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TO: Senate Judiciary Committee
FROM: Kansas Judicial Council, Professor Tom Stacy
DATE: January 31, 2012
RE: Testimony in support of 2012 SB 308

SB 308 contains the policy recommendations of the Criminal Recodification Commission. The Judicial Council recommended the bill, which is similar to last year's HB 2321, after a study by its Criminal Law Advisory Committee.

SB 308 would amend the Kansas criminal code as follows:

- **New Section 1.** The proposed armed criminal action statute is similar to the armed criminal action statute in Missouri. It penalizes use of a firearm in the commission of a felony, unless the underlying felony is one where use of a firearm is a necessary element. Crimes involving the use of a firearm are especially dangerous and justify more severe punishment.

- **New Section 2.** The proposed general reckless endangerment offense is similar to several other jurisdictions. The Kansas code contains numerous offenses that are based on the principle of criminalizing recklessly exposing someone to danger when no injury or death occurs, such as endangerment of a child, casting rocks onto a public road or street, hazing, use or possession of traffic control preemption devices, etc. This general offense provides liability for acts of endangerment that do not fit within these several specific statutes.
- **Section 3.** Subsection (e) is added in order to eliminate the identical offense doctrine of cases such as *State v. McAdam*, 277 Kan. 136 (2004). Under the proposed language, the existence of identical offenses would not automatically demand imposition of the lesser punishment as the prosecutor may choose which offense to charge.
- **Section 4.** Subsection (b) is added to provide for the unilateral theory of conspiracy. Under current law, an offender who intends to enter into a conspiracy is not guilty unless there was an additional guilty co-conspirator. Under the unilateral theory of conspiracy, an offender who mistakenly or falsely agreed to commit a crime would be guilty of conspiracy. This distinction is often important as many police investigations employ the use of an agent or undercover informant who is not a genuine co-conspirator. This proposal is consistent with the Model Penal Code and the law of many jurisdictions.
- **Section 5.** Subsections (c)(1)(T) and (c)(1)(U) are added to the list of inherently dangerous felonies. Abandonment of a child and aggravated abandonment of a child possess the same dangers as aggravated endangering of a child.
- **Section 6.** The committee's proposed amendment pertains to subsection (b). Current law has subsection (b)(2) as a stand-alone provision which could lead to the

criminalization of trivial behavior, such as a young person driving a date to a place where both intend to engage in sexual conduct. The correction is proposed to bring the statute in line with the perceived intent of the Legislature.

- **Section 7.** Subsection (a)(1) should be removed as it is unconstitutional in light of the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The State or local government could be exposed to civil liability if this offense is retained in statute and results in an arrest. The best practice is to remove unconstitutional statutes from the criminal code.
- **Section 8.** Subsection (a)(5) is unconstitutional in light of the Kansas Supreme Court decision in *State v. Limon*, 280 Kan. 275 (2005), and the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The State or local governments could be exposed to civil liability if this offense is retained in statute and results in an arrest. The best practice is to remove unconstitutional statutes from the criminal code.
- **Section 9.** The addition of subparagraph (c)(2)(A)(ii) is recommended to increase the severity level of the violation when the victim and offender are in a parent/child relationship. A violation of the parental duty to care for a child deserves greater punishment than other forms of incest.
- **Section 10.** The addition of subsection (a)(3) as proposed would criminalize mere possession of recordings produced in violation of subsection (a)(1). Subsection (a)(3) does not require the further intent to sell or rent the recordings. Possession alone should be sufficient to trigger criminal liability.
- **Section 11.** The phrase “sexual battery” should be changed to “sexually motivated crime” to expand liability to other sexually motivated crimes other than sexual battery. For

example, an offender who enters a home with the intent to rummage through the victim's underwear enters with the intent to commit a misdemeanor, *i.e.* criminal deprivation of property, which is not a theft. However, due to the sexually motivated nature of the offense, such behavior should fall under the burglary statute. The definition of "sexually motivated" is identical to how it is defined in K.S.A. 21-6626, 22-3717, 22-4902 and 59-29a02.

- **Section 12.** The recommendation is to expand liability under this statute. Under current law it is a crime to falsely report a crime. Subsection (a)(1)(A) expands liability to cover persons who falsely report that a particular person committed an offense. Targeting an innocent person aggravates the offense and the severity level should be higher in such cases. Subsection (a)(1)(B) expands liability to any person that provides false information to law enforcement with the intent to obstruct the officer's official duty. This revision goes beyond falsely reporting a crime and may cover instances where an offender misleads law enforcement to prevent detection of a crime or the proper investigation of a crime. Subsection (a)(2) expands liability to offenders who destroy, conceal or alter evidence in order to prevent law enforcement from apprehending an offender. These acts are clearly prohibited under the current statute.
- **Section 13.** The recommended changes to subsection (a)(4)(B) and the addition of subsection (a)(5) are due to several troubling limitations on the crime included in subsection (a)(4). First, the current crime only applies when an offender agrees to accept some consideration for a promise to destroy evidence, etc. The destruction of evidence of a crime, in the absence of consideration, should be a crime. For that reason, the recommendation is to add subsection (a)(5) which would apply to both criminal and civil

cases because the offense deals with the judicial process generally, not just the criminal justice process.

