

## MINUTES

### KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

August 22, 2007  
Room 526-S—Statehouse

#### Members Present

Tom Stacy, Chairman  
Ed Klumpp, Vice-Chairman  
Judge Larry Solomon  
Ed Collister  
Michael Kaye  
Steve Opat  
Tim Madden  
Kim Parker  
Jacqie Spradling  
Debra Wilson

#### Staff Present

Judge John W. White, Reporter  
Judge Patrick J. Brazil, Reporter  
Brett A. Watson, Staff Attorney  
Jill Wolters, Senior Assistant, Office of the Revisor of Statutes  
Jerry Ann Donaldson, Principal Analyst, Kansas Legislative Research Department  
Athena Andaya, Principal Analyst, Kansas Legislative Research Department  
Jason Thompson, Assistant, Office of the Revisor of Statutes  
Duston Slinkard, Assistant, Office of the Revisor of Statutes

#### Others Attending

Richard Samaniego, KCAA  
Lana Watson  
Scott Schultz, Kansas Securities Commission  
Natalie Gibson, Kansas Sentencing Commission  
Helen Pedigo, Kansas Sentencing Commission  
Lana Walsh, Office of Judicial Administration

Professor Stacy introduced Brett Watson, the new staff attorney. Mr. Watson introduced himself and stated that he was looking forward to working with the Commission.

Professor Stacy announced that a listserv has been created for the Commission at Washburn Law School. He informed the group that any communication via email that involved five or more members of the Commission should be done via the Listserv in order to comply with the Open Meetings Act. He also cautioned members that if they made postings on the website and sent email over the Listserv their email addresses would be published. He moved to allow publication online of the Commission's archive. The motion was unanimously adopted. (Mr. Opat and Collister were not present at this point.)

Professor Stacy moved and Ms. Spradling seconded, that the July 25, 2007 minutes be approved as drafted. The motion was unanimously adopted.

Judge Solomon expressed his concern that the Model Penal Code (MPC) culpability standards discussed at the previous meeting may conflict with current efforts by the Kansas Sentencing Commission (KSC) to review the guideline's offense severity levels. He introduced Ms. Pedigo, Executive Director of the KSC.

Ms. Pedigo addressed the Commission. She introduced herself and stated that she and the KSC were looking forward to working with the Commission. She said that the KSC is aware that the Commission is considering adopting the MPC culpability standards and she expressed concern that they may conflict with the guidelines. She noted that in 1990, the Crime Seriousness Subcommittee of the KSC established the following principles regarding crime severity ranking: (1) the primary determinant is harm produced by the criminal conduct; (2) culpability should be used primarily for the purpose of assessing aggravating and mitigating circumstances; and (3) the guidelines address three general societal interests in descending order: (a) protecting the individual from physical and emotional injury, (b) protection of public and private property rights, and (c) protecting the integrity of government institutions, public peace and public morals. She noted that extensive effort had been expended to create the current severity rankings.

Ms. Pedigo suggested that adopting the MPC culpability standards would extend the life of the KCCRC and would require extensive efforts, on the part of the KSC, to re-examine the severity rankings. She concluded by requesting that the work of the Commission be released to the KSC on a section by section basis so that it could provide timely input into the severity ranking process.

Professor Stacy stated that victim harm was not the only basis for the severity levels. He noted the offenses of vehicular homicide and first degree murder, stating that they both result in the same victim harm but are treated differently based upon offender culpability.

Ms. Pedigo stated that her concern was that adopting MCP culpability standards would shift the emphasis in severity rankings from victim impact to offender culpability. Ms. Parker concurred with this statement.

Judge Brazil stated that the Commission was not interested in a complete adoption of the MCP, but rather, it was looking to the code, as many states have done, for guidance and inspiration.

Judge White stated that to some degree the current criminal code already embodies several MPC theories. He also noted that the previous recodification effort in 1969 used the MPC as a guide.

Judge Solomon believed that a substantial point of discussion at the last meeting was over the question of whether to adopt the MCP culpability standards. He also expressed his concern that adopting those standards would constitute a major change in the code.

Mr. Klumpp ask Ms. Pedigo about the possibility of a Commission member attending the KSC's Proportionality Subcommittee meeting. Ms. Pedigo stated that she could not anticipate any problem with a Commission member attending. Professor Stacy suggested that some member of the Commission should volunteer to attend.

