MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

August 27, 2008
Room 545-N—Statehouse

Members Present

Professor Tom Stacy, Chairperson
Ed Klumpp, Co-chairperson
Senator David Haley
Senator John Vratil
Representative Lance Kinzer
Representative Jan Pauls
Judge Richard Smith
Debra Wilson
Steve Opat
Tim Madden
Ed Collister

Staff Present

Judge John White, Reporter
Brett Watson, Staff Attorney
Sean Ostrow, Assistant to the Commission
Jill Wolters, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Melissa Doeblin, Office of the Revisor of Statutes
Jerry Donaldson, Kansas Legislative Research Department

Also Present

Tom Drees, Member of the Proportionality Subcommittee
Kelly Potter, Kansas Social and Rehabilitative Services
Dwain Worley, Kansas Bureau of Investigation
Jim Schieferecke, Kansas Bureau of Investigation
Jeff Brandau, Kansas Bureau of Investigation
Ed Britton

Tim Madden said that the Kelly Potter would try to organize a state-wide tour for the members of the Commission as a way to bring new viewpoints from across the state.

Professor Stacy said that the trip would be a good way to spread awareness of the Commission's mission and also gather knowledge of local issues and concerns from other areas of Kansas. Professor Stacy said that they were considering hiring another staff member to assist the Commission in its legislative recommendation function. Ms. Potter said that they had discussed locating a researcher from the POUND association. Professor Stacy said that the hope was to accomplish the Commission's mission within the three years previously allotted by the legislature, but if this was not possible then the hope was that the legislature would extend the life of the Commission. Ms. Potter said that she would like to make her services available to the Commission, and would be in contact regarding the organization of a trip to western Kansas.

Judge White gave a summary of the two subcommittee meetings that had occurred since the last Commission meeting. He said he thought the subcommittee had been making strong progress, and gave a short list of some of the statutes they had recently completed. These statutes included; Article 37 – property crimes, Article 31 – preliminary and general provisions, Article 32 – criminal liability, and Article 33 – conspiracy, solicitation, and other special issues. He said he expects the Commission to be ready to present these to the legislature very soon.

Judge White mentioned there were some recommendations regarding the property crimes, in particular the burglary statute. One question concerned the Commission's interest in elevating the requisite intent of the perpetrator in burglary cases. Judge White said he would like the Commission as a whole to discuss this possible change at a later date.

Other discussions concerned the statute of limitations for various crimes, and the possibility of altering those. He also mentioned the recommendations regarding jurisdiction and the expansion Kansas jurisdiction where relevant. Finally, he said that some statutes would be moved to different, more appropriate chapters.

Professor Stacy said that the subcommittee was making significant strides, particularly on the issue of culpability levels. He said the subcommittee would continue to work to clarify the issue of culpability without making substantive changes to the law.

Heroin Quantity

Professor Stacy said that the purpose of the day's meeting would be to conclude the analysis of the changes proposed by the proportionality subcommittee. He called upon Tom Drees to discuss his work with the proportionality subcommittee.

Mr. Watson introduced the KBI agents in attendance, who were available to answer questions regarding the relevant statutory revisions and other concerns of the Commission. Jeff Brandau said that the KBI was concerned that the heroin quantity thresholds proposed by the subcommittee were high.

Mr.Watson said that law enforcement agents informed him that heroin distribution was on the rise in Kansas. Jeff Garmon of the DEA task force provided this information. Mr. Brandau said that heroin had become a major issue on the east coast, and he was concerned that its proliferation would spread to Kansas. He said that due to the extremely potent, addictive, and harmful nature of the drug, heroin should warrant proportionally higher sentences. He said that the quantity proposals in the revised draft were an accurate reflection of personal use vs. dealer/distributor quantities. He said that subsection (a) would be consistent with personal use levels, while subsection (b) began to fall into the range of small-time sellers. Professor Stacy suggested changing (a) to include levels up

to and including 1 gram, and changing (b) to over 1 gram. The purpose of this would be to ensure that people who were mere users, and not distributors of the drug, would not be penalized as dealers. Mr. Brandau said that this change could be an appropriate measure for achieving this goal, because the 1 gram amount also encompassed large volumes intended for personal use.

