Senate Judiciary Committee
February 13, 2020
Senate Bill 333

Kansas Association of Criminal Defense Lawyers
Neutral (with proposed amendments)

Dear Chairman Wilborn and Members of the Committee:

My name is Meryl Carver-Allmond, and I am an attorney in Kansas practicing criminal defense appeals. I appear today on behalf of the Kansas Association of Criminal Defense Lawyers.

While we generally support the Judicial Council's efforts to provide more appropriate placement options for people who are deemed permanently incompetent to stand trial, we have concerns regarding SB 333 because (1) it would extend indefinite commitment procedures to a much broader class of people, and (2) it would exacerbate a current flaw in the statutory scheme which triggers indefinite commitment based solely on a prosecutor's allegation that a person has committed a crime–*i.e.*, without any judicial finding that the person committed the crime or even the opportunity to be heard on whether the person committed the crime. If the Committee would make small adjustments to the bill, it would alleviate these concerns.

Our primary concern about this bill is that the indefinite commitment process is triggered solely by a prosecutor charging a person felony. The state would never have to produce any lawfully obtained evidence, and no court would make any finding, by any standard, that the accused *had actually committed* the charged offense. A prosecutor's charging document is not evidence, it is merely a piece of paper used to invoke the jurisdiction of the district court. We routinely tell juries that a charging document does not have any evidentiary value. But under SB 333, a person could be subject to commitment for the rest of their lives based in part on a charging document without any proof of its truth or accuracy whatsoever.

This flaw is present in the current system already, but it will be exacerbated by the fact that SB 333 proposes to expand the reach of people who could become subject to indefinite commitment. Under the current law,

only people who are charged with off-grid felonies or severity level 1-3 felonies fall under the provisions for indefinite commitment. The provisions of SB 333 would be triggered upon a charge of *any person felony*, which can include comparatively minor offenses like reckless aggravated battery, criminal threat, and residential burglary. The potential underlying prison sentences for these comparatively minor offenses are usually not that long, ranging from 5 to 23 months depending on criminal history. Most of them are presumptive probation.

For cases involving shorter potential sentences, or for more serious cases where the accused has a substantial defense, criminal defense attorneys could be placed in an impossible ethical quandary.

In general, a criminal defense attorney who questions his or her client's competency to stand trial should raise that issue with the court at the earliest possible time. After all, trial of a person who is not competent to stand trial violates the Due Process Clause. *Dusky v. United States*, 362 U.S. 402 (1960).

But for a client who could have a substantial defense when brought to trial, the criminal defense attorney may feel compelled to allow his or her client to go to trial, even while incompetent, which would at least allow the client to have an opportunity to have a day in court on the criminal charge. If the client is acquitted at trial, he or she will not be subject to indefinite commitment under SB 333. As such, we believe that, in some cases, criminal defense attorneys will feel ethically compelled to keep quiet about a client's potential incompetency, see what happens at the trial, and then, if the client is convicted, retrospectively raise the competency concerns (perhaps in a post-trial motion for new trial). We do not believe that the Legislature intends such an outcome, but the current system creates such perverse incentives and SB 333 would exacerbate them.

And for clients who would be facing short maximum penalties, the criminal defense attorney will, again, be forced to consider allowing the client to go to trial, even while incompetent, recognizing that the client would serve out any potential sentence and be released from confinement in a relatively short period (maybe even time served) as opposed to potentially being committed for the rest of their lives. We do not believe that the Legislature intends to place criminal defense attorneys and their clients in such "Catch-22" situations, but SB 333 will do exactly that.

We believe that these shortcomings in SB 333 can be remedied with fairly minor amendments. First, the Legislature should not expand the provisions for indefinite commitment to the much broader class of people accused of all "person felonies." The current commitment scheme applies to off-grid and severity level 1-3 offenses, which all result in long sentences upon conviction. If the Legislature would restrict application of SB 333 to off-grid and severity level 1-3 offenses, it would mitigate the circumstances where a potential prison sentence, even if convicted, is preferable to indefinite commitment.

Second, as part of the process for triggering indefinite commitment, the prosecution should have to make a preliminary showing, with lawfully obtained evidence, that the accused actually committed the charged offense and that he or she did not have legal defense to that crime. This does not have to be a full-blown jury trial, but it should require the state to prove to an impartial judge by some standard that the accused did commit the charged offense. In the absence of such proof, an accused person should not be held in custody under the auspices of a criminal charge.

To alleviate these problems, we recommend that new section 4 of SB 333 be amended as follows:

(a) If the defendant is found incompetent to stand trial and the court is required to proceed under this section, the court shall review the nature of the charges. If the defendant is charged with a

misdemeanor offense or nonperson felony offense or a nondrug severity level 4-10 felony offense, the court shall dismiss the criminal proceedings without prejudice and the county or district attorney shall provide victim notification. If the defendant is charged with ~~a person~~ an off-grid or nondrug severity level 1-3 person felony offense, the court shall commit the defendant to the custody of the secretary for aging and disability services.

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(c) If the court finds by clear and convincing evidence that the defendant committed the charged offense and is likely to cause harm to self or others, the court shall order the least restrictive placement or conditions possible as necessary to protect the public, . . .

(d) When determining whether the defendant committed the charged offense as described in subsection (c), the court shall use the rules of evidence applicable to criminal trials and the defendant shall have the right to counsel, to confront witnesses, to call witnesses on his or her behalf, and to present any defense that could be presented in a criminal trial.

(~~d~~e) If the court does not find that the defendant committed the charged offense or is likely to cause harm to self or others, the court shall dismiss the criminal proceeding without prejudice and discharge the defendant. The county or district attorney shall provide victim notification regarding the outcome of the hearing.

(ef) This section shall be a part of and supplemental to article 33 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.

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Thank you for your consideration, and please feel free to contact me further with any questions.

Sincerely,

Meryl Carver-Allmond
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