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TO: The Honorable Representatives of the Committee on Corrections and Juvenile Justice

FROM: Thomas R. Stanton
Reno County District Attorney

RE: House Bill 2385

DATE: February 15, 2024

Chairman Owens and Members of the Committee:

Thank you for allowing me to submit testimony regarding House Bill 2385.

The purpose of this bill is to replace the term “rebuttable presumption” in K.S.A. 21-5705(e) with the term “permissive inference,” and add language to make it clear that the inferences can only be considered by a factfinder when they are supported by facts presented at trial. The Bill also modifies K.S.A. 60-416 to define all rebuttable presumptions and permissive inferences in the criminal law to ensure the constitutionality of these legal presumptions.

In 2012, the legislature enacted legislation which created an inference that possession of a certain quantity of controlled substances suggested the drugs were possessed for sale rather than personal use. In doing so, the term “rebuttable presumption” was used to establish the inference as an applied to those specific quantities of controlled substances. The quantities established by the legislature depended on the specific controlled substance, how that controlled substance was used, and the detrimental effect resulting from use of specified substances. For example, the presumptive quantity for sale for methamphetamine was 3.5 grams based on its instantly addictive properties and the amounts normally used by the individual user. The presumption for cocaine was set at 100 grams, and the presumption for marijuana was set at 450 grams. As a prosecutor who has spent the majority of my 33-year career prosecuting drug cases, I believe those inferences remain indicative of clear intent to distribute the various drugs.

The statute has recently come under a constitutional attack from appellate defense counsel because of the use of the term “rebuttable presumption” in the statute. In 2021, I argued a case before the Kansas Supreme Court (*State v. Dominic Holder*, 314 Kan. 799, 502 P.3d 1039 [2022]) in which this constitutional issue was raised. The argument presented by defense was that the term “rebuttable presumption” carries with it an implication that the defendant must present evidence to rebut the presumption. Justices of the Kansas Supreme Court expressed concern that the use of that term creates a shifting of the burden of proof in a criminal case, resulting in an unconstitutional application of law. Another aspect of this issue is that the pattern jury instruction for the presumption was written in a manner that is more consistent with a permissive inference than with a rebuttable presumption. So, while the instruction read to the jury would not suggest shifting the burden, the statute itself may very well carry that implication.

The Supreme Court in my case did not reverse the Mr. Holder’s conviction for possession of marijuana with intent to distribute because the amount he possessed for distribution (approximately 40 pounds) was really not affected by statute or the jury instruction at trial. The Supreme Court found that there was no real possibility the jury would have convicted of a lesser charge based on the evidence presented at trial. However, it became clear to me during arguments before the Supreme Court that the language in the statute needed to be modified from “rebuttable presumption” to “permissive inference” because the Court is likely to find the statute unconstitutional if the issue is properly preserved for appeal, and the evidence could support either possession for sale or possession for personal use.

In consultation with other prosecutors, we also determined that it would be best to add a phrase to make it clear that the inference had to be supported by evidence presented at trial.

I first submitted the language for those amendments in HR 2705. This Committee held a hearing on that Bill, and subsequently referred it to the Judicial Council for review. The Judicial Council suggested an amendment to K.S.A.60-416, which deals with presumptions under the law, to create specific language pertaining to criminal presumptions in general. This is necessary because the language of K.S.A. 21-5705 deals only with those presumptions specifically related to the distribution of controlled substances.

The legislation was re-introduced as HB 2385 on February 9, 2023, with the addition of Section 2 which contains the language needed to amend K.S.A. 60-416 to address the constitutional concern first raised by the Supreme Court in *Holder*. The Bill was referred to this Committee.

On April 14, 2023, the Kansas Supreme Court issued rulings in three cases. In all three cases, the Court found the instruction regarding the rebuttable presumption given by the trial judge was legally inappropriate because it reflects the test for a permissible inference, not the rebuttable presumption as clearly stated in K.S.A. 21-5705(e). The Court then relied on standing issues to deny the constitutional arguments raised by the defendants. However, the Court made it very clear that the use of rebuttable presumptions in criminal cases is unconstitutional, citing clear precedent from the United States Supreme Court. The KCDAA and the Attorney General’s Office subsequently attempted to get a hearing scheduled for this Bill, but the effort came too late in the legislative process for that effort to be successful.

