
either article 29 or article 29b of chapter
59 of the Kansas Statutes Annotated, and
amendments thereto, or a guardianship pro-
ceeding pursuant to article 30 of chapter 59
of the Kansas Statutes Annotated, and amend-
ments thereto, whenever appropriate. The
secretary shall provide or cause to be pro-
vided to the defendant such services as may
be available and appropriate to the defendant
in light of the secretary's findings as pro-
vided for herein. The secretary shall report
to the court, the defendant's attorney, and
to the county or district attorney of the
county in which the criminal proceedings are
pending concerning the secretary's findings
and actions. Upon request of the defendant
or the county or district attorney, the court
may set a hearing on the issue of whether the
secretary's actions are sufficient to meet the
defendant's needs or to protect the public
interests. If no such request is made within
10 days after receipt of the secretary's report,
the court shall dismiss without prejudice the
charges against the defendant, and the period
of limitation for the prosecution for the crime
charged shall not continue to run until the
defendant has been determined to have attained
competency in accordance with K.S.A. 22-3302
and amendments thereto.

then
(repeat language above)

1 eedings pursuant to article 20 of chapter 59 of the Kansas Statutes An-
 2 notated, and any amendments thereto. For such proceeding, "mentally ill
 3 person subject to involuntary commitment for care and treatment" means
 4 a mentally ill person, as defined in subsection (e) of K.S.A. 2000 Supp.
 5 50-2046, and amendments thereto, who is likely to cause harm to self and
 6 others, as defined in subsection (f)(3) of K.S.A. 2000 Supp. 50-2046, and
 7 amendments thereto. The other provisions of subsection (f) of K.S.A. 2000
 8 Supp. 50-2046, and amendments thereto, shall not apply.

9 (3) When reasonable grounds exist to believe that a defendant who
 10 has been adjudged incompetent to stand trial is competent, the court in
 11 which the criminal case is pending shall conduct a hearing in accordance
 12 with K.S.A. 22-3302 and amendments thereto to determine the person's
 13 present mental condition. Reasonable notice of such hearings shall be
 14 given to the prosecuting attorney, the defendant and the defendant's at-
 15 torney of record, if any. If the court, following such hearing, finds the
 16 defendant to be competent, the proceedings pending against the defend-
 17 ant shall be resumed.

18 (4) A defendant committed to a public institution under the provi-
 19 sions of this section who is thereafter sentenced for the crime charged at
 20 the time of commitment may be credited with all or any part of the time
 21 during which the defendant was committed and confined in such public
 22 institution.

23 Sec. 2. K.S.A. 22-3303 is hereby repealed.

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

May also need to make a minor correction to KSA 22-3305,
 to also note chapter 59, article 29b. therein where article 29
 is mentioned. (add a new section 2 to the bill and correct current
 section 2 - then section 3 - accordingly)