Professor Stacy moved to make D(3)(a) "up to and including 1 gram" and change (b) to "more than 1 gram." Ms. Wilson seconded, and the motion passed unanimously.

Dosage Units

Mr. Worley, a chemist with the KBI, described the typical testing procedure for drugs that could be measured by "testing" or "dosage" units. He said that chemists often just tested a few of the individual pills or other units, so they could properly assume that the other units contained identical, or at least similar substances. He said that the KBI didn't want to get into a situation where they had to test every single unit, especially when units appear uniform and the total quantity consists of a large number of units.

Cultivation

The KBI staff said they thought that three levels for felony cultivation were more appropriate than two. These levels would be set at 4-49 plants, 50-99, and 100 and more plants. Mr. Brandau said that most plants get an average of 1 pound per year. He said there is a large, and increasing, industry of medium-sized indoor growers, who were very difficult to catch. Oftentimes these people operated in their basements and homes, and were not part of widespread distribution networks, but rather smaller, personal circles of marijuana users. Mr. Drees said that a level 7 with no priors would be presumptive probation under the new sentencing grid, but that with priors they would fall into the presumptive imprisonment range.

Mr. Opat asked why they would want to deal with this issue less strictly if this was an admitted problem. He suggested that the problem could be better dealt with by imposing harsher laws on mid-range indoor growers. Senator Vratil said that there are very numerous viewpoints on marijuana, and that not everyone viewed it as a crime that warranted extensive jail time. Mr. Opat said that marijuana growth has historically had numerous other evils and violence associated with. Mr. Brandau said that there is not a major culture of violence associated with marijuana cultivation, but there is the occasional incident. Pit bulls are often employed to protect the crop from other dealers and users, but generally not the cops, who are not the medium-sized growers' primary concern. He also said that you don't see many booby traps in Kansas. Mr. Madden asked if there are other thresholds that could be considered, and Mr. Brandau replied that he considered anything over 25 plants a commercial operation. He said that he has seen as much as ten plants be consistent with personal use growth.

Mr. Madden moved to change line 29 on page 5 to increase the 4 to a 10 for purposes of presumption of intent to distribute. He said this was based on the KBI's testimony that personal use may extend beyond 5 plants. Ms. Wilson seconded, and the motion was discussed.

Mr. Drees said this would not interfere with the proportionality subcommittee's recommendations because they hadn't previously assigned quantities to the distribution presumption, only that they thought it should be in place.

Representative Kinzer asked the KBI whether they had heard of personal use growers being punished too harshly under current laws. Mr. Drees and Mr. Brandau said that most cases of 10 and

under plants are being pleaded as misdemeanors, and they had never heard of a 10 plant cultivator going to prison for that offense. Mr. Drees said that most users are also dealers in some sense because they use with their friends, supplying them when in need and relying on them in kind. Representative Pauls pointed out that by reducing marijuana cultivation to a misdemeanor incentives to plead guilty are also reduced. She also said that there are studies proving marijuana is a gateway drug, and that the potency of marijuana is much higher than it has been in previous years. Mr. Drees said thought that the guidelines were based on the level of harm to society as viewed by the legislature, and did not think that they should depart from the proportionality subcommittee's proposals.

Judge Smith said he was concerned that changing the cultivation levels would be a red flag to the legislature that the Commission is recommending a major change that would lessen the penalties for drug possession. He said such a change would likely be unpopular amongst the legislature. Senator Vratil said that at the last session, several legislators had expressed interest in decriminalizing marijuana. He said he thought this change could be viewed by some as an attempt to open the door to decriminalization. Ms. Wilson said that she thought the proposal makes sense in terms of real-life issues and the relative lack of harm surrounding marijuana culture.

Representative Kinzer thought that the change would send a very poor societal message that the legislature did not think marijuana was a serious issue. He said there is a very real societal cost associated with illicit drugs, and that any message that the legislature sends regarding lessening this penalty would be controversial. He said he couldn't support this motion, and would view it as a roundabout attempt to legalize marijuana in the long term.