Mr. Opat cited a law review article that found only six states had adopted the MPC distinction between knowledge and purposeful culpability. He noted that the current law clearly distinguishes between specific and general intent and the distinction is not ambiguous to practitioners. He asked whether the Commission wanted to change something that is relatively well understood and could result in overlapping criminal offenses. He also stated his opposition to extending criminal negligence outside the context of homicide.

Ms. Parker pointed out that in the context of endangerment of a child, recklessness is a statutory mental state.

Ms. Spradling stated that the Commission did not intend to switch the emphasis from victim impact to offender culpability in crime severity rankings.

Judge White asked Ms. Pedigo for her assessment of property crimes. Mr. Klumpp asked if KSC revisions would lead to increased incarceration. Ms. Pedigo responded that the Proportionality Subcommittee was considering a career criminal provision and a provision that would equate two non-person felonies with a person felony for criminal history purposes. She also noted Senator Schmidt's three strikes bill that is currently being considered by the legislature.

Judge White asked Ms. Pedigo for any advice she might give on drug crimes. She indicated that there were three important issues: (1) not including escalators in any revised drug crimes; (2) preserving Senate Bill 123 alternative sentences; and (3) creating a single grid system for drug and non-drug crimes.

Mr. Collister stated that the current sentencing grid was ineffective because by the time offenders were sentenced the deterrent effect of the punishment had faded. He objected to the use of a negligence standard in criminal statutes because the standard is vague in the civil context and would be too vague in the criminal context.

Professor Stacy announced the agenda for the next few months. He informed the committee that he and Judge Brazil intended to address drug crimes at the next meeting then property crimes and sex crimes at the following two meetings. The reporters and the staff attorney would submit proposed revisions two weeks prior to the next meetings and discussion of the proposed changes could occur via the Listerv. He also described the form of the revisions he would submit. Proposed revisions shall be submitted along with the current Kansas statute, its legislative history, the analogous provision from the MPC, and then illustrative provisions.

The discussion of Article 1 began. The Commission considered § 21-110 which contained the title of the code. The reporters suggested no substantive change. The Commission approved the section.

The Commission considered § 21-111 which contained a definition of crimes, felonies, misdemeanors and infractions. The reporters suggested no substantive change. Professor Stacy asked if all crimes are individually defined as felonies, misdemeanors or infractions. Ms. Wolters stated that criminal statutes individual designate whether a crime is a felony or misdemeanor, etc. She also explained that the current version of § 21-211 (KSA 21-3105) serves as an explanation of the meaning of the defined terms. The Commission approved the section.

The Commission considered § 21-112 which addressed the scope and applicability of the code. The reporters suggested no substantive change. Judge Solomon referred to a prior version of § 21-112. It contained a subsection (e) which, in any cases pending after the effective date of the code but dealing with an offense committed prior to that date, would allow the defendant an election between the old and new provisions on defenses and sentencing. New procedures in the code will be followed if they were “justly applicable.” Judge White explained subsection (e) but noted that it was not contained in the newest draft.

Ms. Wilson cited a memorandum written by Professor Paul Robinson regarding the Kansas recodification. In that memo, Professor Robinson objected to the § 21-112 (KSA 21-3102) because it allowed the prosecution of uncodified common law crimes.

Professor Stacy argued that § 21-112 prohibited prosecution of uncodified crimes but it merely pointed to the common law as a source of authority for defining certain legal terms of art. He cited “heat of passion” as an example as that term is well understood at common law but not defined in the code.

Professor Kaye stated that the section was unclear and expressed a preference for important terms being defined by statute and not case law.

Judge White suggested that, as the Commission move forward, it should try to incorporate such case law definitions in the statutes. The Commission approved the section.

The Commission considered § 21-113 which contained a provision on severability. The reporters suggested combining KSA 21-3111 and KSA 21-3112 and simplifying the language. Judge White noted that the language from the original statute including the phrase “person or circumstance” should be reinstated to § 21-113. The Commission approved the section.

The Commission considered § 21-114 which preserved civil remedies. The reporters suggested no substantive change. The Commission approved the section.

The Commission considered § 21-115 which addressed jurisdictional applicability. The reporters suggested no substantive change. They suggested several changes in the section’s language. They suggested replacing the term territorial with jurisdictional; changing “the proximate result of such act” to “or a proximate result of such act” in subsection (b); and changing “a person who commits the homicide” to “a person charged with committing the homicide” in subsection (c).

