

## HOUSE COMMITTEE ON JUDICIARY

Hon. Fred Patton, Chairman  
Hon. Bradley Ralph, Vice-Chairman  
Hon. John Carmichael, Ranking Minority Member

February 19, 2019  
3:30 p.m.

Chief Judge Merlin G. Wheeler  
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### NEUTRAL WRITTEN TESTIMONY REGARDING 2019 HB 2292

Thank you for the opportunity to present testimony regarding HB 2292. I am Merlin G. Wheeler, Chief Judge of the Fifth Judicial District (Lyon and Chase Counties) and a member of the Executive Committee of the Kansas District Judges Association (KDJA). I serve as one of three Co-Chairs of the Legislative Committee of the association along with Chief Judge Thomas Kelly Ryan of the 10<sup>th</sup> Judicial District and Chief Judge Glenn R. Braun of the 23<sup>rd</sup> Judicial District.

In 2017, a similar proposal to modify K.S.A. 21-6824 (commonly referred to as 2003 SB 123) was presented to the Legislature in 2017 HB 2087. That measure, and the current 2019 HB 2292, proposed extending availability of certified substance abuse treatment programs to certain persons entering into a diversion agreement in lieu of further criminal proceedings. At that time, Scott M. Schultz, Executive Director of the Kansas Sentencing Commission (KSC), identified several potential advantages of the bill which KDJA agrees would also apply to HB 2292. These include incentivizing both prosecutors and offenders to avoid costly trial proceedings by utilization of pre-trial diversion agreements. There was also identified the potential for shortening the time of arrest to time of treatment, allowing for more court time to be spent on violent offenders, and requiring no additional supervision staff (the same staff would conduct supervision as would supervise following a conviction).

These advantages however, assumed in part, that the substance abuse treatment is paid for by the State via SB 123 funding. In reviewing HB 2292, KDJA is concerned that it is not explicit that such funding will be available to pre-trial divertees. It is possible that the provisions of K.S.A. 75-52,144 would require the KSC to pay the treatment costs, but as an abundance of caution, we urge that it be made clear in this legislation that SB 123 funding be used for payment of treatment and substance abuse evaluation costs.

While not in any way intending to minimize the potential advantages of passage of HB 2292, we, like Director Schultz, also express concern that it does not address what the effect would be if the diversion were to be revoked, conviction occurs, and the former

divertee would be eligible for SB 123 services post-conviction. As he pointed out in 2017, conceivably the offender could get up to 36 months treatment on one case. In considering passage of this bill, we urge this committee to evaluate the possibility of double treatment on a single case from both cost and philosophical perspectives.

Another concern we express is based upon experience of judges who administer drug courts utilizing evidence based standards. The Drug Court Judicial Bench Book tells us that "...research suggests that outcomes tend to be better when drug court can apply some degree of coercive leverage over participants to keep them engaged in treatment. If there is little consequence for failing to complete the program, outcomes tend to be poorer. Thus, pre-plea diversion models tend to have less impressive effects because participants who are terminated are essentially put back in the same position, legally speaking, as when they were first arrested." KDJA recognizes that divertees may not necessarily go into a drug court setting, but believe that the same principal suggested by this research would apply without regard to whether supervision is in a drug court setting or by regular supervision.

We also pause to point out that divertees being supervised by court services officers or community corrections officers pose potential supervision issues because of the distinct difference between pre and post-conviction status of the individual. Because post-conviction offenders may be subject to jail sanctions that pre-conviction divertees are not subjected to, problems with mixing the two types of persons may arise. Certainly this would require different tracks for each group if in a drug court and likely different supervision methods if supervised outside of the drug court setting.

Of additional concern is the ability of our court services staffs to provide the criminal risk-need assessment called for to determine eligibility for SB 123 evaluation and treatment services. These services are normally not involved until post-conviction and without information as to the number of potential divertees, it is impossible for us to evaluate the fiscal note of additional cost to the Judicial Branch or availability of court services officers to provide this service to prosecutors considering diversion applications.

KDJA recognizes that this bill calls for the existence of a memorandum of understanding between prosecutors and either court services or community correctional services before any pre-trial diversion treatment program would become effective. This threshold would require extensive cooperation and negotiation between the necessary parties which would involve the courts. Our suggestion here is that the issues that would arise in any such discussion should be addressed by the authorizing legislation so that all parties have full knowledge of reasonable expectations of each party on a statewide rather than district or county basis. We therefore suggest that prior to passage an opportunity be extended for further study and collaboration between affected groups be afforded.

Thank you very much for the opportunity to present this testimony.

Merlin G. Wheeler, Chief Judge

Glenn R. Braun, Chief Judge

Thomas Kelly Ryan, Chief Judge