Mr. Madden's motion failed, with only Ms. Wilson and Mr. Madden voting in favor of the motion.

Senator Vratil moved to approve the proposed statutes on pages 4, 5,6. Ms. Wilson seconded, and the motion passed unanimously.

Manufacturing Meth

Mr.Watson explained the meth manufacturing proposal and the two approaches the Commission had considered taking; the "conservative approach" and the "open texture approach." He discussed the pros and cons and other implications of such approaches.

Jim Schieferecke, a KBI chemist, said that the amount of pseudoephedrine can be determined, and then a theoretical yield is determined based on this amount. He said that all chemists agree on the theoretical yield as a proper measurement. He said that if real yields were to be the benchmark there would be all sorts of arguments or "what ifs" regarding the total amount, based on circumstances and scenarios that reach far beyond the prognostication abilities of KBI chemists. Mr. Worley said there are good cooks and bad cooks, so it is impossible to know how much the actual yield will be.

Senator Vratil said that the "capable" language implies that the yield is theoretical, and approved of the statutory language.

Mr. Collister asked why prosecutors weren't using the aggravating factors listed on page 7 in tandem with meth manufacture. Mr. Watson said he thought many may be plead away, but he only had records of the resulting convictions. Mr. Collister said he didn't see why adding the aggravated meth offense would make it less likely that the other associated crimes would be charged or not plead down. He said he didn't see the benefit of rewriting the statute to include the aggravated

offense when prosecutors already had the ability to aggravate based on the same factors.

Mr. Drees said that Proportionality's recommendation was intended to recognize the seriousness of the aggravated meth manufacture statute; he said that instead of trying to make meth manufacture, which is a level 3 offense, aggravated, they decided to make the aggravated offense applicable to all manufacture of controlled substances. But he agreed with Mr. Collister that there is currently nothing keeping prosecutors from charging these crimes.

The KBI officers testified that 10% or more of meth convictions involve amounts of over 100 grams. They also said that meth addicts more likely to manufacture than non-addicts. Though there is a correlation between manufacture and addiction, it is difficult to tell which comes first. Mr. Drees said that just keeping meth materials behind the counter has made a huge difference in diminishing the availability of meth precursors, and thus limited the amount of manufactured meth as a whole. Representative Pauls asked if the Kansas meth statute proposal was similar to the federal statute. Mr. Worley said that the 50% yield was also utilized in federal cases. He said that theoretical yields were often based upon half of the precursor amount. This was typically the agreed-upon average amount of any given potential yield, which was safe for evidentiary burden purposes.

Professor Stacy said he wanted to make the sentencing accurate to actual practice, with proportionality of sentencing as a primary concern. *Senator Vratil moved to table the issues, on pages 6,7,8 indefinitely, Professor Stacy seconded, and the motion passed unanimously*.

21-508 and 21-512

Mr. Watson addressed the drug code memo. He said that after discussing some of the statutes with the Revisor of Statutes, some stylistic changes had been made. He discussed the inclusion of MDMA in 21-506. In 21-508 and 21-512 the introductory phrase had been changed from "it shall be unlawful to…"

Mr. Opat moved to approve the changes and adopt them into the code. Ms. Wilson seconded. Professor Stacy asked whether the previous edits had been made by the Revisor of statutes. Ms. Wolters said that the Revisor's office had gone through to edit the statutes into a uniform style, and would plan on presenting the edited statutes, showing the edits in italics and strike-through format, to the Commission at an appropriate time. *The motion carried unanimously*.

Professor Stacy said that the objective for the afternoon would be to approve as many of the proportionality subcommittee's recommendations as possible.

Special Sentencing Rules

Mr. Watson explained the memo regarding off grid felonies and the Commission's efforts to place those on the proposed grid. Mr. Drees said that the DUI proposal had been removed from the grid because of the large bed-space impact. He said that proportionality, bed impact, uniformity, and practicality would all be improved by bringing off-grid felonies onto the grid. He advised the legislature to continue to place new felonies on the grid as they were enacted. *Senator Vratil moved for the Commission to approve recommendation #1 on the memo, Ms. Wilson seconded and the motion carried unanimously*.

