KANSAS JUDICIAL COUNCIL

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TO: Senator Tim Owens, Chair, Senate Judiciary Committee

From: Criminal Law Advisory Committee, Kansas Judicial Council

Re: Testimony in support of 2011 Substitute for House Bill 2318

Date: March 18, 2011

TESTIMONY OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE ON 2011 SUBSTITUTE FOR HOUSE BILL 2318

In June, 2010, the Kansas Judicial Council Criminal Law Advisory Committee (Advisory Committee) was asked to study comments received regarding 2010 House Bill 2668. The comments included some concerns that the Recodification Commission had already addressed but also pointed out some apparent errors or omissions in the bill. The Advisory Committee also reviewed the policy recommendations included in Vol. II of the Recodification Commission's report. The Advisory Committee considered and discussed the Commission's recommendations and subsequently agreed with many of them. House Bill 2318 as originally proposed by the Advisory Committee would implement the Commission's recommendations pertaining to the drug code.

Senate Judiciary
3-21-11
Attachment 3

During the hearing on HB 2318 in the House Corrections and Juvenile Justice Committee, the Kansas County and District Attorney Association proposed a balloon amendment to the bill. The balloon amended the drug code to add an additional sentencing severity level to the drug grid. The Judicial Council Criminal Law Advisory Committee did not have an opportunity to review or consider this proposal and therefore did not take a formal position on the proposed balloon.

The balloon amendment was approved by the House Committee and subsequently required a substitute bill in order include all of the statutes referencing the drug grid severity levels and to ensure that severity levels of drug crimes were amended to maintain proportionality and consistency. The resulting legislation is encompassed in Substitute for House Bill 2318. The following is a brief explanation of each section of the bill as amended by the House Committee.

- **Section 1.** This section remains as proposed by the Council Advisory Committee. The definition of "manufacture" in the drug code should be revised. The proposed language would exclude the actions of packaging, repackaging and cutting controlled substances. Packaging, repackaging and cutting are not properly part of criminal drug manufacturing, but rather, they are acts more closely associated with drug distribution.
- **Section 2.** This section was added to the substitute bill due to the balloon proposal. The section would amend severity levels of the crimes in response to the addition of a severity level on the drug grid.
- **Section 3.** This section remains as proposed by the Council Advisory Commitee. The severity of drug distribution should be determined by the quantity of the drug.

The idea for using quantity originated at the Kansas Sentencing Commission Proportionality Subcommittee and was supported by the Recodification Commission. These two groups agreed to let the Commission determine the proper quantity levels and the Criminal Law Advisory Committee agrees with their proposals.

Currently, the severity level for distribution is based on recidivism of the offender. However, the recidivism enhancement was created before the sentencing guidelines. Since the guidelines account for an offender's criminal history, drug quantity is a preferable alternative method of determining the severity level of the offense. Of the four states that border Kansas, each ranks the severity of its drug distribution offense by quantity in some way.

The Commission conducted a substantial amount of research and carefully considered the proposed language. In 2008, staff members consulted with the KBI, the DEA, Kansas law enforcement officers along with Kansas prosecutors and district court judges regarding the proposal. The Commission also employed Kyle Smith, formerly of the KBI, as a staff attorney to work on this proposal.

The quantity thresholds are based on four classifications: small, medium, large and super large. The quantity thresholds are based on quantities that represent distribution units. Subsection (c)(1) creates a generic quantity threshold into which drugs such as cocaine fall. There is a specific quantity threshold for heroin and methamphetamine, due to its smaller distribution unit, and drugs sold by dosage unit such as LSD or prescription drugs. Subsection (g)(2) defines a dosage unit similarly to the definition used in the Drug Tax Stamp Act.

Subsection (e) contains a presumption of intent to distribute if certain quantities are possessed. A defendant may rebut the presumption; however, it allows a jury to infer, from the quantity alone, that a defendant intended to distribute.

- **Section 4.** This section was added to the substitute bill due to the balloon proposal. The section would amend severity levels of the crimes in response to the addition of a severity level on the drug grid.
- **Section 5.** This section remains as proposed by the Council Advisory Committee. The proposed language is recommended in lieu of K.S.A. 21-36a09. The relationship between the possession of paraphernalia and precursors offense and the general possession, distribution, and manufacturing offenses has caused much confusion and litigation in cases such as *State v. Campbell* and *State v. McAdam*. A method of clarifying the relationship between these offenses is to eliminate the possession of paraphernalia and precursors as a separate offense and define such possession as a sufficient overt act toward the attempted violation of the possession, distribution and manufacturing offenses.
- **Sections 6 and 7.** These sections generally remain as proposed by the Council Advisory Committee. After passage of the drug code recodification, the provisions of the 1,000 feet of school enhancement in K.S.A. 21-36a05, K.S.A. 21-36a09 and K.S.A. 21-36a10 were unintentionally changed. The previous version of the school property enhancement required the offender to be 18 or more years of age.

Legislation was submitted in 2010 to correct the error; however, the Recodification Commission has since discovered that several prosecutors are in favor of removing this offender age element and in retrospect; the Commission determined that the purpose of the school property enhancement is meant to protect children from the dangers of controlled substances. In many cases, the offenders who bring controlled substances within such proximity to the schools are themselves under 18 years of age. Therefore, the recommendation is to remove the 18 year offender age requirements from the 1,000 feet of school property enhancements.

In addition, section 6 now includes amendments to severity levels of the crimes due to the balloon proposal to add a severity level on the drug grid.

- **Section 8.** This section remains as proposed by the Council Advisory Committee. The recommendation is to add subsection (d) in order to permit dual prosecution for this offense and theft by deception. The remaining amendments are technical in nature.
- **Sections 9 through 30.** These sections were added to the substitute bill due to the amendment to the drug grid. The amendments in these sections generally relate to statutory cross-references and to amending severity levels to maintain proportionality and consistency. The Council Advisory Committee does not take a formal position on these sections.