

**House Judiciary- Senate Bill 204
March 11, 2021**

**Kansas Association of Criminal Defense Lawyers
Neutral**

Chairman Patton and members of the Committee:

Senate Bill 204 is designed to prohibit court-ordered psychiatric or psychological evaluations. 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 1979 *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, in the following years 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, that implied idea that sexual assault witnesses are less reliable than regular witnesses could be corrected by changing the rule to allow evaluations in any case if there are compelling reasons to grant such an evaluation. Psychological and Psychiatric professionals can offer valuable insights in those rare instances where there is a concern about psychological issues with a complaining witness. These evaluations are not therapy sessions where the complaining witness must rehash the incident giving rise to the criminal charge. They are a general psychological evaluation, to determine whether there is an underlying psychological issue which would impair witness’ ability to tell the truth.

This type of evaluation is not needed often, but it can provide crucial information in the rare instances where it is needed. A better alternative to SB 204 might be to

consider a bill that would allow a district court to order an evaluation in any type of criminal case, only 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.

This statutory language 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.

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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