Mr. Drees said that he would change the severity level to a level 10 nonperson felony for a number of unclassified felonies, including the cruelty to animals statute, 21-4310(d). Judge Smith said this would create the possibility of increasing the penalty for those unclassified felonies that were not yet associated with a severity level, and Mr. Drees agreed.

Non-Prison Sanction Recommendation

Mr. Watson said that the "border boxes" were undergoing the terminology change to make them "presumptive imprisonment boxes". Mr. Drees explained the court service officers' request for information and notice 10 days prior to sentencing as to whether there were suitable programs in place which would qualify the defendant for a non-prison sanction.

Ms. Wilson said she had taken an informal survey of public defenders. She said she found that most times the presumption is that probation or some other non-prison alternative will be forthcoming, but attorneys later find that the defendant is in a border box because the defendant has failed to fully disclose their criminal history. Many attorneys have said that they felt uneasy with the idea of the court services officer, and not the judge, making the recommendation of probation. She said that defenders frequently did not get the pre-sentence investigation results until a couple days before sentencing, which would make the proposed 10 day rule unworkable.

Judge Smith said that the sentencing may be unduly delayed, but thought that the 10 day rule could in fact put too much time pressure on the defense attorney. He also said he thought the court services officer would be an appropriate person to investigate the availability of such programs. Judge White said that the three questions were whether 1) the defendant qualifies for the probationary program 2) such a program exists and 3) the program may admit the defendant within a reasonable time. Judge Smith said the presumption of imprisonment in border boxes needs to be emphasized. Judge White asked what the bed-space impact would be, and Mr. Drees said that an additional 450 beds would be required over a ten year period.

Judge Smith said that a rule that would require the court to give a date for filing the PSI at the time of the conviction would be helpful. Ms. Wilson said that you could also make it go the other way; the proposed probation would have to come within a certain number of days of the PSI, and the defense attorney would have this amount of time to complete the request for a non-prison sanction.

Mr. Collister said that part of the problem was whether the computerized records available to the courts could be sufficiently detailed for determining criminal history scores. For example, burglary could be a person or nonperson crime, which could be determinative of whether someone is eligible for probation.

Judge Smith moved to adopt the recommendation , and to incorporate language that would allow individual districts to formulate time limitations regarding the time within which the PSI must be filed, and a time period within which the defense attorney would be required to petition for probation or alternative sentencing. Senator Vratil seconded, and the motion was discussed.

Mr. Klumpp made a substitute motion, with fewer words, to approve the recommendation with the language that "sentencing shall not be made until the Presentence investigator has the opportunity to verify the availability of the program (non-prison sanction) to the defendant.

Judge Smith agreed with the language Mr. Klumpp came up with, and accepted this as a friendly amendment. However, Senator Vratil said he wasn't sure that this language properly captured the spirit of the recommendation because it did not say anything about the proper notice aspect.

Senator Vratil asked if the staff could prepare the actual language of the statute in a more concise way that would still capture the aims of the proposed statute.

Judge Smith withdrew his motion, and made a motion to approve the recommendation and allow the staff time to draft a proposal. Senator Vratil seconded, and the motion carried unopposed.

Recommendation Eliminating Special Sentencing Rules

Mr. Watson moved on to the recommendation regarding special sentencing rules. Mr. Drees said these particular statutes were selected because the new grid puts them into presumptive imprisonment, which eliminates the need for special rules to ensure imprisonment for violation of these statutes. Professor Stacy said that the Commission could either adopt these statutes piecemeal or adopt them all at once. *Ms. Wilson moved to approve all recommended changes in the recommendation, except for the domestic battery statute and Senator Vratil seconded. The motion carried with Mr. Opat dissenting*.

Revisions to the Domestic Battery Severity Levels

Mr. Watson explained the domestic battery recommendation was to impose special sentencing rules along with actual severity levels. Mr. Drees said that a third instance of domestic battery would be a level 9 severity, and each subsequent offense would be considered a higher level felony.