Professor Stacy noted that in *State v. Grissom* the Kansas Supreme Court held that it was sufficient that “criminal acts [occurred] in Kansas which were a substantial and integral part of an overall continuing crime plan and which were in partial execution of the plan” in order to assert criminal jurisdiction. Professor Stacy recommended revising the statute to reflect the language of *Grissom*.

In response to Professor Stacy's proposed text, Mr. Madden objected that the term "proximate result" may be too narrow as some acts done outside of the state may be those where the state can legitimately exercise jurisdiction, but are not strictly the proximate result of out of state activity. He proposed adopting language of the Nevada statute (NRS 171.020) which the court relied on in *Grissom*. Professor Stacy responded that his proposal draws on the language of *Grissom* and he was indifferent to which language was used.

Professor Kaye noted that the Nevada statute extends jurisdiction to out of state acts which were a substantial and integral part of an overall continuing criminal plan. He expressed concern that the term substantial may be too limiting.

Professor Stacy stated that under his proposal there would be jurisdiction when a homicide victim's body is found within the state, not just the presumption of jurisdiction. He recognized that this may raise a due process issue regarding foreseeability of jurisdiction; however, he suggested this could be resolved through litigation.

Ms. Parker suggested that if the Commission chooses to adopt *Grissom* it should follow it as closely as possible. Professor Kaye disagreed and stated that the Commission should not just lift the language from the opinion for the statute. Judge White said the reporters would revise the section.

The Commission considered § 21-120 which provides time limitations. Judge White explained that the most recent version removed the 10 year statute of limitations for crimes where the victim is the Kansas public employee retirement system. At the previous meeting, Senator Vratil expressed his disfavor with the deletion on the grounds that the 10 year statute of limitation represented an important policy decision made recently by the legislature. In his opinion, there would be wide-spread legislative opposition to § 21-120 unless the statute of limitation was in tact. No member of the Commission objected to Judge White's suggestion that the statute of limitation be returned in a future draft.

Ms. Spradling suggested that the tolling provision should apply to felony and misdemeanor cases. She cited the example of an offender who commits a series of rapes and a sexual battery and is not apprehended until the statute of limitations runs on the misdemeanor. Ms. Spradling argued that it would be difficult to explain to the victim of the sexual battery why the offender can be prosecuted for the felony rape but not the misdemeanor battery.

Mr. Klumpp proffered the example of prosecuting a driving while suspended charge 15 years after the offense. He claimed to be comfortable with extending the tolling provision in person felony cases, but was less comfortable with property or traffic cases. The meaning of a felony, according to Mr. Klumpp, has lost much of its meaning as several felony offenses have been added to the code. Ms. Parker concurred with the suggestion of extending the tolling provision to person felonies.

Judge Solomon's interpretation of the section was that the statute of limitations began to run based solely on the discovery of the crime and not based upon the Commission of the offense. Noting that the version of the current statute (KSA 21-3106) is based on Commission of the offense, Judge Solomon suggested a revision to incorporate that principal.

Ms. Parker stated that the purpose behind subsection (b) was to allow prosecution when an offender's identity is concealed but later determined by DNA evidence. Regarding subsection (f), Mr. Klumpp stated that he did not believe an offender's identity would be known if DNA evidence is

discovered but the actual donor of the evidence is not known. Ms. Parker suggested that in those cases a complaint is usually filed in the name John/Jane Doe.

Judge White stated that the revised subsection (f) would be more expansive than the current version as it completely tolls the statute of limitation while the offender's identity is unknown. Professor Stacy concurred, noting that the current version of subsection (f) had demanding and specific standards that permit tolling the statute of limitations. He and Mr. Klumpp suggested that the current version of subsection (f) should be incorporated into the comments and should be a tool for guiding prosecutorial discretion.

Judge Brazil spoke of the need for some limitation provision, even when the statute of limitations is tolled. He suggested an outside limit, beyond which the tolling provision would not extend. This would not be applicable to subsection (a) cases involving off-grid felonies, murder in the first or second degree, voluntary manslaughter, terrorism, or illegal use of weapons of mass destruction.

Judge White envisioned a scenario where an offender was charged with a crime but convicted of the lesser included offense. In that case the statute of limitations had not run on the greater offense but it had on the lesser one. Judge White argued that it would be preferable to have a single statute of limitations and tolling provision to avoid confusing situations such as his hypothetical.