It seems likely that the first defendant to overcome the standing issues raised by the Supreme Court in previous cases will be successful in obtaining a ruling that the use of rebuttable presumptions in criminal statutes is unconstitutional.

K.S.A. 21-5705(e) is not the only Kansas criminal statute that contains a rebuttal presumption provision. Other Kansas statutes that contain similar presumptions are as follows:

- K.S.A. 21-5611(d) (Unlawful Transmission of Visual Depiction of a Child) - contains a rebuttable presumption of intent to harass if the offender transmitted the visual depiction of a child to more than one person.
- K.S.A. 22-2611 (Jurisdiction and Venue) - presumption that death occurred in the county where the body of the victim is found.
- K.S.A. 21-5427(c) (Stalking) - provides that a person who is served with a protective order or warned by a law enforcement officer about stalking actions shall be presumed to have acted knowingly as to any like future act targeted at the specific person named in the order or as advised by the officer.
- K.S.A. 21-5804 (Prima Facie Evidence of Intent to Permanently Deprive) - provides that, in property crime prosecutions (e.g. theft), certain facts shall constitute prima facie evidence of intent to permanently deprive an owner of property; for example, the giving of a false name or address at the time of buying or selling the property. This statute was interpreted as creating a rebuttable presumption in *State v. DeVries*, 13 Kan. App. 2d 609, 780 P.2d 1118 (1989).
- K.S.A. 21-5823(c) (Forgery) – rebuttable presumption that a person is considered fictitious if it is not known if the person is real or fictitious.
- K.S.A. 21-6401(e) (Promoting Obscenity) – rebuttable presumption that a person promoting obscene materials did so knowingly or recklessly under certain circumstances.
- K.S.A. 21-6423(d)(2)(D) (Violation of Consumer Protection Order) – presumption involving knowledge of a court order or judgment that has been properly posted.
- K.S.A. 21-5714(c) (Unlawful Representation that Noncontrolled Substance as Controlled Substance) – presumption that a reasonable person would have reason to believe that a controlled substance is being distributed if certain factors are present.
- K.S.A. 21-5805(d) (Unlawful Acts Involving Theft Detection Shielding Devices) – possession of 15 fraudulent receipts or product codes or of a device which manufactures such codes creates presumption of intent to cheat retailer.
- K.S.A. 21-5821(d)(1) (Giving a Worthless Check) – presumption of written notice under certain circumstances.
- K.S.A. 21-5825(c) (Counterfeiting) – possession of 25 or more counterfeit items presumes intent to distribute.
- K.S.A. 21-6407(c) (Dealing in Gambling Devices) – proof of possession of a device designed exclusively for gambling purposes presumes intent to distribute.
- K.S.A. 8-1005(b) (Evidence of Blood Alcohol Concentration Test) – a BAC of .08 or more is prima facie evidence of DUI.

Section 2 of the proposed legislation defines all presumptions as inferences and allows the law to conform to the current instruction regarding those inferences. This language would, therefore, require the appellate courts to find the current instruction is legally appropriate when addressing the presumptions. This Bill would also address the constitutional issues raised by the Court in its

rulings.

It is the consensus of prosecutors I have spoken to on this issue that Section 2 is the most vital portion of the Bill. We are united in asking that, at a minimum, Section 2 be passed into law by the legislature.

It is my belief, and the belief of the prosecutors with whom I have discussed this issue, the Kansas County and District Attorneys Association and the Kansas Attorney General's Office, that this change in language is required to preserve the constitutionality of the statutes previously promulgated by this body. I urge the passage of this legislation.

Respectfully submitted,

/s/ Thomas R. Stanton

Thomas R. Stanton

Reno County District Attorney