He said the escalating 30 day, 90 day or 1year in Department of Corrections custody for domestic battery offenders would apply in addition to the typical sentencing grid punishments. After the minimum time with the DOC the offender would undergo a behavior modification program or some other community program. Professor Stacy said that adopting this statute may have the consequence of putting someone into a worse situation, such as the loss of a job, because of the absence caused by a mandatory prison term. But Mr. Drees said this would only apply to a third time offender whose repeated behavior warranted such a punishment. Mr. Opat said that the judge will nearly always provide work release for third time offenders so long as you can provide evidence that you are gainfully employed and will enter into counseling. He said he didn't see any advantage to the proposed system.

Representative Pauls said that in the past the DOC had been in charge of most or all domestic battery situations, but then they left it to be dealt with by county jails, who complained about the cost associated with housing domestic battery offenders. She said there was no real easy way to handle the situation, and Mr. Opat agreed. Mr. Opat said that in his experience people sent to county jail did not repeat. He was also concerned that the people who fall into border boxes would have to do prison time, even though most people who fall into border boxes for other crimes often get probation.

Judge Smith said that if the jail time was a condition of probation, this would create a new status of criminal punishment in Kansas regarding jail-time credits. It was tentatively agreed that the courts could assess this situation and handle it as they saw fit.

Judge Smith moved to adopt this recommendation, Senator Vratil seconded, and the motion carried with Mr. Opat abstaining and Mr. Madden dissenting.

Mr. Klumpp moved to adopt the domestic battery recommendation, Representative Pauls seconded, and the motion carried with Mr. Madden dissenting.

Revision of Severity Levels for Selected Offenses

Battery on a Corrections Officer

Mr. Drees introduced the proportionality subcommittee's proposed change to §21-3413, which would lower battery on a city corrections officer to a level 9 from the then-current level 5. He said that if serious harm occurred, then the general aggravated battery statutes would apply to proportionally punish infliction of serious injury. Senator Vratil said that there should be an overall movement towards getting rid of special punishment statutes. He said this movement was being reflected in legislation coming from the Senate; no new special sentencing rules would be forthcoming, and the Commission should eliminate special sentencing rules wherever practical.

Judge Smith moved to adopt this statute, and Mr. Opat seconded. The motion carried unanimously.

Aggravated Battery

Judge Smith said this statute is always plead down and is widely recognized as being very over-penalized. Mr. Klumpp agreed with the proposal, which would change the aggravated battery statute to reflect the difference between reckless and intentional infliction of bodily harm, and provide a proportionate corresponding severity level.

Professor Stacy moved to adopt the proposal, Ms. Wilson seconded, and the motion carried with Mr. Opat dissenting.

Aggravated battery on a LEO

Mr. Watson explained that this penalty would be lowered one level to a severity level 5 in cases where great bodily harm was not intentionally inflicted. *Senator Vratil moved to adopt the proposal, Ms. Wilson seconded, and the motion carried unanimously*.

Electronic Solicitation of a Child

Mr. Watson explained how the proposed amendment would lower the severity level to a 4 or a 5, depending on the age of the child. Mr. Drees said he felt like a severity level 1 was too severe for violating this statute because it doesn't require any actual physical contact or inflicted harm. He noted that if the solicitation escalated to further contact with the child, there would be other crimes that would sufficiently penalize the behavior in conjunction with this statute.

Mr. Klumpp stated that this would be a difficult sell to the legislature because it lessens the penalty for a most odious crime.

Ms. Wilson moved to adopt the proposal and Professor Stacy seconded. Representative Kinzer said this has zero chance of passing in the legislature, and would give the legislature pause as to the Commission's overall intent. He strongly cautioned the Commission against this highly controversial amendment, and Judge Smith agreed. Senator Vratil said that he thought it was easy enough to explain the reasoning behind the Commission's recommendation, which was proportionality, and didn't think that simply making the recommendation would portray the Commission in a negative light. Mr. Klumpp said that the Commission's documentation must be carefully worded and go to extra lengths to explain how this punishment is grossly disproportionate to the harm in fact it was punished as severely as manslaughter. Professor Stacy said that he was concerned about the

lack of proportionality when you look at whether the target is to aggravate successful attempts or to catch attempts that otherwise could go unpunished. Representative Kinzer said that the electronic aspect of the statute is the focus, because it facilitates contact with children. Representative Pauls said that her concern was that the statute didn't distinguish between a young perpetrator and an older perpetrator, so that two kids nearly the same age could be found guilty under this statute even though it is consensual. She thought that there would be some serious problems getting the levels lowered by the legislature, but would also like to see the age discrepancy cleared up.

