

Senate Judiciary- Senate Bill 355
February 19, 2020

Kansas Association of Criminal Defense Lawyers
Neutral

Chairman Wilborn and Members of the Committee:

The Kansas Association of Criminal Defense Lawyers (KACDL) is an organization dedicated to ensuring justice and due process for persons accused of crime or other misconduct.

The rule allowing the psychiatric or psychological examination of a complaining witness stems from a 1979 Kansas Supreme Court case called *State v. Gregg*. The *Gregg* Court looked at the issue of whether or not an exam should be allowed and held that a trial court has discretion to order an exam if there is a compelling reason. However, in that case, the *Gregg* Court found that there was no abuse of discretion when the trial court refused to order the evaluation.

In doing a review of Kansas Supreme Court cases since *State v. Gregg* which looked at this issue, no cases were found where the trial court was told it should have ordered a psychiatric or psychological examination. In a case called *State v. Stafford*, 296 Kan. 25 (2012), the Supreme Court stated “A district court typically does not abuse its discretion in refusing to order a psychological examination.” This type of evaluation is rarely granted by the district court and the refusal to grant an evaluation is almost impossible to disturb on appeal because of the review standard of “abuse of discretion”.

The language in the *Gregg* decision is very problematic. It singles out complaining witnesses in sexual assault cases in a way that implies they are less truthful than complaining witnesses in other types of cases. Additionally, the courts have not extended the ability to request a psychological evaluation to other types of cases; these evaluations have been limited to sexual assault cases.

However, SB355 may not be the best way to address the problem with *Gregg* evaluations. Psychological and Psychiatric professionals can offer valuable insights in rare instances where there is a concern about psychological issues with a complaining witness. The evaluations typically are a general psychological evaluation, to determine whether there is an underlying issue impairing the witness’ ability to tell the truth. They are not a therapy session where the complaining witness must rehash the incident giving rise to the criminal charge. This type of evaluation is not needed often, but it can provide crucial information in the rare instances where it is needed. This is not limited to sexual assault cases. A better alternative to SB 355 might be to consider a bill that

would allow a district court to order an evaluation in any type of criminal case, when that court makes a finding that an evaluation would be beneficial in determining whether a witness is giving truthful information. The bill could employ the same factors set forth by the courts for considering an evaluation currently:

1. Whether there is corroborating evidence of the complaining witness' version of facts;
2. Whether the complaining witness demonstrates mental instability;
3. Whether the complaining witness demonstrates a lack of veracity;
4. Whether similar charges by the complaining witness against others are proven to be false;
5. Whether the defendant's motion appears to be a fishing expedition;
6. Whether the complaining witness provides an unusual response when questioned about their understanding of what it means to tell the truth.

It would create a very high burden to meet in order to get an evaluation ordered. However, it would allow for the opportunity to get a psychiatric or psychological examination in the rare circumstances where there are serious questions about a complaining witness' ability to tell the truth. It would help the court determine if a complaining witness meets the general qualification requirements of a witness under K.S.A. 60-417. Namely, whether the witness is capable of understanding their duty to tell the truth. Without the ability to order a psychiatric or psychological examination, the courts would only be allowed to determine the ability of a complaining witness to tell the truth based on the questioning of the attorneys absent any help from a mental health professional.

The current state of the law is problematic in the way it singles out complaining witnesses in sexual assault cases; however, removing the ability to get an evaluation under any circumstances is not the answer. A better approach would be to recognize that psychological evaluations can in rare circumstances offer valuable insights in a variety of cases and to provide guidelines and a clear mechanism for obtaining an evaluation in any type of criminal case.

A change on this subject is due and we urge the committee to consider creating a bill that would treat all cases equally and allow for evaluations in limited circumstances, when necessary to serve the interests of justice.

Thank you for your consideration,

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