Mr. Collister proposed a universal two year statute of limitations for all offenses except those in subsection (a). He suggested the practice of prosecuting crimes so far from the date the offense was committed tended to have little impact on the offenders and caused the law to lose its integrity. Ms. Spradling and Parker objected to this proposal. Ms. Spradling stated that the other side of the issue was that offenders who avoid prosecution long enough also avoid any punishment for their crimes. Ms. Parker stated that the two year statute of limitation was workable in earlier times, but since the discovery of DNA evidence it had become unworkable. Mr. Klumpp noted that the legislature had already made an important policy decision to extend the statute of limitations and the Commission did not have the duty to reverse that decision.

Professor Stacy moved that the discovery exception provisions should apply to felonies and misdemeanors, not infractions. His motion was seconded and passed by the Commission. Mr. Collister objected.

Ms. Parker moved to amend the section so that the statute of limitations would run after five years after Commission of the offense or two years after discovery of the offense. Her motion was seconded and passed unanimously.

The Commission considered § 21-130 which addressed the burden of proof and presumption of innocence. The reporters suggested replacing the term "prosecution" with the term "state." Ms. Spradling asked whether such a change would be relevant in cases prosecuted by municipal governments. Ms. Parker stated that it would not be relevant because municipal prosecutors enforced city ordinances.

Professor Stacy proposed revising the statute to clarify which party has the burden of production and persuasion regarding guilt, defenses, and other miscellaneous issues such as jurisdiction. He pointed to a conflict in the case law where the Kansas Supreme Court has held in some cases that territorial applicability is an issue to be tried to the jury beyond a reasonable doubt and other cases that reach the opposite conclusion. Professor Stacy emphasized that he did not

advocate changing current law regarding the burdens, but rather, he advocated codifying the case law.

Mr. Collister stated that he believed that the U.S. Supreme Court has held any fact that is not a pleading element of the offense is an element of the crime and must be proved beyond a reasonable doubt. He suggested that further research should be done on this question as any decision by the Commission may be effected by constitutional law precedent. Professor Stacy responded that some states allocate the burden of persuasion of the insanity defense to the defendant and these statutes have withstood constitutional challenges.

Ms. Parker was skeptical of changing the statute and expressed her belief that any change may create greater conflicts. Professor Stacy pointed to the Commission's mission of addressing conflicts in the case law. Ms. Parker moved to adopt the statute and change the term "prosecution" to the term "state." Mr. Klumpp amended the motion to also instruct the reporters to do further research on the issue. The amended motion was seconded and passed by the Commission. Professor Stacy objected.

The Commission considered § 21-140 which dealt with multiple prosecutions for the same act and lesser included offenses. The reporters stated that the section needed further research before a revision could be submitted. They also noted that the Commission had previously rejected incorporating language from *State v. Winters*. Mr. Opat noted that the Kansas Supreme Court had recently returned the law of multiplicity to the elements test and he was dissatisfied with this state of the law.

The Commission considered § 21-141 which dealt with the effect of a former prosecution. The reporters suggested no substantive change. The Commission approved the section.

The Commission considered § 21-150 which dealt with definitions. The reporters noted that this section would be changed as the Commission proceeded through the rest of the code. Ms. Parker noted that, regarding the burden of proof, the use of the term, "in all criminal prosecutions" would have to be scrutinized to exclude post-conviction proceedings and other situations where the burden of proof should merely be preponderance of the evidence.

Professor Stacy addressed the fall agenda and explained that drug crime would be considered in September; property crime in October; and sex offenses in November. Additional material from articles 1-4 would be considered when it was possible. As the meeting in December would fall close to Christmas, Professor Stacy suggested two meetings in January and none in December. He also informed the members that it would be necessary to begin work on a report to the legislature, due at the end of January, that would detail the Commission's progress.

Professor Stacy also addressed the issue of publicity. He stated that he wanted the legal community to have a positive impression of the Commission's work. He and Professor Kaye were invited to write about the Commission for the KBA journal and the journal of the Kansas Association of County and District Attorneys. Mr. Collister suggested that the Kansas Trial Lawyers Association would be a good source of publicity.

Mr. Klumpp stated that he was working on the Commission's budget and he was establishing performance based measures of the Commissions success.

Ms. Wolters informed the Commission that it would be difficult to use Statehouse facilities when the legislature came back into session. Professor Stacy suggested that the Commission would be able to use the facilities of the Judicial Counsel.

The meeting was adjourned at 4:00 p.m.

Submitted by Brett A. Watson,  
Staff Attorney to the KCCRC

Approved by Committee on:

September 26, 2007

(Date)