- **Section 14.** The proposed change is recommended to avoid the unintended consequence of criminalizing innocent conduct intended to “induce payment of a claim.” The revision would require the “intent to mislead the recipient and cause the recipient to take action in reliance thereon.” This revision provides a superior culpability standard and adequately targets the kind of behavior the legislature originally intended to criminalize.
- **Section 15.** The recommendation is to add the phrase “or arrest” to subsections (a)(1), (a)(2), (b)(1)(A) and (b)(1)(B) and to add subsection (e). Under current case law, an offender may only be charged with escape from custody if there is a formal written charge, not when the offender is only under arrest without a written charge. Escape while under arrest without a written charge may still be charged under obstruction of legal process, but that offense is subject to a lesser penalty. It was determined that the legislature intended this offense to apply to offenders under arrest, without a formal written charge, and the proposed changes clarify that intent.
- **Section 16.** The current bribery statute is flawed for several reasons. First, it lacks a quid pro quo requirement, *i.e.* a requirement that a bribe be offered in exchange for the improper performance of a public officer’s duties. See, *State v. Campbell*, 271 Kan. 756 (1975). This is unusual compared to bribery statutes in other jurisdictions. Second, the statute does not apply to the omission of performance of a public duty. Third, the current offense may criminalize violations of state ethics laws as it prohibits a public official from accepting something to which they are not legally entitled.

The revision requires that some consideration be offered “in exchange for the performance or omission of performance of the public official’s powers or duties.” This kind of quid pro quo element is common to bribery offenses in other jurisdictions. The revision limits the kind of property that can be offered or accepted to that which the public official “is not permitted by law to accept.” The revised language clarifies that a public official may accept some gifts that are consistent with state ethics laws.

- **Section 17.** Respecting the infractions established in this statute, the recommendation is to insert language indicating whether and what degree of culpability is required. Neither K.S.A. 21-6110, which defines infractions, nor K.S.A. 21-6112, which specifies penalties, addresses this matter. Under the recodification (section 13(d) & (e) of HB 2668), recklessness would be required because the definition of the crime does not “plainly dispense with any mental element.” The committee believes that the Legislature intended for the infractions established in K.S.A. 21-6110 to be strict liability.

Whereas K.S.A. 21-6110 does not say anything about culpability, K.S.A. 21-6112(b), which makes those who own or run public places liable for smoking infractions committed by those on the premises, does explicitly require culpability. This leads to the conclusion that, in contrast with K.S.A. 21-6112(b), the infractions defined in K.S.A. 21-6110 are not meant to require culpability. When the Legislature has intended to establish a strict liability offense, the recodified version of the offense expressly provides that there is “no requirement of a culpable mental state,” thereby avoiding the default requirement of recklessness (section 13(d) & (e) of HB 2668). See, *e.g.*, HB 2668 §§ 184, 194. We recommend insertion of the same language.

It is unclear whether this language should be inserted in K.S.A. 21-6110 or K.S.A. 21-6112. The recodification defines offenses and prescribes the penalty in the same statute. The provisions here depart from that arrangement and put the penalties in a different statute, K.S.A. 21-6112. Ideally, the provisions would be revised to conform to the general scheme of the recodification.

- **Section 18.** The recommendation is to change some language in K.S.A. 21-6112(b) to make it consistent with the recodification's culpability provisions. K.S.A. 21-6112(b) makes one who owns or controls a public place liable for allowing smoking to occur if that person knows of and acquiesces in the smoking. The recodification uses and defines "knowledge" as a culpability term. See 2010 HB 2668 § 13. However, the recodification neither uses nor defines the term "acquiesce." The Committee recommends that the term "acquiesce" be replaced with the phrase "recklessly permits." The recodification does define recklessness. It is the Committee's judgment that recklessness captures the Legislature's intent regarding the culpability required by K.S.A. 21-6112(b).

In addition, the Committee recommends changing language in K.S.A. 21-6112(f) to make it consistent with the recodification's culpability provisions. This provision makes it an infraction for an employer to take adverse action against an employee, applicant, or customer "because" the employee, applicant, or customer has reported or attempted to prosecute a smoking violation. The infraction will be committed only when the employer's subjective purpose is to retaliate. As defined in the recodification, "intent" is the applicable culpability term. The Committee recommends wording K.S.A. 21-6112(f) accordingly.

- **Section 19.** In light of the dangerous nature of explosives and the possibility for their misuse when concealed, a C misdemeanor seems inadequate. The recommendation is to increase the penalty to a class A person misdemeanor.
- **Section 20.** Subsection (h) requires a county or district attorney to file charges of animal cruelty when a valid complaint is presented. This unnecessarily constrains the discretion of prosecutors and this kind of restriction on discretion is not employed in any other criminal statute. The recommendation is to strike subsection (h) because the better policy is to permit prosecutors to determine whether filing charges is justified on a case-by-case basis.
- **Section 21.** The recommendation is to strike the phrase “or using as an advertising device or promotional display.” Several legitimate businesses use these animals as part of a promotional display, especially during holidays such as Easter. Prohibiting use of these animals as part of an “advertising device” could possibly criminalize their use in producing commercial advertisements. The Committee agreed that the legislature did not likely intend to criminalize this conduct.
- **Section 22.** The recommendation is to add new language to subsection (b) that will provide guidance to district courts regarding when and how concurrent and consecutive sentences should be imposed. The new language in subsection (b)(1) provides judicial discretion to impose an entire consecutive sentence or any part of such a sentence. Under current law, a consecutive sentence may only be imposed if the entire sentence is imposed with the result being that consecutive sentences are not often imposed. Allowing judicial discretion to impose a portion of a consecutive sentence allows for greater proportionality.