Professor Stacy said the Commission should make it clear to the legislature that there is a connection between the proposal and the harm sought to be rectified. As it stood, said Professor Stacy, the statute creates an extremely weighty penalty for a harm which, while serious, does not warrant a severity level 1. Senator Vratil stated that the Commission should make their decisions with the best public policy in mind, and not discuss the best or most popular political stance. *The motion carried with Mr. Opat and Representative Kinzer dissenting*. Judge Smith emphasized the importance of making the Commission's intent, as illustrated by the preceding conversation, well-known to the legislature when explaining this proposal.

Abuse of a Child

Mr. Drees said there is currently a lesser penalty for abusing a child than there is an adult, if anything the vulnerability of child should aggravate and increase the sentence. Mr. Opat said that he has encountered trouble and confusion regarding this statute in practice. He suggested viewing the crime as a general crime, such as aggravated battery, while treating the fact that the victim is a child as an aggravating factor. *Mr. Opat moved to eliminate the statute while adding a clause to the aggravated battery statute making battery of a child a higher level offense, Ms. Wilson seconded.*

Judge Smith wanted to make sure that this statute was not intended to cover some sort of behavior that wouldn't be covered by the aggravated battery statute before proceeding, and was concerned that the unusual language of this statute had specific harms in mind.

Mr. Drees said that this statute was sort of a relic of old laws charging parents with inflicting cruel or unusual punishment on a kid. Simple battery by a parent against a child was permitted, and was permitted at common law. 21-3609 was intended to catch those acts by parents against children that were not allowed under law. He said the Commission should be careful to not give the impression that the court may make parents immune to aggravated battery of their children. Representative Pauls said she thought the "shaking" clause should remain in the statute, in order to combat this particularly serious harm.

Professor Stacy said that he thought that this statute had an element of cruelty which made it somewhat broader than the battery offenses in that it covers. Professor Stacy thought it might be advantageous to make it clear that you can charge both aggravated battery and abuse of a child concurrently.

Judge Smith found that Kansas holdings are in concurrence with Professor Stacy's view. He cited two cases, *Aldrete* and *Riles*, which treated 21-3609 and aggravated battery as separate crimes of different breadth. Mr. Opat thought that the aggravated battery statute should nonetheless reflect battery upon children as an aggravating factor which would take it up a severity level. He also said the penalty under 21-3609 should reflect the aggravating factor of harm to a child victim. *Mr. Opat withdrew his previous motion, and made a new motion to make serious bodily harm to a child a level 3 in the context of 21-3609. Senator Vratil seconded, and the motion carried unopposed*.

Aggravated Endangering a Child

Mr. Drees explained the proportionality subcommittee's reasoning for elevating the penalty level for this statute, and mentioned that the phrase "could result" has always been problematic for courts. Professor Stacy noted the difference between aggravated endangering and simple endangerment was very slight, and the Commission struggled with the difference. Judge Smith said this needs to be looked over by staff because it has numerous problems that would require substantive analysis and recodification analysis. The Commission agreed to table this recommendation for the time being.

Aiding Person Required to Register

Mr. Drees felt this statute carried too large of a penalty. Mr. Opat said that the original discussions lead everyone to believe this statute would be set at a level 10, but somehow it ended up as a level 5. *Mr. Opat moved to adopt the proposal, Professor Stacy seconded, and the motion carried unanimously*.

The meeting adjourned at 4:20. Judge White said that the subcommittee and the Commission would meet as planned in October, but that future meeting dates may be altered to accommodate the holiday season.

Prepared by Brett Watson

Approved by Commission on:

September 24, 2008
(Date)